

**BEFORE THE
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 REPLY TO RESPONDENT'S COUNTER-
MEMORIAL ON THE MERITS**

24 March 2011

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REPLY ON THE MERITS

I. INTRODUCTION AND SUMMARY OF ARGUMENTS

1. In its Counter-Memorial on the Merits, Respondent attempts to shift the focus of this case from Respondent's breaches of its obligations under CAFTA to a factually unsupported, revisionist (and largely irrelevant) history of Claimant's performance under the Usufruct Contracts. In order to weave its fictitious narrative, Respondent resorts to obfuscation, mischaracterizations, misrepresentations and disingenuousness throughout its Counter-Memorial. Regarding Claimant's performance under the Usufruct Contracts, Respondent insists that FVG breached its railway rehabilitation obligations under Contract 402, the right-of-way usufruct contract, but misrepresents what those obligations were and neglects to disclose the fact that FEGUA confirmed by official letter that FVG had its complied with its actual rehabilitation obligations. Respondent places great emphasis on the fact that FVG had not recorded any profit in any year prior to the publication of the *Lesivo* Resolution (on an *accounting* basis), but neglects to mention that FVG's lack of profitability was driven largely by Respondent's failure to fulfill its own contractual obligations and that, when this is properly taken into account, FVG was *profitable* on a cash flow basis. Respondent complains about FVG's failure to obtain sufficient financing and outside investment to rebuild and reopen the South Coast corridor, yet Respondent knows full well that FVG's inability to obtain such financing and investment was caused by Respondent's failure to remove squatters from the South Coast right-of-way.

2. Respondent further misrepresents the circumstances and motivations which gave rise to the process which culminated in the publication of the *Lesivo* Resolution on August 25, 2006. Contrary to Respondent's contention, the *lesivo* process was secretly initiated and pursued by Respondent not out of concern about any alleged legal infirmities in the usufruct equipment contracts (Contracts 143/158), which the Government both internally and externally acknowledged were "in effect." Rather, as confirmed by Respondent's own witnesses and records, the real story is that the alleged legal defects in Contracts 143/158 – which Respondent caused and could have easily resolved on its own without any need for "negotiation" with FVG – were utilized by Respondent as a mere pretext to issue the *Lesivo* Resolution, which Respondent then proceeded to use as a means to try to coerce FVG to renegotiate and surrender its rights under the Usufruct Contracts. The Government's non-negotiable demands to FVG in exchange

for withdrawing the *Lesivo* Resolution included, *inter alia*, (i) requiring FVG to put up a \$50 million investment to re-open the entire South Coast corridor or surrender its rights to “other [interested] investors” such as Ramón Campollo; (ii) relieving the Government of its contractual obligations to remove squatters and make payments to the Railway Trust Fund; (iii) requiring FVG to drop its local breach of contract arbitrations against FEGUA; (v) increasing the canon fee payments to the Government under the Usufruct Contracts; and (iv) forcing FVG to surrender certain railway equipment that had been granted in usufruct. Indeed, Respondent’s witnesses in this case freely admit the Government’s bad faith motivation behind the *Lesivo* Resolution. Moreover, the Government’s “take it or leave it” settlement proposals both before and after the publication of the *Lesivo* Resolution and its deliberate strategy to keep the *Lesivo* Resolution secret from Claimant completely bear out this conclusion.

3. However, to the apparent surprise of the Government of Guatemala, Claimant did not give in to the Government’s extortionate demands. Instead, like any responsible business would, in the immediate days after the *Lesivo* Resolution was published, Claimant issued a press release protesting the Government’s hostile and improper action. Respondent preposterously asserts that this press release concerning the *Lesivo* Resolution – and not the *Lesivo* Resolution itself – was the principal cause of the damage which ultimately led to collapse and shutdown of FVG’s business operations. However, this litigation-inspired theory conveniently ignores what really happened: in addition to Claimant’s press release, there were countless newspaper, television and radio reports in Guatemala concerning the *Lesivo* Resolution in the days and weeks after it was published. These reports did not once quote or rely upon Claimant’s press release, but, instead, reported the statements of President Berger, the Attorney General and other senior Government officials which trumpeted the Government’s action and implacable hostility to FVG. It was the Government’s *Lesivo* Resolution and accompanying public statements which poisoned and destroyed FVG’s relations with its existing and potential customers, suppliers, lessees, investors and bankers.

4. President Berger further made clear in his public statements that the reason he declared *lesivo* was not because of any legal defects in the usufruct equipment contracts, but because FVG had not re-opened the South Coast corridor. He and other Government officials also made clear that they were going to take away the railway usufruct from FVG unless FVG

acceded to the Government's extortionate demands, including putting up \$50 million within 90 days to re-open the South Coast corridor. As discussed herein, Claimant's third party witnesses all state that they first learned about the declaration of *lesividad* from these media reports quoting President Berger and other Government sources. They also confirm that their respective decisions to stop doing or not do business with FVG were not influenced or encouraged by anything Claimant said or did, but because the *Lesivo* Resolution and the Government's accompanying statements made clear that the Government did not intend for FVG to be in business in Guatemala any longer.

5. Respondent's attempts to dismiss the involvement of Ramón Campollo in its expropriatory scheme against Claimant only serve to bolster Claimant's case further. As thoroughly demonstrated herein, Mr. Campollo's blanket denial of knowledge of or interest in the railway and Claimant's Usufruct rights are not credible and are decisively contradicted by (1) the several actions and statements of his acknowledged representative and agent, Héctor Pinto; (2) his financial and personal connections with the family of President Berger; and (3) the fact that, based upon his own business experience in operating a railroad and in the Guatemala commercial real estate sector, he was a direct competitor of Claimant.

6. Thus, rather than proving that this arbitration is the culmination of some grand litigation "exit strategy" on Claimant's behalf, Respondent amply confirms in its Counter-Memorial what Claimant has steadfastly maintained: the *Lesivo* Resolution was not issued in order to rectify any alleged legal defects in Contracts 143/158 or to "uphold the rule of law" as Respondent so self-righteously and disingenuously contends. Rather, it was issued so that Respondent could use it as a weapon to force Claimant into renegotiating and surrendering its substantial economic rights and benefits under the other Usufruct Contracts to the benefit of Respondent and its private sector ally, Mr. Campollo.

7. As discussed herein, Respondent's arguments that it has not breached any of its obligations under CAFTA and that, even if did breach any obligation, such breach did not cause any harm to Claimant, should be rejected out of hand. In Section II, Claimant replies to Respondent's factual summary and corrects the several misrepresentations, half-truths and misleading and unsupported statements presented by Respondent. Section III replies to

Respondent's arguments against Claimant's four specific claims: (1) indirect expropriation (Section III.B); (2) violation of fair and equitable treatment (Section III.C); (3) failure to provide full protection and security (Section III.D); and (4) failure to afford national treatment (Section III.E).

8. In Section III.B, Claimant demonstrates that (i) the five-point "effects test" posited by Respondent for an indirect expropriation is not found in or supported by CAFTA or customary international law; (ii) Claimant possesses sufficient rights in the investment that was indirectly expropriated by Respondent; (iii) the *Lesivo* Resolution directly interfered with Claimant's investment and its reasonable, investment-backed expectations; (iv) the *Lesivo* Resolution and subsequent Government acts in furtherance of the Resolution substantially deprived Claimant of the reasonably expected economic benefits of its investment; (v) the *Lesivo* Resolution is not entitled to any deference; and (vi) the *Lesivo* Resolution was an unlawful expropriation under CAFTA, as it was not issued for a legitimate public purpose, it was enacted in a discriminatory manner and in disregard of due process of law, and Respondent has not paid prompt, adequate and effective compensation to Claimant.

9. In Section III.C, Claimant rebuts Respondent's contention that it has not violated its obligation to provide fair and equitable treatment to Claimant's investment. Claimant demonstrates that Respondent's characterization of the customary international law minimum standard of treatment – which, according to Respondent, does not include any State obligation to refrain from acting arbitrarily, to act transparently or not frustrate an investor's legitimate expectations – is contradicted by the evolutionary standard recognized by several NAFTA tribunals and evidenced by State practice and *opinio juris*. Claimant further demonstrates that Respondent has breached its actual fair and equitable treatment obligation through (i) its failure to act in good faith towards Claimant and its investment; (ii) its denial of due process to Claimant; (iii) its arbitrary and discriminatory treatment of Claimant and its investment; and (iv) its failure to act in a transparent manner and frustration of Claimant's legitimate expectations.

10. In Section III.D, Claimant rebuts Respondent's contention that it did not violate its obligation to provide full protection and security to Claimant's investment. Claimant points out that, under customary international law, this obligation requires Respondent to take

reasonable, *active* measures to prevent actions by third parties and organs of the host State (which includes, *inter alia*, the acts of local authorities and police) that interfere with or damage the foreign investor's property or assets. The record evidence, however, demonstrates that the measures Respondent undertook to protect FVG's property and assets after the *Lesivo* Resolution were wholly insufficient and unreasonable and, in fact, rather than actively protecting Claimant's investment, Respondent actively encouraged harm to the investment with its numerous public statements in the wake of the *Lesivo* Resolution which informed the citizenry of Guatemala that FVG's Usufruct Contracts were invalid and that the Government was going to take the railroad away from FVG.

11. In Section III.E., Claimant responds to Respondent's national treatment arguments. Claimant further demonstrates that, contrary to Respondent's assertion, Claimant and Ramón Campollo were investors in "like circumstances" at the time of the *Lesivo* Resolution, in that Mr. Campollo owned and operated a railroad and both Claimant and Mr. Campollo were direct competitors in the most significant and potentially profitable aspect of the Usufruct – its real estate rights. Claimant further demonstrates that both the direct and circumstantial evidence in this case, when viewed in its entirety, overwhelmingly shows that (1) the *Lesivo* Resolution was motivated in substantial part to facilitate Mr. Campollo's takeover of FVG's Usufruct rights and assets; (2) the *Lesivo* Resolution had a demonstrable adverse effect on Claimant's investment; and (3) that it did not have a reasonable nexus to a legitimate Government policy.

12. Finally, Section IV responds to Respondent's "no damages" arguments by demonstrating that Claimant is entitled under customary international law to recover both its lost investment *and* its lost cash flow/profits and that its lost cash flow/profits claim is not speculative. Claimant further shows that, by amortizing its total investment expenditures over its projected future income stream, there has been no "double counting" in its damages claim. Claimant also presents in this section its revised damages claim, which reflects additional information and data that has come to light since submitting its Memorial on the Merits, and also adjustments made in response to certain criticisms and issues raised by Respondent and its damages expert.

II. REPLY TO RESPONDENT'S FACTUAL SUMMARY

A. The Government's Usufruct Bidding Rules

13. As Respondent concedes in its Counter-Memorial, the Government's Bidding Rules for the railway usufruct state that the Government's purpose in awarding the Usufruct was to restore railroad transportation in the country, which had been totally defunct since early 1996.¹ However, while Respondent complains throughout its Counter-Memorial that FVG failed to deliver an expected level of canon payments to FEGUA, nowhere do the Bidding Rules state that one of the Government's purposes in awarding the usufruct was for FEGUA – a non-functioning Government agency whose neglect had previously driven the railroad out of business – to earn substantial financial compensation from the usufructary.

14. Respondent also points to the Bidding Rules to argue that its motivation in requiring that the FEGUA railway equipment be awarded through a bidding process separate from the right-of-way was because FEGUA expressly reserved the right to build and operate another rail line or give a concession to another private company to construct a new rail line in Guatemala.² This argument is just one of several risible *post hoc* explanations and justifications that appear throughout Respondent's Counter-Memorial but which have no basis in reality. If, in fact, after the existing right-of-way usufruct was awarded to FVG, FEGUA or another party had ever expressed an interest in building another rail line wholly separate and apart from the existing right-of-way – an extremely dubious proposition that never occurred – it is indisputable that such newly constructed line would have used *standard* gauge track and equipment. In contrast, the FEGUA equipment is *narrow* gauge equipment.³ Thus, once FVG was awarded the exclusive use of the existing right-of-way under Contract 402 for the *next fifty years*, there were no other parties who would or could have conceivably been interested in utilizing the narrow gauge equipment in Guatemala. The reality is that Guatemala's utilization of a separate bidding process for the FEGUA equipment was never anything more than form over substance; the only plausible explanation for the Government's two-step process was to allow FEGUA to obtain

¹ Ex. R-1, Bidding Rules, §§ 1.1, 2.4.

² Counter-Memorial on Merits ¶¶ 39, 254, 256; Ex. R-1, Bidding Rules, § 4.1.15.

³ Ex. R-1, Bidding Rules, § 4.1.3.

another revenue stream from the Usufruct in the form of an additional canon fee payment from FVG for use of the FEGUA equipment.

B. Respondent Accepted Claimant’s Business Plan and Economic Offer Without Qualification or Revision

15. Respondent’s arguments about the various obligations and commitments Claimant undertook pursuant to the Usufruct willfully ignore and mischaracterize key portions of the Business Plan and Economic Offer which comprised Claimant’s successful bid. First, contrary to Respondent’s suggestion throughout its Counter-Memorial, in Claimant’s Business Plan – *which Respondent approved and accepted* – Claimant committed to invest *no more than \$10 million* of its own money in the rehabilitation of the right-of-way.⁴ Further, that \$10 million commitment was intended to be used only for *completion of Phase I and rehabilitation of the FEGUA rolling stock*.⁵ Regarding Phases II through V, Claimant’s Business Plan only committed to completing the rehabilitation and reopening of these portions of the railway if *business conditions warranted*.⁶ Furthermore, even if subsequent business conditions warranted completion of Phases II through V, RDC never committed in its Business Plan (or anywhere else) that it would invest *its own funds* in such phases.⁷ Rather, Claimant consistently represented – and Respondent always understood – that completion of these phases was contingent and dependent upon Claimant’s ability to obtain sufficient additional outside investment or financing from local or international investors or lenders.

16. As part of Respondent’s effort somehow to justify its actions in connection with issuing the *Lesivo* Resolution, Respondent complains that Claimant paid FEGUA only a “pittance” in canon fees when compared to the amount of canon payments that Claimant originally projected paying FEGUA in its Economic Offer.⁸ However, there is nothing in any of the Usufruct Contracts that obligated FVG to pay any specified or minimum amount of canon to FEGUA for any specified time period, and Respondent never accused FVG of breaching any of

⁴ Ex. C-15, Envelope A: Technical Offer, § 6.1.

⁵ *Id.*

⁶ *Id.* § 4.0.

⁷ Third Statement of H. Posner III ¶ 2.

⁸ Counter-Memorial on Merits ¶¶ 178-79.

the Usufruct Contracts on this ground. Indeed, it is transparent from the structure of FVG’s bid that revenue risk was to be shared between FVG and FEGUA. Moreover, Respondent’s assertion that FVG’s projected payments to FEGUA were a key factor in the Government’s decision to award the Usufruct to Claimant is simply not credible, given that the only other bid received on the Usufruct was deemed non-qualifying and that, prior to the Usufruct being awarded to FVG, FEGUA was receiving *no income* whatsoever from the railway because it had been shut down for well over a year, a shutdown that was entirely FEGUA’s fault.

17. In any event, Claimant’s Economic Offer explicitly did not promise or guarantee to pay FEGUA any certain amount of canon fees over the term of the Usufruct. The Economic Offer clearly stated that the projected annual canon fee payments to FEGUA set forth therein were based upon “*estimated income by cargo*” and that the canon fee amounts “*do not have the quality of any fixed monetary offer, since they are based on estimates contained in the business plan.*”⁹ To make this point crystal clear, Claimant’s Economic Offer also included the following explicit disclaimer: “[FVG] *shall not be liable* to pay the amounts of money expressed in the column labeled ‘payments to FEGUA.’”¹⁰ Perhaps most important is that FVG’s commitment was to pay FEGUA a share of its revenues, as opposed to its profits, as a demonstration of both good faith and commitment. However, as will be shown below, even though Respondent knew that it had no legal basis or right to complain about the amount of canon payments it was receiving from FVG under the Usufruct, Respondent nevertheless used this issue as one of its primary excuses for its own failure to comply with its key obligations under the Usufruct Contracts, and subsequently to demand renegotiation of these contracts once Respondent became determined to secure more favorable financial terms for itself.

18. Finally, while Respondent now argues that Claimant submitted a “non-conforming” bid for the right-of-way usufruct because the bid included the FEGUA railway equipment,¹¹ there is no evidence that Respondent took such a position at the time or, indeed, until its current filing before this Tribunal. All of the contemporaneous official documents

⁹ Ex. C-15, Envelope B: Economic Offer (emphasis added).

¹⁰ *Id.*

¹¹ Counter-Memorial on Merits ¶ 37.

issued by Respondent in connection with the award of the Usufruct make clear that Respondent accepted Claimant's bid in its entirety without qualification or objection.¹² Respondent has not presented any contemporaneous evidence that it ever informed Claimant that Claimant's approved and awarded bid was "non-conforming."

C. Contract 402 Did Not Obligate FVG to Complete Either Phase II or III Within a Specified Time Frame

19. Contract 402, the right-of-way usufruct contract, contains several provisions that bear discussion and emphasis in light of the various arguments Respondent advances in its Counter-Memorial. One of the foremost arguments that permeates Respondent's entire Counter-Memorial, as well as many of its supporting witness statements, is Respondent's contention that FVG breached Contract 402 by not completing Phase II – the reopening of the Pacific/South Coast corridor – and not constructing Phase III – the branch line extension to Cementos Progreso – within the alleged time periods proscribed by Contract 402. Indeed, Respondent and its witnesses have now finally and candidly conceded that its desire for the rapid completion of Phase II was the principal reason why Respondent proceeded with declaring Contracts 143/158 *lesivo*.¹³

20. However, as Respondent well knows, Contract 402 did *not* obligate or require FVG to complete Phase II, Phase III or any other Phase subsequent to Phase I within *any* specified time period. Clause 13 of the contract – which the Government drafted – instead only required FVG to *begin* (not conclude) these phases within a specified time period:

PHASE TWO (II) of the restoration program, which is part of the USUFRUCTARY's proposal during the bidding process from which this contract arises, shall **begin** within a three-year term as of the date this contract becomes effective. Railway cargo transportation referred to in this PHASE shall be offered at least in one segment, within a six-month term, as of the date PHASE TWO (II)

¹² See Ex. C-16; Exs. R-55, R-56, R-58, R-59.

¹³ See Counter-Memorial on Merits § III.H ("Faced With The Reality That FVG Could Not And Would Not Make The Necessary Investments To Restore Phase II of the Railway Project, And Having Failed To Negotiate A Resolution Of the Legal Defects Within Contract 143/158, FEGUA Initiated The Process To Declare Contract 143/158 *lesivo*"); ¶ 110 (Government representatives came to the August 24, 2006 meeting "prepared to negotiate and brought a draft contract that proposed solutions to the various disputes between the parties, including those with respect to Contract 402, the trust fund and the legal defects giving rise to the *lesivo* Declaration"); Statement of R. Aitkenhead ¶ 11; Statement of A. Zosel ¶ 17.

begins. 4. PHASE THREE (III) of the restoration program, which is part of the USUFRUCTARY's proposal during the bidding process from which this contract arises, shall **begin** within a five-year term as of the date this instrument becomes effective. Railway cargo transportation referred to in this PHASE shall be offered at least in one segment, within a six-month term, as of the date PHASE THREE (III) begins.¹⁴

Thus, contrary to Respondent's assertion, under the terms of Contract 402, FVG was only required to *begin* restoration of the Pacific/South Coast corridor by May 2001 (three years after Contract 402's May 23, 1998 effective date) and offer railway services on *one segment* of such corridor within six months of that date (November 2001). With regard to Phase III, FVG was only required to *begin* this phase by May 2003 and offer railway services on one segment of this line within six months of that date. Further, Phase III was, as a commercial matter, entirely under the control of a single customer, Cementos Progreso. Clause 13 was entirely consistent with the terms of FVG's bid, which only committed FVG to completing Phase I (restoration of the Atlantic corridor), with the remaining four phases to be completed "according to business conditions" and if the capital investments could be economically justified.

21. Most important, FEGUA officially acknowledged that FVG fully complied with its restoration obligations under Contract 402. Specifically, on November 28, 2001, FEGUA Overseer René Minera officially confirmed to FVG that FVG had fully satisfied its Phase II performance obligations by commencing railway operations on one segment of South Coast corridor, the stretch from Tecúm Umán station to the Mexican border:

[T]he Overseer's Office considers that [FVG] has complied with the terms and obligations by supplying and rendering cargo railway transportation services, at least partially, for six-month term following the initial date of said Phase two (II); **accordingly, the terms of the second paragraph, subsection three (3), Clause Thirteen of the contract, regarding the RAILWAY RESTORATION PLAN, have been met.** Therefore, the Overseer's Office can do nothing but acknowledge that such railway operations have been properly commenced.¹⁵

¹⁴ Ex. C-22, Contract 402, cl. 13(3)-(4) (emphasis added).

¹⁵ Ex. C-61, 28 Nov. 2001 letter from FEGUA Overseer R. Minera to FVG General Manager G. Brunelle (emphasis added).

Respondent's failure to disclose the existence of this letter to the Tribunal in its Counter-Memorial, while complaining vociferously about FVG's failure to complete restoration of the South Coast corridor, is yet another example of Respondent being less than candid and forthright with the Tribunal. Respondent's other claims and proofs should be viewed in this light.

22. Further, on May 5, 2003, FEGUA Overseer Hugo Sarceño officially acknowledged in writing that, for reasons beyond FVG's control, it was impossible for FVG to begin the Phase III restoration within the time frame required under Contract 402, and he thereby waived FVG's obligation to comply with this provision:

The Overseer's Office has verified all issues regarding the Technical Study referred to in your Official Letter and has reached the conclusion that it is actually impossible for [FVG] to begin Restoration Phase Three (III) according to the Program submitted by the usufructuary for the purposes of the bidding process from which the aforesaid contract arises. Accordingly, [FVG] is actually unable to render railway cargo transportation services under the terms of the program within a six-month term following the beginning of Phase Three (III).

Therefore, it is imperative for both companies, Ferrocarriles de Guatemala – FEGUA– and [FVG], to keep constant communication in order to determine the commercial feasibility of Phase Three (III) in the future.¹⁶

Respondent also failed to disclose the existence of this letter to the Tribunal in its Counter-Memorial.¹⁷

23. Clause 16 of Contract 402 sets forth the penalties that could be imposed upon FVG for its failure to comply with its railway restoration obligations under Clause 13. Consistent with the terms of Clause 13, Clause 16 provides that FVG is obligated to surrender to

¹⁶ Ex. C-62, 5 May 2003 letter from FEGUA Overseer H. Sarceño to J. Senn. As Jorge Senn explained in an August 2004 news article, there was one legal reason and one technical reason why the parties agreed in 2003 that it was materially impossible at the time to begin Phase III, the line to Cementos Progreso. The legal reason was that there was no actual right-of-way owned by the Government between Cementos Progreso and the main Atlantic corridor line, and, therefore, before construction could have begun, the Government had to expropriate the necessary property. The technical reason was that there was a very large height difference between the Cementos Progreso location and the point where the Atlantic line is located. Ex. R-82, *Siglo XXI*, "Under the Glass: A Train that Fails to Get Back on Track," 22 Aug. 2004; Third Statement of J. Senn ¶¶ 5-6. See also Ex. C-63, 28 Apr. 2003 letter from J. Senn to FEGUA Overseer H. Sarceño (describing technical study conducted on FVG's behalf which concluded that FEGUA did not own the right-of-way between Cementos Progreso and the Atlantic main line).

¹⁷ Indeed, it is difficult to understand how Respondent can, in good faith, take the positions that it does in its Counter-Memorial in these regards.

FEGUA the properties covering the unrestored segments of the railway only if FVG failed to *begin – not complete –* restoration of the specified phases and render cargo transportation services in accordance with the time frames set forth in Clause 13:

The Usufructary's failure to **begin** railway restoration and failure to render cargo transportation services under the terms of sections two, three, four, five, and six of the THIRTEENTH CLAUSE of this contract: In the event that the USUFRUCTARY fails to restore the railway and fails to render cargo transportation services under the terms of sections two, three, four, five, and six of the THIRTEENTH CLAUSE hereof the Usufructary shall surrender to FEGUA the real property where the railway yet to be restored is located, and any such property shall no longer be subject to this usufruct.¹⁸

As discussed below, had Respondent possessed the contractual rights it claims, Respondent would not have had to resort to the *Lesivo* Resolution to demand that FVG surrender its rights to the Phase II properties to other interested investors such as Ramón Campollo. Rather, pursuant to the mandatory arbitration clause in Contract 402, it would have simply brought an arbitration claim or counterclaim to achieve that end.

24. Although FEGUA Overseer Arturo Gramajo constantly griped about FVG's failure to reopen the entire South Coast corridor after he assumed his position in early 2004, FEGUA *never once* accused FVG of being in breach of its Phase II or III restoration obligations under Contract 402.¹⁹ Moreover, FEGUA *never* claimed it was entitled under Contract 402 to reclaim any unrestored portions of the railroad due to FVG's failure to complete these phases. The reason FEGUA never made any such claims against FVG is because FEGUA knew, and had acknowledged in official Government correspondence, that FVG had in fact *fully complied* with its railway restoration obligations under Contract 402. Dr. Gramajo acknowledged in a 2005

¹⁸ Ex. C-22, Contract 402, cl. 16(II) (emphasis added).

¹⁹ Third Statement of J. Senn ¶ 7; Third Statement of H. Posner III ¶ 7. Claimant made a written document request to Respondent requesting any written communications between FEGUA and FVG wherein FEGUA accused FVG of breaching Contract 402 or informed FVG of any breaches of Contract 402. In response to this request, Respondent did not produce any correspondence with FVG wherein Respondent accused FVG of being in breach of its Phase II or III restoration obligations, and, in fact, FVG never received any such correspondence from Respondent. Furthermore, Respondent never threatened or asserted any local arbitration claim or counterclaim against FVG for breaching any provision of Contract 402. Third Statement of J. Senn ¶ 7; Third Statement of B. Duggan ¶ 4.

interview with the Guatemalan press the validity of his predecessor's 2001 letter recognizing FVG's compliance with its Phase II restoration obligations:

According to document 272-2001, a letter sent by Ferrocarriles de Guatemala, signed by René Minera Pérez, former overseer, acknowledges Ferrovías' compliance, as it reads: "The terms of paragraph two of the clause named Railway Restoration Plan were fulfilled. . . ."

Considering that the note is legal evidence of compliance, [FVG] requested the eviction of approximately four thousand families that live on land granted to the corporation.

*Gramajo acknowledges the existence and validity of said note, but he considers that the obligation was to restore the entire railway line.*²⁰

25. Dr. Gramajo further acknowledged in another 2005 interview that FVG's contractual obligation was to "start," not to "complete" the railway phases, and, therefore, that FVG was in compliance with its restoration obligations under Contract 402. Nevertheless, he complained that these contract terms were too "accommodating" of FVG:

Although the contract that the State signed with Ferrovías in November 1997 establishes the dates when the five phases of the railroad reactivation project must start, it does not provide dates for their completion.

According to Arturo Gramajo, FEGUA's Overseer, *the document is too accommodating of Ferrovías.*²¹

26. The foregoing official acknowledgements and admissions by three separate FEGUA Overseers – including Dr. Gramajo – confirm that the assertions by Respondent and its witnesses – including Dr. Gramajo – regarding FVG's alleged failure to comply with its contractual obligation to complete restoration of the South Coast corridor are false as both a matter of fact and law. Respondent's accusations have nothing to do with FVG complying with its *legal* obligations under the Usufruct. Rather, as discussed further below, they have everything to do with Respondent subsequently deciding, years later, that the terms of Contract 402 – *which it drafted* – were "unfair" and "detrimental" to Respondent and, therefore, it used

²⁰ Ex. C-64, *Siglo XXI*, "\$25-million Investment Put on Hold," 7 Sept. 2005 (emphasis added).

²¹ Ex. R-87, *Prensa Libre*, "Slow Paced Train," 13 Feb. 2005 (emphasis added).

the *Lesivo* Resolution against Contracts 143/158 as a pretext and means to force FVG to renegotiate the terms of and relinquish its rights under Contract 402, so that the contract would be less “accommodating” to FVG and more “accommodating” to both Respondent and its private business sector ally, Ramón Campollo.

D. FVG’s Performance Under Contract 402 Was Conditional Upon FVG Obtaining Use of the Necessary FEGUA Railway Equipment

27. With regard to FVG’s right to use the FEGUA equipment, Respondent strenuously maintains that the right-of-way usufruct and equipment usufruct were completely separate and independent transactions and contracts that essentially had nothing to do with each other. Respondent, however, concedes that, under the parties’ Master Contract, Contract 402, FVG had the right “[t]o acquire railway and non-railway equipment owned by FEGUA, as it may be convenient for its operations, under the terms of the bidding conditions from which this contract arises.”²² Further, in the event that FVG was unable to obtain the necessary FEGUA equipment for reasons not attributable to it, under Clause 18 of Contract 402, FVG had the right to terminate that contract without any liability.²³ Thus, the parties understood and agreed that FVG’s performance under the right-of-way usufruct, including its rehabilitation and reopening of the railway, was *conditional upon* FVG’s ability to acquire and use the FEGUA equipment “as it may be convenient for its operations.” This understanding was entirely consistent with the terms of Claimant’s bid, which made it quite clear that Claimant was only willing to invest in the railway if it obtained use of the FEGUA railway equipment.²⁴ The simple fact of the matter is that both parties knew and understood that, if FVG had been denied use of the FEGUA equipment to operate the railway, whether through an unsuccessful bid or because of reasons within the Government’s control, FVG would have exercised its right to terminate Contract 402 without further liability.²⁵

²² Ex. C-22, Contract 402, cl. 10.

²³ Ex. C-22, Contract 402, cl. 18(III).

²⁴ See Ex. C-15, § 6.1 (stating that the “Assets That Are to be Obtained With the Concession” include the “exclusive use of all railways, right-of-way, yards, *locomotives, freight cars*, stations, maintenance premises, *equipment* and real property of [FEGUA] for an initial period of fifty (50) years.”) (emphasis added).

²⁵ Third Statement of H. Posner III ¶ 43.

28. Respondent, however, ignores these obvious facts and asserts, without any basis whatsoever, that the “reasons not attributable to [FVG]” language of Clause 18 would have required “some showing [by FVG] that it could not acquire rail equipment elsewhere in the world to operate the Guatemalan railway” before it could terminate Contract 402.²⁶ Respondent presents no legal or factual support for its baseless addition of wholly self-serving language to a contract it had drafted, and there is no evidence that either party ever viewed this provision as imposing such a burden upon FVG. In any event, Respondent’s speculative musings on Claimant’s potential ability to acquire usable and appropriate narrow gauge railway equipment elsewhere in the world are both irrelevant and have no basis in reality.

29. As someone who has operated railways and acquired rolling stock throughout the world (United States, Europe, Africa, South America and Central America), Claimant’s Chairman, Mr. Posner, is one of the world’s foremost authorities on narrow gauge railways and equipment. In his Third Statement, Mr. Posner explains that, besides Guatemala and a handful of tourist railways located in the U.S., Canada and Peru, the only countries in the world that have three-foot (914 mm) narrow gauge main line railways are Colombia, El Salvador and Honduras.²⁷ Contrary to Respondent’s suggestion (for which it offers no proof), Mr. Posner states that none of these railroad systems had a sufficient available stock of usable 3-foot narrow gauge railway equipment that could have been acquired by FVG and transported to Guatemala at a reasonable cost and within a reasonable time.²⁸ Furthermore, it would have been prohibitively expensive for FVG to acquire rolling stock utilized by wider narrow gauge railways, such as meter and “Cape” (3’ 6”) gauge railways and convert it to 3-foot narrow gauge rolling stock.²⁹ Accordingly, if Respondent had not awarded or had denied FVG the use of the FEGUA equipment to operate the Guatemalan railway, FVG would have promptly exercised its right to terminate Contract 402 without any further liability or obligation and RDC would never have

²⁶ Counter-Memorial on Merits ¶ 40.

²⁷ Third Statement of H. Posner III ¶¶ 47-50.

²⁸ *Id.* ¶¶ 54-58.

²⁹ *Id.* ¶¶ 59-60.

invested the more than \$15 million which it spent in rehabilitating and operating a railroad for Guatemala.³⁰

E. FVG’s Use of the Railway Equipment Despite Respondent’s Failure to Obtain Executive Approval of Contract 41

30. Contract 41, the Onerous Usufruct Contract Involving Railway Equipment, dated March 23, 1999, was awarded to FVG by a separate bidding process conducted by Respondent in December 1997. Not surprisingly, FVG was the only party who submitted a bid, because it would have made absolutely no economic sense for any party to try to obtain use (not ownership) of narrow gauge railway equipment for fifty years that could only be used on a railway that was to be controlled by another party for the same fifty years.

31. As a result of the negotiations that resulted in Contract 41, FVG agreed to pay a canon fee in the amount of 1% of the gross freight traffic revenue of the railroad, not to exceed Q.300,000 per year.³¹ This canon fee structure and rate was proposed by FVG in its December 11, 1997 equipment bid proposal.³² However, contrary to Respondent’s assertion, this canon fee was not to be paid *to FEGUA* for its use and benefit.³³ Rather, Contract 41 provided that these canon fees were to be paid into the *Railway Trust Fund* established pursuant to Contract 402 and were to be used *by FVG* exclusively for “the refurbishment and modernization of the railroad system tracks.”³⁴

32. Contract 41 required approval by Executive Resolution (*Acuerdo Gubernativo*) in order to go “into force,” but that approval, which was entirely in the control of Respondent, was never obtained. The FEGUA Overseer at the time Contract 41 was entered into, Andrés Porras, asserts that he requested President Álvaro Arzú to approve the contract.³⁵ However, there is no evidence that Mr. Porras did anything else besides make one request. Nor is there any evidence,

³⁰ Third Statement of H. Posner III ¶ 61.

³¹ Ex. R-3, Contract 41, cl. 7(I).

³² Ex. C-18; First Statement of H. Posner III ¶ 17.

³³ See Counter-Memorial on Merits ¶ 41.

³⁴ Ex. R-3, Contract 41, cl. 7(II).

³⁵ Statement of A. Porras ¶ 23.

documentary or otherwise, that any other Government official besides Mr. Porras ever requested Presidential approval of Contract 41. Furthermore, despite the Government's purported position that such ratification was legally necessary and essential, it never provided FVG with any reason or explanation as to why it did not or could not obtain ratification, notwithstanding the fact that obtaining Executive approval was the Government's responsibility and – as this Tribunal has already concluded – entirely within the Government's (not FVG's) control to accomplish.³⁶ Indeed, to this day, nobody in the Government of Guatemala, including former Overseer Porras, can offer *any explanation* as to why Contract 41 was never approved. The cruel irony of Respondent's inexcusable inaction on obtaining Executive approval of Contract 41 is that it is only by virtue of this inaction that Respondent was even ever in a position to demand, more than four years after Contract 41 was executed, that FVG enter into a new equipment contract, which then provided Respondent with the opportunity three years later to declare such contract *lesivo*.

33. Notwithstanding Respondent's failure to obtain Executive approval of Contract 41, FVG's use of the FEGUA railroad equipment was expressly endorsed by the terms of the Master Contract, Contract 402. Under the terms of Contract 402 – which was approved by a Congressional decree introduced by the President – FVG had the legal right to obtain the FEGUA railroad equipment without any further Executive approval.³⁷ Contract 402 further provides that FVG had the unilateral right to terminate the Usufruct if it was unable to acquire the FEGUA equipment.³⁸ In other words, both parties considered FVG's right to obtain the FEGUA rolling stock such an important aspect of the Usufruct that FVG's failure to do so would entitle FVG to terminate the Usufruct without any liability. Indeed, as a practical matter, FVG could not have even *begun* the rehabilitation of the railway infrastructure without using the FEGUA equipment as work trains to move and deliver replacement ties and rails.

34. These provisions of Contract 402 not only further demonstrate the integrated and comprehensive nature of that contract concerning the operation and use of the FEGUA railway assets, they also help to explain why FVG was not only allowed, but required, continuous use of

³⁶ Second Decision on Jurisdiction ¶ 144.

³⁷ Ex. C-22, Contract 402, cl. 10(e).

³⁸ *Id.*, cl. 18(III).

the railway equipment notwithstanding any issues the Government purportedly had with Contracts 41 and (later) Contract 143. Indeed, FEGUA granted FVG possession and use of certain FEGUA railway equipment that it “deem[ed] convenient for its operations” approximately three weeks after Contract 41 was executed on March 23, 1999.³⁹ FEGUA’s actions demonstrate, among other things, that it clearly understood that it would have been in obvious breach of Contract 402 had FVG been denied the use of such equipment.

35. At most, it can be argued that Contract 41 was not *ratified* by the President after it had been executed by the parties. But no one from the Government ever told or suggested to FVG that the Government considered this contract “illegal” or “invalid.” The parties’ shared understanding concerning the ongoing validity of Contract 41 was expressed in Contract 143, which states in Clause One, section V: “[Contract 41], while it was signed by the parties thereto . . . and was therefore *totally valid*, did not take effect because it had not been approved by the President of the Republic, even though that was *an unnecessary requirement* because the Overseer of [FEGUA] has the necessary powers to sign that contract.”⁴⁰ Contract 143 further provides in Clause One, section VI, that the parties have agreed to “terminate” Contract 41.⁴¹ Obviously, if the parties considered Contract 41 to be “illegal” because of lack of Presidential approval they would not have chosen to terminate it. Instead, they would have simply declared it invalid and void *ab initio*.

36. Furthermore, despite the lack of Executive approval of Contract 41, FEGUA allowed FVG to use the FEGUA railway equipment on a continuous, uninterrupted basis under short-term arrangements pursuant to the terms of Contract 41, including its financial terms (*i.e.*, the 1% canon fee, which was *paid to FEGUA*).⁴² The first of these authorizations was granted by FEGUA on April 12, 1999, less than three weeks after Contract 41 was entered into, and three days before train service was restored between Guatemala City and El Chile.⁴³ Thus, as the

³⁹ See Ex. R-41, 12 Apr. 1999 letter from FEGUA Overseer A. Porras to FVG General Manager R. Fernandez.

⁴⁰ Ex. R-5 (emphasis added).

⁴¹ *Id.*

⁴² Second Decision on Jurisdiction ¶¶ 27, 143; Statement of A. Porras ¶ 22.

⁴³ Ex. R-197; Second Decision on Jurisdiction ¶ 143.

Tribunal has already concluded, at all relevant times, both FEGUA and FVG conducted themselves substantially as if the terms of Contract 41 had been in effect.⁴⁴ This performance included FEGUA's acceptance of FVG's canon fee payments for use of the equipment without reservation or protest. In other words, as a *de facto*, if not *de jure*, matter, the parties consistently acted as if Contract 41 was in force.⁴⁵

F. Contract 143 was Negotiated and Executed at the Behest of FEGUA to Replace Contract 41

37. Respondent contends that Contract 143 did not contain any increased benefits for FEGUA. Quite the contrary, starting in 2002, FEGUA used the lack of Executive ratification of Contract 41 as a pretext to renegotiate this contract to obtain more favorable terms for itself. On August 22, 2002, the Chief Financial Officer of FEGUA, Jose Carrillo, wrote to FEGUA Overseer Minera to recommend that Mr. Minera make a formal request to FVG for payment for use of the FEGUA equipment since January 2000 in the amount of 1% of the gross rail freight as required under the terms of Contract 41.⁴⁶ Mr. Minera wrote to FVG that same day to note that Contract 41 had still not been approved by Executive Resolution and requesting payment of the 1% canon fee for FVG's use of the equipment. In closing, Overseer Minera informed FVG that "[g]iven the silence of the Higher Authorities for approval of Contract No. 41, *we are ready to renegotiate the contract.*"⁴⁷ On October 9, 2002, Overseer Minera wrote a follow-up letter to FVG that reiterated FEGUA's position that, given the "administrative silence from the Superior Authorities with regard to the approval of Agreement No. 41, *we are prepared to renegotiate this agreement.*"⁴⁸

38. In January 2003, Hugo Sarceño replaced Mr. Minera as FEGUA Overseer. Upon assuming the Overseer's position, Mr. Sarceño promptly met with FVG's General Manager,

⁴⁴ Second Decision on Jurisdiction ¶ 144.

⁴⁵ *Id.*

⁴⁶ Ex. C-65, 22 Aug. 2002 letter from FEGUA CFO J. Carrillo to FEGUA Overseer R. Minera.

⁴⁷ Ex. R-198, Official Letter No. 167-2002, Letter from FEGUA Overseer R. Minera to J. Senn, 22 Aug. 2002 (emphasis added).

⁴⁸ Ex. R-42, Official Letter No. 197-2002, Letter from FEGUA Overseer R. Minera to J. Senn, 9 Oct. 2002 (emphasis added).

Jorge Senn. At this meeting, Mr. Senn discussed with Mr. Sarceño the issue concerning the lack of Executive approval of Contract 41.⁴⁹ One week later, Mr. Senn sent a follow-up letter to Mr. Sarceño where he reiterated that FVG was willing “to do whatever necessary in order to complete what is pending in relation to the usufruct contract over railroad equipment documented by Public Instrument No. 41.”⁵⁰ Accordingly, shortly after meeting with Mr. Senn, Mr. Sarceño approached Mr. Senn with a proposal to replace Contract 41 with a new usufruct equipment contract.⁵¹

39. The terms of the new usufruct equipment contract proposed by FEGUA were substantively identical to Contract 41 except for its financial terms. In Contract 41, FVG agreed to pay a canon fee to the Railway Trust Fund in the amount of 1% of the gross freight traffic revenue of the railroad, not to exceed Q.300,000 per year.⁵² However, in 2003, when FEGUA requested that Contract 41 be replaced by what became Contract 143, it demanded that the canon fee be increased to 1.25%, with no annual limitation, and paid *directly to FEGUA* instead of to the Trust Fund.⁵³ Overseer Sarceño informed FVG at the time that this increase in canon fee was necessary for technical and legal reasons, none of which were ever identified and which, obviously, do not exist.⁵⁴

40. Respondent, however, argues that the 1.25% canon fee in Contract 143 was not an increase over the 1% canon fee in Contract 41 because this initial canon fee was based upon the annual “gross freight traffic revenue of the railroad,” while the later canon fee in Contract 143 was 1.25% of the “net value of the freight billing,” which excluded applicable taxes (*i.e.*, value-added taxes) paid by FVG.⁵⁵ Respondent further asserts that, based upon this alleged lower measure for the canon fee under Contract 143, FEGUA did not receive any additional financial benefit from Contract 143. Accordingly, Respondent speculates that it is “very unlikely that

⁴⁹ Third Statement of J. Senn ¶ 9; Ex. C-66, 21 Jan. 2003 letter from J. Senn to FEGUA Overseer H. Sarceño.

⁵⁰ Ex. C-66

⁵¹ Third Statement of J. Senn ¶ 9.

⁵² Ex. R-3, cl. 7.

⁵³ *Id.*; First Statement of J. Senn ¶ 7.

⁵⁴ Third Statement of J. Senn ¶ 10.

⁵⁵ Counter-Memorial on Merits ¶ 56.

FEGUA would have insisted in this change in canon fee as it would not have been in its interest to do so.”⁵⁶ Each of Respondent’s arguments is factually incorrect and its conclusion is, therefore, specious.

41. First, Respondent’s argument that FEGUA did not receive any additional financial benefit from the canon fee under Contract 143 is contradicted by the fact that the canon fees under Contract 41 were limited to Q.300,000 annually and were supposed to be paid into the Railway Trust Fund and used *by FVG* exclusively for “the refurbishment and modernization of the railroad system tracks,” while the canon fees under Contract 143 had no annual limitation and were paid *directly to FEGUA* rather than the Trust Fund.

42. Second, Respondent’s assertion that the Contract 41 canon fee was actually *higher* than the Contract 143 because of the “gross” vs. “net” distinction between the two contracts ignores the fact that FVG always calculated and paid the canon fees under both contracts *the same way*, namely, on the basis of the total annual amount invoiced by FVG for freight transportation by rail, which *excluded all applicable taxes* such as the value added tax.⁵⁷ In other words, notwithstanding Contract 41’s language, FVG never calculated or paid the Contract 41 canon fee based upon the “gross freight traffic revenue of the railroad,” but, instead, always paid it, and FEGUA accepted it, without challenge, on the basis of the “net value of the freight billing.”

43. Furthermore, FEGUA audited FVG’s books and agreed with the basis for FVG’s canon fee calculation under the terms of Contracts 41 and 143 on each and every occasion.⁵⁸ One such audit occurred in October 2003 in connection with the parties reaching a final settlement of the canon fees FVG owed FEGUA for its use of the FEGUA equipment under the terms of Contract 41. This audit was occasioned by parties having executed Contract 143 in August 2003 to replace Contract 41.⁵⁹ Upon conclusion of the audit, FEGUA’s Finance Director, José Miguel Carrillo, FEGUA’s Internal Auditor, Sergio Alejandro Girón, and FVG’s

⁵⁶ Counter-Memorial on Merits ¶ 56; Statement of J. Carrillo ¶ 18.

⁵⁷ Third Statement of J. Senn ¶ 12; Ex. C-67, Minute No 11-2003, 1 Oct. 2003.

⁵⁸ Third Statement of J. Senn ¶ 12.

⁵⁹ *Id.*

Financial Manager, Jorge de León, each signed a handwritten minute entry in FEGUA's books which stated that the parties were all in agreement that the total amount of canon owed for FVG's use of the railway equipment from the beginning of its operations to August 13, 2003 was Q.330,781.35, which was equivalent to "one percent (1%) on the *total invoicing of freight transport*."⁶⁰ The "invoicing of freight transport" is another way of stating the "net value of freight billing." This evidence also directly refutes Mr. Carrillo's assertion that he was completely unaware of the existence of Contracts 143 and 158 until early 2004, because he was involved in and signed off on the FEGUA audit in October 2003, which closed the books on FVG's use of the railway equipment under the terms of Contract 41, which had been replaced by Contracts 143/158.⁶¹

44. Respondent expresses some puzzlement and unfamiliarity in its Counter-Memorial regarding certain alleged "back-dated" lease agreements for the railway equipment that its own entity, FEGUA, and FVG entered into on August 13, 2003.⁶² The story behind those agreements was as follows: Prior to the execution of Contract 143 in August 2003, FEGUA required FVG to complete its canon payment obligations for its use of the FEGUA equipment since the beginning of the Usufruct, on which only one Q.7,500.00 payment had been made to date.⁶³ Because Contract 41 had never been approved by Executive Resolution and because FEGUA did not want to have any obligation to pay any equipment canon fee into the Railway Trust Fund, Overseer Sarceño proposed as a solution a lease contract (Contract 03-2003) to cover the period of FVG's use of the equipment from January 30, 1998 through August 28, 2003 (the planned execution date of Contract 141) with a symbolic payment of Q.10,000.00.⁶⁴ However, FEGUA subsequently had second thoughts about this amount and decided that FVG's payment should match the 1% canon fee requirement stated in Contract 41. FEGUA initially calculated this 1% canon fee to be Q.341,802.80, which included the first payment of

⁶⁰ Ex. C-67 (emphasis added); Third Statement of J. Senn ¶ 12.

⁶¹ See Statement of J. Carrillo ¶ 17.

⁶² Counter-Memorial on Merits ¶ 47; Ex. R-199; Ex. R-66.

⁶³ Third Statement of J. Senn ¶ 14; Exs. R-42, R-198 (FEGUA requesting payment of 1% canon fee for FVG's use of railway equipment).

⁶⁴ Third Statement of J. Senn ¶ 14; Ex. R-199.

Q.7,500.00, and this amount was reflected in Contract 03-2003.⁶⁵ FEGUA, however, later discovered that this amount had been mistakenly calculated and that the correct total amount owed was Q.377,975.11 (including the previous payment of Q.7,500.00).⁶⁶ In order to fix this mistake, FEGUA decided that it was better for the parties to sign a new lease contract which stated the correct canon fee, which became Contract 05-2003.⁶⁷ On October 17, 2003, FEGUA invoiced FVG for Q.370,475.11, which FVG paid on that same day.⁶⁸

G. Guatemalan Law Did Not Require that Contract 143 be Approved by Executive Resolution or be Awarded Pursuant to a New Public Bid

45. Respondent asserts that both Overseer Sarceño and FVG knew (or should have known) that Contract 143 violated Guatemalan law at the time it was executed because it was not subject to a new public bidding process and did not require Executive approval for it to go into effect.⁶⁹ However, there is absolutely no credible evidence that, after Contract 143 was entered into, FVG understood or believed this contract to be illegal and void or was ever informed by FEGUA that it considered this contract to be illegal and void.⁷⁰ Entirely consistent with the fact that FVG had been using the railroad equipment with the Government's permission and blessing for almost *six years* prior to the execution of Contract 143 on August 28, 2003, Contract 143 specifically provided that no further Executive approval or ratification of the contract was necessary.⁷¹

46. As Claimant's Guatemalan law expert, Dr. Eduardo Mayora, explains, there was no requirement under Guatemalan law that Contract 143 be further ratified by the President after

⁶⁵ Third Statement of J. Senn ¶ 15.

⁶⁶ *Id.*

⁶⁷ *Id.*; Ex. R-66.

⁶⁸ Ex. C-68, FEGUA Invoice No. A55008.

⁶⁹ Counter-Memorial on Merits ¶ 54.

⁷⁰ Counter-Memorial on Jurisdiction ¶¶ 4, 30, 85, 102, 108, 131; Jurisdiction Hearing Tr. 566(5)-(9), 573(3)-(7) (Mr. Senn stating that he was not informed of any alleged illegalities); 686(3)-(10) (Mr. Duggan stating that he was not informed of any alleged illegalities).

⁷¹ Ex. R-5, cl. 6.

execution. As explained by Dr. Mayora, pursuant to Decree Law 91-84,⁷² the Overseer of FEGUA could exercise the powers of the extinct FEGUA Board of Directors and its President and, therefore, had the power and authority pursuant to the FEGUA's Organic Law to enter into this type of contract without Executive approval or ratification, which, *inter alia*, gives the Board of Directors the power to approve contracts executed by the FEGUA Manager for amounts in excess of Q.10,000.⁷³

47. Although Respondent's domestic law expert, Mr. Aguilar, acknowledges that the power of the FEGUA Overseer is as broad as the powers provided to the extinct FEGUA Board of Directors and President, he nevertheless maintains that the Overseer's power does not specifically encompass the authority to dispose of the real or personal property of FEGUA such as its railroad equipment.⁷⁴ According to Mr. Aguilar, the FEGUA Overseer's power is merely limited to managing the effective conduct of railway transportation services and specific ancillary services.⁷⁵ However, even assuming *arguendo* that Mr. Aguilar is correct – and Dr. Mayora is of the opinion that he clearly is not – Mr. Aguilar's opinion still ignores the fact that, in the Privatization Act of 1997 (Act No. 20-97), the Congress of Guatemala amended Articles 91 and 94 of the Public Procurement Act to specifically empower the highest ranking authority ("*autoridad superior*") of State autonomous entities – which, in the case of FEGUA, is the FEGUA Overseer – with the power to execute contracts for the disposition of their property and assets, without any further requirement of Executive approval.⁷⁶

48. In addition, contrary to Respondent's position, a usufruct contract over public assets or goods, such as the railroad equipment here, does not require the Administration to grant a "concession" subject to Executive approval because such equipment is not a public good of common use.⁷⁷ Article 457 of the Civil Code of Guatemala distinguishes between public goods

⁷² CL-42, Decree Law 91-84 of the Congress of the Republic of Guatemala (6 Sept. 1984) ("Decree Law 91-84").

⁷³ Third Opinion of E. Mayora ¶¶ 88-98; Second Opinion of E. Mayora ¶ 3.4.2.

⁷⁴ Expert Report of J.L. Aguilar ¶¶ 81, 91.

⁷⁵ *Id.* ¶¶ 81-84.

⁷⁶ Third Opinion of E. Mayora ¶¶ 99-101.

⁷⁷ Second Opinion of E. Mayora ¶¶ 3.5.1 - 3.5.7.

of common use and public goods of special use/not subject to common use.⁷⁸ Article 461 of the Civil Code requires that any rights over public assets or goods of common use be granted through a concession which must be approved by the Administration.⁷⁹ However, contracts for use of public goods of special use/not subject to common use are *not* subject to such a requirement. Civil Code Article 458 lists those public goods which are of common use,⁸⁰ while Article 459 describes those public goods and assets *not* subject to common use.⁸¹ Among those public goods and assets that Article 459 lists as *not* being subject to common use are “those destined for the services of state decentralized entities.” It is undisputed that FEGUA is a state decentralized entity.⁸² Accordingly, the usufruct for the FEGUA railroad equipment was a contract for the use of a public good not subject to common use and, therefore, it was not a concession that, under Guatemalan law, required Executive approval or ratification.⁸³

49. There also was no requirement that Contract 143 had to be awarded pursuant to a new public bidding process. The point of any public bidding process is for the Government to get the best possible offer through a competitive mechanism and, in the case of Contract 143, this is precisely what happened, as this contract contained more favorable economic terms and conditions for the Government than Contract 41, including a 25% increase in the canon fee and the agreement that these payments would go directly to FEGUA rather than the Trust Fund.⁸⁴ There was absolutely no reason to believe that a new public bid for the FEGUA equipment would have resulted in additional bidders and, hence, a better deal for the Government than what was negotiated in Contract 143 because there had been no other bidders for the original award. As Dr. Mayora points out, it runs against financial rationality to believe that any third party would have offered to pay the State *more* to use the railway equipment for 50 years than what

⁷⁸ CL-37, Guatemalan Civil Code (14 Sept. 1963) (“Civil Code”).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Opinion of M. Vielman ¶ 11.

⁸³ Second Opinion of E. Mayora ¶ 3.5.7.

⁸⁴ Third Opinion of E. Mayora ¶ 103.

FVG agreed to pay because, in order to use such equipment, the third party would also have had to pay FVG for use of the right-of-way for almost the next 50 years.⁸⁵

50. Furthermore, although it is certainly not conceded that Presidential approval of or a new public bid for Contract 143 was necessary, such alleged defects would only give rise to a relative, not absolute, incapacity on behalf of FEGUA's Overseer, thus making the contract *voidable*, not void, under Guatemalan law.⁸⁶ Unlike a void contract, a voidable contract can become implicitly validated if the party that created or knew of the alleged defect nonetheless proceeded with the performance of its obligations under the contract.⁸⁷ In this case, Respondent claims that FEGUA purportedly came to the realization after Contract 143 was entered into that the agreement was legally defective, yet Respondent concedes that FEGUA continued to fulfill its contractual obligation to allow FVG the use of its equipment without reservation or protest. Thus, Respondent ratified the contract even if it was voidable at the time it came into existence.

51. Finally, even assuming *arguendo* that Contract 143 contained legal defects that rendered it void *ab initio* under Guatemalan law and that FEGUA and FVG were aware of such defects, this Tribunal has already concluded that such considerations are irrelevant because both parties consistently performed under the contract as if it were a legal and binding agreement. Thus, after Contract 143 was executed, FEGUA no longer demanded or required that FVG obtain renewable authorizations to use the FEGUA equipment, as it did while the parties were waiting (to no avail) for Executive approval of Contract 41. Furthermore, from 2003-06, FEGUA audited FVG's books to confirm the canon fees owed by FVG, and consistently accepted, without protest or objection, FVG's canon payments pursuant to the terms of Contract 143.⁸⁸ Based upon these incontrovertible facts, this Tribunal found that "FEGUA and FVG were faced with a *de facto* situation which they tried to reflect in Contract 143 and FEGUA benefited from a 25% increase in the canon stipulated in Contract 41."⁸⁹ Accordingly, Respondent cannot

⁸⁵ *Id.* Furthermore, as discussed above, had the Government denied FVG the use of the FEGUA equipment, it would have exercised its right under Contract 402 to terminate the Usufruct.

⁸⁶ Third Opinion of E. Mayora ¶¶ 78-86; CL-37, Civil Code, art. 1303.

⁸⁷ CL-37, Civil Code, arts. 1304, 1537.

⁸⁸ Third Statement of J. Senn ¶ 16.

⁸⁹ Second Decision on Jurisdiction ¶ 145.

hide behind the alleged *ultra vires* actions of the FEGUA Overseer in entering into Contract 143 – “‘principles of fairness’ should prevent the government from raising ‘violations of its own law as a . . . defense when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law.’”⁹⁰

52. In sum, Respondent’s contention that Presidential approval and a new public bidding process were required for a re-executed equipment contract where the original contract was properly bid for and whose re-execution was alleged to be necessary only because of the President’s failure to approve the original contract, has already been decisively rejected by this Tribunal, is not supported by the facts or the law and was never a proper basis for declaring such contract *lesivo*, *i.e.*, harmful to the interests of the State.

H. FEGUA did not Inform FVG of any Legal Defects with Regard to Contracts 143/158 Related in the April 2004 Exchange of Correspondence Between Mr. Senn and Dr. Gramajo

53. Respondent continues to maintain that FEGUA “formally informed FVG that Usufruct Contract 143/158 contained serious legal defects” in April 2004 via a legal opinion from FEGUA’s Legal Department.⁹¹ This is nothing more than pure fiction. On April 14, 2004, Jorge Senn, the General Manager of FVG, wrote to Dr. Arturo Gramajo, the new FEGUA Overseer, to request access and use of certain spare parts and workshop warehouse areas as required under the terms of Contract 143.⁹² Dr. Gramajo denied Mr. Senn’s request in a letter to Mr. Senn dated April 21, 2004.⁹³ The letter attached Opinion 47-2004 from FEGUA’s Legal Department.⁹⁴ Dr. Gramajo avers that, through his letter and attached Opinion, he formally notified FVG that the usufruct equipment contracts, Contracts 143 and 158, “suffered from legal defects which affected its validity, including that the contract had been entered into, without the

⁹⁰ Second Decision on Jurisdiction ¶ 146 (quoting *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Award, 16 Aug. 2007, ¶ 346).

⁹¹ Counter-Memorial on Merits ¶ 60.

⁹² Ex. R-7; First Statement of A. Gramajo ¶ 11.

⁹³ Ex. C-53; Second Statement of J. Senn ¶ 5.

⁹⁴ Ex. R-8.

authorization to do so, by the former FEGUA Overseer.”⁹⁵ To the contrary, Dr. Gramajo’s letter does not mention Contracts 143 and 158 or any “legal defects” in these contracts. Nor does it question the legal validity of Contracts 143 and 158. The letter simply states that, based upon the attached Opinion 47-2004, “IT IS IMPOSSIBLE TO CONSENT TO YOUR REQUEST.”⁹⁶

54. The attached Opinion 47-2004 also does not mention the former FEGUA Overseer nor does it question his authorization to enter into Contract 143. And it does not state that the contract “omitted the key legal requirement of executive approval.”⁹⁷ In fact, the only “irregularity” identified in the Opinion is that Contract 143 “provides for the disposition of assets that are the property of the State of Guatemala without any authorization, as if those assets were owned by private legal entities.”⁹⁸ This statement was never explained to Mr. Senn, and Mr. Senn did not understand it (and, as demonstrated in the preceding section, it was erroneous).⁹⁹ Opinion 47-2004 also does not say this irregularity affected the validity of Contract 143, nor does it characterize Contract 143 as “harmful to the interests of the State” or *lesivo*. It merely advised Dr. Gramajo to redress the irregularity “as soon as possible.”¹⁰⁰

I. Discussions Between FEGUA and FVG Starting in 2004 Did Not Concern the Validity of Contracts 143 and 158 or Whether the Contracts Were “*Lesivo*”

55. Respondent asserts that, starting in 2004, the “parties initiated negotiations in an effort to remedy the defects in Contract 143/158.”¹⁰¹ Although there were some discussions starting in 2004 between FVG and FEGUA concerning entering into (yet again) a revised or new rail equipment contract to accommodate various concerns raised by FEGUA,¹⁰² at no point was it suggested by FEGUA during these discussions that Contracts 143 and 158 were so defective as

⁹⁵ First Statement of A. Gramajo ¶ 12.

⁹⁶ Second Statement of J. Senn ¶ 5; Ex. C-53.

⁹⁷ Counter-Memorial on Merits ¶ 59.

⁹⁸ Ex. R-8.

⁹⁹ Second Statement of J. Senn ¶ 5; Jurisdiction Hearing Tr. 597(22)-598(3) (Senn).

¹⁰⁰ Ex. R-8.

¹⁰¹ Counter-Memorial on Merits ¶ 61; First Statement of A. Gramajo ¶ 13.

¹⁰² See Exs. R-50, R-80.

to be invalid or that they were *lesivo*, *i.e.*, harmful to the interests of the State.¹⁰³ And, while FVG did not consider Contracts 143 and 158 to be legally defective in any material sense, it was, as always, willing to engage in good faith discussions with FEGUA to resolve whatever reasonable issues and concerns that FEGUA may have had, in order to protect RDC's substantial investment.¹⁰⁴ What was always of paramount importance to FVG was that the Government honor its prior contractual obligations and commitments that it made in awarding the Usufruct to FVG so FVG could successfully rehabilitate and operate the railway.¹⁰⁵ Even Respondent does not argue that Claimant's expectations in this regard were unreasonable.

56. Respondent places great emphasis on Jorge Senn's November 15, 2004 letter to Vice-Minister Roberto Diaz, in which he requested Mr. Diaz's support in obtaining "[o]fficial and formal *acknowledgement*" of Contracts 143 and 158.¹⁰⁶ Respondent contends that this letter is a "clear indication" that FVG was aware that Government did not recognize the validity of Contracts 143 and 158.¹⁰⁷ Mr. Senn, however, forcefully rejects that characterization of his letter. As Mr. Senn explained in his testimony at the hearings on jurisdiction, in his letter to Vice-Minister Diaz he was not requesting that the Government recognize the legal validity of Contracts 143 and 158, but, rather, he was seeking acknowledgement of FEGUA's *legal obligations* under the contracts.¹⁰⁸ Mr. Senn explained that he was seeking such acknowledgement from Vice-Minister Diaz because the FEGUA Overseer, Dr. Gramajo, had been for almost a year refusing to acknowledge FEGUA's obligation under Contract 143 to provide FVG with access to crucial spare equipment parts located in the FEGUA-controlled warehouses.¹⁰⁹

57. Mr. Senn's November 15, 2004 letter to Vice-Minister Diaz also discusses how FEGUA's failure to make its contractually obligated payments into the Trust for Rehabilitation

¹⁰³ Second Statement of J. Senn ¶ 7.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Ex. R-9 (emphasis added).

¹⁰⁷ Counter-Memorial on Merits ¶ 64.

¹⁰⁸ Jurisdiction Hearing Tr. 622(5)-(7) (Senn).

¹⁰⁹ Jurisdiction Hearing Tr. 619(14)-621(3) (Senn); Ex. R-5, Contract 143, cl. 4(I)(vii).

and Modernization of the Right of Way (the “Trust Fund”) (estimated at the time to be approximately two million dollars) was making it harder every day for FVG to honor its financial obligations to FEGUA. It notes how these missing Trust Fund payments were very significant both for FVG’s road maintenance and capitalization programs. Mr. Senn’s letter also notes how current and potential investors in the rehabilitation of the South Coast corridor were expressing concerns about the occupation of the right-of-way by squatters and that FVG needed a formal commitment from the Government, per its legal obligations under Contract 402, for the relocation of these people so FVG could proceed with its development plans.

58. In connection with Mr. Senn’s November 15, 2004 letter to Vice-Minister Diaz, on November 24, 2004, FEGUA Finance Director José Miguel Carrillo wrote in response to an inquiry from FEGUA Overseer Gramajo regarding FVG’s demands that FEGUA make its contractually obligated payments to the Trust Fund and remove squatters from the South Coast right-of-way, and that FEGUA acknowledge its obligations under Contract 143 to provide FVG with access to the parts warehouses.¹¹⁰ Director Carrillo’s letter was never disclosed to FVG, but it is nevertheless quite telling, because it starkly demonstrates the Government’s consistent attitude that it could ignore its contractual obligations to FVG and demand renegotiation of those obligations because the Government had decided, in hindsight, that it had not negotiated the terms of the Usufruct Contracts to its best advantage.

59. First, Director Carrillo’s letter concedes upfront that FEGUA was obligated under Contract 402 to contribute its third party income (which was derived from its long-term usufruct contract with COBIGUA, together with its other leases) to the Trust Fund regardless of whether FVG was making its canon payments to FEGUA under the contract. Nevertheless, Director Carrillo complained that FEGUA had not received from FVG during the first six years of the Usufruct the amount of canon payments that FVG had estimated FEGUA would receive – but had explicitly not promised or guaranteed – in its financial bid.¹¹¹ He further pointed out that 35% of FEGUA’s general budget comes from the COBIGUA contract and that, if FEGUA were to contribute this income to the Trust Fund, FEGUA would not be in a position to cover its

¹¹⁰ Ex. R-10.

¹¹¹ *Id.*

expenses incurred each fiscal year.¹¹² For these reasons, Director Carrillo concluded that FEGUA should not comply with its acknowledged unconditional obligation to contribute its third party income into the Trust and that, instead, FEGUA should renegotiate the terms of Contract 402 and its current debt to the Trust should be cancelled. Director Carrillo asserted that such renegotiation is necessary because “the objective of privatizing the railroad services is to seek benefits *for FEGUA* and the Guatemalan people.”¹¹³ Dr. Gramajo echoed Director Carrillo’s position in a 2005 news article:

With regard to the trust, FEGUA owes it Q16 million. A sum it hasn’t paid because “that money is allocated to the pensions of our retired workers, to the museum, to defray our labor obligations and other previous debts,” claims Gramajo, who thinks that, on this issue, the contract is “*legal, but detrimental and unfair.*”¹¹⁴

60. Director Carrillo also took a similar “renegotiation” position in his November 24, 2004 letter with regard to FVG’s demand that FEGUA acknowledge and comply with its obligations under Contract 143: “With respect to official and formal acknowledgement of the Contract for Usufruct of Railroad Equipment, *I suggest that this contract be renegotiated* for FEGUA to receive a specific royalty and not go back to CODEFE through the figure of a trust.”¹¹⁵ In other words, FEGUA was interested in using whatever legal issues and obstacles it could raise with regard to Contract 143 as leverage to demand even more compensation for itself. Of course, nowhere in discussing FEGUA’s legal position with regard to Contract 143 did Mr. Carrillo argue or suggest that this contract was *lesivo*, illegal or invalid.

61. Finally, with regard to the removal of squatters along the South Coast right-of-way, Director Carrillo was similarly dismissive of FEGUA’s unconditional contractual

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Ex. R-92, *Magazine D*, “The Life, Passion and Death of a Railroad,” 31 July 2005 (emphasis added). Dr. Gramajo’s complaints about the “unfairness” of FEGUA’s Trust Fund contribution obligations are particularly galling in light of the fact that it was the Government which had originally offered as part of its Usufruct Bidding Terms that all income from FEGUA’s existing usufruct contracts, leases and easements would be retained by the railway usufructuary, not FEGUA. See Ex. R-1, Bidding Rules, § 4.1.13.

¹¹⁵ Director Carrillo apparently had not actually read Contract 143 before he wrote his letter because, if he had, he would have seen that Contract 143 provides that FVG’s canon payment goes directly to FEGUA rather than to the Trust Fund.

obligation, ludicrously suggesting that it was “obvious” this problem would “disappear” once FVG began maintaining a railroad presence along this route, which certainly did not reflect FVG’s experience with the North Coast/Atlantic line, where squatters remained a recurring problem even after operations resumed on that route. Mr. Carrillo further wrongly asserted that it was FVG’s responsibility, not FEGUA’s, to keep empty stretches of track free from squatters.

62. On December 9, 2004, FEGUA’s Legal Department issued Opinion No. 204-2004, which had been requested by Dr. Gramajo.¹¹⁶ This opinion was never provided or disclosed to FVG. Like Director Carrillo’s November 24, 2004 letter, this opinion principally concerned FVG’s demand that FEGUA comply with its contractual obligation to contribute its third party income to the Trust Fund. Consistent with Director Carrillo’s position, Opinion 204-2004 concludes that FEGUA should seek to renegotiate the terms of Contracts 402 and 820 on the basis that FEGUA was not “economically capable” of complying with its Trust Fund contribution obligations under these contracts.

63. Opinion 204-2004 also addresses FVG’s demand for FEGUA to acknowledge its legal obligations under Contracts 143 and 158. Although the opinion asserts that the contracts needed to be approved through an Executive Resolution in accordance with the original bidding conditions (it notably makes no mention of the need for a new public bidding process), rather than recommending that FEGUA take action to request Executive approval, it instead recommends (like Director Carrillo) that FEGUA take advantage of this issue by seeking renegotiation of those provisions of the contract that are “totally unfavorable” to FEGUA (“Given this situation, FEGUA at the present time has a clear interest in examining again the legal and economic aspects involved in this contract, so that some of the clauses of that contract that are totally unfavorable to Ferrocarriles de Guatemala–FEGUA can be negotiated and amended. . . .”).¹¹⁷

64. Respondent contends that, from mid-2004 through early 2005, FEGUA and FVG held a “series of negotiations in which their principal objective was to enter into a *new*

¹¹⁶ Ex. R-11.

¹¹⁷ *Id.*

equipment usufruct that cured the legal defects contained in Contract 143/158.”¹¹⁸ Respondent further asserts that FEGUA “put forward several possible solutions and exchanged several new possible draft [usufruct equipment] contracts” with FVG.¹¹⁹ However, not once during these discussions did FEGUA ever present or provide to FVG a legal opinion identifying what it believed to be the “legal defects” of Contracts 143 and 158.

65. Instead, Respondent asserts that FEGUA’s discussions with FVG over entering into a new usufruct equipment contract broke down in 2005 because of unresolvable disagreements over whether FVG was properly protecting certain rail equipment or because FVG’s Chairman, Henry Posner III, was unwilling to cede custody of certain rail equipment due to his “love of old railway equipment.”¹²⁰ Not only is that assertion ludicrous,¹²¹ Respondent’s explanation for the cause of the “breakdown” in these discussions illustrates its bad faith in trying to use purported “legal defects” in Contracts 143 and 158 as leverage to achieve its other objectives.

66. Furthermore, at no point in 2005 did Dr. Gramajo or anyone else from FEGUA ever inform FVG that the parties were at an impasse or even that there was a dispute between them concerning Contracts 143 and 158.¹²² And at no point did anyone from FEGUA or the Government ever assert or suggest that Contracts 143 and 158 were *lesivo*.¹²³ Nor did anyone from FEGUA or the Government ever offer to resolve these relatively minor issues, which were entirely within the Government’s control and could have been easily accomplished without any effort or action on the part of FVG.

¹¹⁸ Counter-Memorial on Merits ¶ 61.

¹¹⁹ First Statement of A. Gramajo ¶ 20.

¹²⁰ Mr. Posner does not dispute that he is fond of old railways and rolling stock; after all, that is his business – renovating and operating railroads whose State owners have allowed them to fall into disrepair and decay. But, *railroading is his business*, in contrast to Dr. Gramajo, who is an obstetrician whose *hobby* is railroads. Unlike, apparently, the Government, Mr. Posner recognizes that, for railroad preservation to work, the underlying railroad must be physically healthy and financially viable. Second First Statement of H. Posner III ¶ 8; Second Statement of J. Senn ¶ 11.

¹²¹ Issues of protection of the equipment and its cultural and historical patrimony value were never a significant part of any discussions between FVG and FEGUA regarding the terms of Contracts 143 and 158. Second Statement of J. Senn ¶ 11.

¹²² *Id.* ¶ 14.

¹²³ *Id.*

67. By way of example, Dr. Gramajo mentions in paragraph 11 of his First Statement that one of the defects FEGUA identified with Contract 143 was that it was never approved by the Executive. There was nothing that FVG did or could have done to prevent this alleged defect from being resolved by the Government; as was the case with Contract 41, it was the Government's fault that this alleged necessary approval had not been accomplished, and it was entirely within the Government's control to resolve this issue. In other words, for almost every issue identified by Respondent regarding Contracts 143 and 158, there was little to nothing for the parties to "negotiate."¹²⁴

J. FVG's Financial Situation in 2004 and 2005 was Stable and on the Verge of Profitability

68. Respondent argues that, by 2004 and early 2005, FVG's financial situation was "dire" because the company had yet to turn a profit and had to obtain additional capital contributions from RDC to finance operations.¹²⁵ However, the same 2004 and 2005 FVG Annual Reports to which Respondent cites to paint its "dire" financial picture of FVG state that there had been and was an ongoing commitment from RDC to finance FVG's operations and strengthen capital.¹²⁶ In other words, due to RDC's demonstrated steadfast and long-term commitment to FVG, there did not exist any serious risk or concern at the time about FVG's financial position.

69. Further, contrary to Respondent's assertion that FVG was on the verge of bankruptcy by 2004, the 2004 FVG Annual Report states that the company was, by then, operating on an almost breakeven basis from its Phase I operations and was on the verge of *profitability*:

While financing for our company has remained elusive, we have succeeded in further reducing operating losses to the point *where we are almost breakeven on a cash flow basis*. This is important because it means the end of shareholder funding, an important consideration for all of us. . . . Because we are so close to

¹²⁴ *Id.* ¶ 13.

¹²⁵ Counter-Memorial on Merits ¶ 70.

¹²⁶ Ex. C-27(g), FVG 2004 Annual Report, at RDC001265; Ex. C-27(h), FVG 2005 Annual Report, at RDC001332.

breaking even, a single breakthrough – such as a new contract or use of our right-of-way, or a resolution of how our infrastructure trust-fund is administered in conjunction with the government – has the potential to eliminate the losses which have plagued us since inception.¹²⁷

70. The 2005 FVG Annual Report further points out that the single biggest problem FVG had with regard to funding operations and achieving profitability was not its failure to reopen the South Coast corridor or in achieving certain freight traffic levels, but because FEGUA had improperly retained more than \$2 million in income that it had received from its third party leases rather than complying with its contractual obligation to deposit such funds into the Railway Trust Fund where the funds would have been used by FVG to rehabilitate and maintain the railway.¹²⁸ Indeed, had these funds been available to FVG, the company would have enjoyed a positive cash flow. In particular, FVG would have had a positive cash flow of Q.1,105,318 in 2004 on an EBITDA basis when the estimated FEGUA Trust Fund payments are included for that year.¹²⁹

K. Potential Investors were Unwilling to Commit to the South Coast Railway Project Because of the Government’s Unwillingness to Remove Squatters

71. In its Counter-Memorial, Respondent places great emphasis on Claimant’s failure to restore and re-open the entire South Coast railway corridor. Although not legally obligated under the terms of Contract 402, FVG’s business plan always contemplated rebuilding and reopening the entire South Coast/Pacific corridor if business conditions warranted it and FVG could obtain sufficient additional outside investment or financing from local or international investors or lenders for this project, which had an estimated cost in the range of \$50 - \$100 million.¹³⁰

72. It was also always contemplated by both Claimant and Respondent that one of the potential likely sources of local investment for the South Coast project was the Guatemalan sugar

¹²⁷ Ex. C-27(g), FVG 2004 Annual Report, at RDC001204 (emphasis added).

¹²⁸ Ex. C-27(h), FVG 2005 Annual Report, at RDC001276.

¹²⁹ Third Statement of H. Posner III ¶ 13, Annex 1. To be clear, Claimant is *not making a claim for these missing funds here*, but is merely making the point that Respondent should not be allowed to rely upon Claimant’s lack of profitability when the principal reason for this condition was Respondent’s own contractual breaches.

¹³⁰ Ex. C-15, § 4.0.

industry that dominated the South Coast region economy. The sugar industry had a potentially strong economic interest in utilizing the South Coast railway as an alternative to trucks to transport the growers' sugar exports from the mills located the Southern region to the Pacific port of Puerto Quetzal. Starting in 2004, FVG had multiple discussions with Freddie Pérez, General Manager and representative of the Guatemalan sugar export industry association, Expogranel, S.A. regarding participating in a joint venture with FVG to develop a standard gauge railway for the South Coast. On July 3, 2004, Mr. Pérez sent FVG a letter confirming the sugar industry's interest in investing in the South Coast railway project:

According to multiple communications, I hereby ratify that the Guatemalan sugar industry is interested in participating with Ferrovías in a joint venture to develop the broad-gauge Pacific Railway Project for the transport of bulk sugar exports to Puerto Quetzal. As part of this project, we have also considered using these means to transport our imports, such as fuel and fertilizer.¹³¹

Along with the sugar industry, other Guatemalan industries expressed interest in investing in and/or utilizing a rehabilitated standard-gauge South Coast railway, including the energy sector¹³² and animal feed producers.¹³³

73. In addition to soliciting local industries, RDC also sought out international sources for co-financing of the South Coast project, including the World Bank, the International Finance Corporation (IFC) and the Inter-American Development Bank (IDB).¹³⁴

74. However, the interest and willingness of all potential outside investors, both local and international, were limited by their concerns about the continued occupation of the South Coast right-of-way by families of squatters and the Government's failure to commit formally, per

¹³¹ Ex. C-69, 3 July 2004 letter from Expogranel General Manager F. Pérez to J. Senn.

¹³² Ex. C-70, 3 June 2004 letter from AMATEX President J. Habie to J. Senn (stating that his holding group, including its power-generating company, Gesur, is interested in taking part with FVG in developing the Pacific railway project for the transport of carbon and fuel to Puerto Quetzal).

¹³³ Ex. C-71, 4 June 2004 letter from Aliansa President J. Bosch to J. Senn (stating that his holding group's animal feed producer, Aprovisa, is interested in the reactivation of the Pacific railway so it could use it as an alternative to ground transportation).

¹³⁴ Third Statement of H. Posner III ¶ 8; Ex. C-72, "Project Summary: Guatemala South Coast Railway" submitted to IDB Private Sector Group, 18 Mar. 2002; Ex. C-73, "Guatemala South Coast Railroad Reconstruction Project," Project Introduction Prepared for Interested Parties, 1 Aug. 2002.

its contractual obligation, to remove and relocate these families.¹³⁵ In order to obtain a more accurate estimate and understanding of the extent of the squatter problem, in April 2004, FVG and Expogranel jointly financed, at their own cost of Q.33,530.12 (approximately \$4,200), a helicopter aerial video study of the South Coast right-of-way.¹³⁶ The aerial video revealed that an estimated 4,000 families (approximately 16,000 persons) were currently occupying portions of the South Coast right-of-way.¹³⁷

75. On September 13, 2004, FEGUA took out a paid press release in the Guatemalan newspaper *Al Dia* where it admitted that “it has not promoted nor requested the eviction of any of the settlement groups that currently occupy the railway right-of-way” and apparently had no intention of doing so, despite FVG’s repeated demands.¹³⁸

76. FVG repeatedly advised the Government that FEGUA’s failure to remove, or even commit to remove, the squatters from the South Coast corridor per its contractual obligations – as demonstrated by FEGUA’s September 13, 2004 press release – was causing potential investors to resist making any formal commitments to invest in the South Coast railway project. The situation was succinctly summarized by Jorge Senn in his November 15, 2004 letter to Vice-Minister Diaz: “Current and potential investors have expressed their concerns about the occupation of the right-of-way by encroachers. As was established in the contract, *we will need a formal commitment from the government for the relocation of these people so as to be able to proceed with our development plans.*”¹³⁹

77. The reason why the squatter problem made potential investors hesitant to commit to the South Coast project was obvious: a project that contemplated rebuilding the entire South Coast railway with standard gauge rail could not begin before all squatter families were cleared

¹³⁵ Third Statement of H. Posner III ¶ 9; Ex. C-74, 11 Mar. 2005 email from H. Posner III to B. Duggan, J. Senn *et al.* (describing how “The Squatter Problem” is a major impediment to obtaining IFC financing for FVG). Again, Claimant here is not making a claim in this arbitration regarding Respondent’s failure to remove squatters prior to the *Lesivo* Resolution, but is responding to Respondent’s contention raised in its Counter-Memorial.

¹³⁶ Third Statement of J. Senn ¶ 32; Ex. C-75, FVG invoice to Expogranel, 10 June 2004 (charging Expogranel Q16,765.06 for its 50% share of the helicopter video cost).

¹³⁷ Ex. C-27(g), 2004 FVG Annual Report at RDC001222.

¹³⁸ Ex. C-76, *Al Dia*, FEGUA paid press release, 13 Sept. 2004.

¹³⁹ Ex. R-9 (emphasis added).

from the right-of-way, and only the Government had the legal authority and power to remove and relocate squatters.¹⁴⁰ Neither RDC nor any local or foreign investor was willing to take the risk of investing potentially tens of millions of dollars in this project where the Government had not complied – and was unwilling to make a commitment to comply – with its fundamental contractual obligations. As Mr. Senn explained in a 2005 news article:

They [the Government of Guatemala] haven't relocated the squatters, or delivered the spare parts warehouse, or made stipulated payments to the trust created for the overhaul of the line. . . . The combination of these factors creates a *lack of legal certainty*, and when we are seeking investors willing to put money into the construction of a new line to the Pacific, *they want to have guarantees that they're not going to lose their money and that the agreement is going to be maintained.*¹⁴¹

L. Ramón Campollo Expresses Interest in Investing in the South Coast and Enlists Claimant's Advice and Assistance on the Railroad He Owns and Operates in the Dominican Republic

78. On December 3, 2004, Claimant's representatives met with Ramón Campollo at Greenberg Traurig's offices in Miami, Florida. Mr. Campollo asserts that this meeting was initially requested by William ("Bill") Duggan and Jorge Senn, not by him.¹⁴² Messrs. Duggan and Senn, however, both insist that Mr. Campollo was the one who requested the meeting.¹⁴³ Regardless, both sides agree that the purpose of the meeting was to discuss Mr. Campollo's potential interest in investing in the railway, particularly the rebuilding of the South Coast corridor.

¹⁴⁰ Respondent points to FVG allowing the electricity company Gesur to set up some of its electricity transmission poles close to the middle of a small segment of the South Coast right-of-way in 2003 as evidence that FVG never had any intention of rehabilitating the South Coast corridor. Counter-Memorial on Merits ¶ 169. *See also* Statement of M. Samayoa ¶ 22. However, the reason why FVG allowed Gesur to install its poles in the middle of the right-of-way was because the presence of squatters along the right-of-way made it impossible to install them elsewhere. Third Statement of J. Senn ¶¶ 32, 35. Indeed, the FEGUA report which discusses the installation of the Gesur transmission poles contains several photographs which clearly demonstrate the presence of squatter settlements along the right-of-way. *See* Ex. R-259. Under the terms of FVG's easement agreement with Gesur, Gesur was obligated to relocate the poles to the side of the right-of-way once the Government complied with its contractual obligation to remove the squatters. Third Statement of J. Senn ¶ 36.

¹⁴¹ Ex. R-92 (emphasis added). *See also* Ex. C-64 (stating that restoration of the South Coast railway will occur once the legal uncertainty created by the Government's noncompliance with its contractual obligations is resolved).

¹⁴² Statement of R. Campollo ¶ 11.

¹⁴³ First Statement of J. Senn ¶¶ 20, 22; First Statement of B. Duggan ¶¶ 5-6.

79. Mr. Campollo asserts that, prior to being contacted by Claimant’s representatives in December 2004 to request a meeting, he had not heard from any of Claimant’s representatives since a meeting he had with Henry Posner III that took place at his home in Guatemala “[a]round 2000 or 2001” to discuss the railroad project.¹⁴⁴ Like much of his testimony, Mr. Campollo’s recollection in this regard is either faulty or dishonest; Mr. Campollo had not only heard from Claimant’s representatives just months prior to the December 2004 meeting, he had *hired and paid Claimant* to provide consultancy work for him *on a railroad he owned and operated*.

80. On July 13, 2004, Jorge Senn was contacted by a representative of Mr. Campollo, Steffan Lehnhoff, who inquired about Claimant providing assistance and input on how best to improve and upgrade the operational efficiency of Mr. Campollo’s Consorcio Azucarero Central (CAC) railroad located in Barahona, Dominican Republic.¹⁴⁵ The CAC railroad was located within a large sugar mill granted in concession to Mr. Campollo called Consorcio Azucarero Central, and was being used to transport sugar cane from the fields to the mill. The rail line was approximately 44 kilometers long, narrow (one meter) gauge and utilized eight locomotives and approximately 400 wagons.¹⁴⁶ Mr. Lehnhoff informed Mr. Senn that the railroad was moving approximately 400,000 metric tons of sugar cane annually and that Mr. Campollo wanted to increase railway traffic in the next two years to 600,000 metric tons.¹⁴⁷ Mr. Lehnhoff asked Mr. Senn whether Claimant would be interested in providing paid consultancy work for Mr. Campollo on how to improve the railroad’s efficiency or if Claimant could recommend another person or entity who might be interested in such work.

81. Mr. Senn forwarded Mr. Lehnhoff’s request to Bill Duggan, and Mr. Duggan informed Mr. Senn that he would make himself available to provide personally the requested

¹⁴⁴ Statement of R. Campollo ¶¶ 8, 11.

¹⁴⁵ Third Statement of J. Senn ¶ 38; Ex. C-77, 14 July 2004 email from S. Lehnhoff to J. Senn.

¹⁴⁶ Ex. C-78, William J. Duggan, “Consultancy on Possible Methods of Upgrading the Railroad Operations Within the Sugar Mill to Increase Efficiency and Sugar Cane Traffic Performance,” Trip Report, August 2004; Third Statement of B. Duggan ¶¶ 6, 10. By way of comparison, in Guatemala, FVG operated 15 locomotives and approximately 200 railcars on 333 kilometers of railway. First Statement of H. Posner III ¶ 22.

¹⁴⁷ Third Statement of J. Senn ¶ 38; Ex. C-77, 14 July 2004 email from S. Lehnhoff to J. Senn.

consulting services for Mr. Campollo.¹⁴⁸ (Mr. Duggan also recalled that Mr. Campollo had mentioned to him at their previous meeting a few years earlier that he was interested in RDC providing such assistance for his railroad.) Mr. Duggan subsequently met with Mr. Lehnhoff in Guatemala in early August 2004, where it was agreed that Mr. Duggan would travel to the Dominican Republic to observe the operations and maintenance of the CAC railroad and then prepare a report containing his observations and recommendations.¹⁴⁹

82. Mr. Duggan traveled to the Dominican Republic on August 16, 2004 and spent three days there traveling on the railroad, examining the railway track and rolling stock condition, observing the railway's operations and maintenance activities, and meeting with managers and supervisors.¹⁵⁰ On the evening of August 17, 2004, Mr. Duggan was invited to the local home of Mr. Campollo, where he and Mr. Campollo's nephew, Pablo Campollo, had dinner with Mr. Campollo and discussed with him what Mr. Duggan had observed so far on his trip.¹⁵¹

83. Mr. Duggan subsequently prepared a detailed written report describing his activities and observations during his time at Mr. Campollo's railroad and his recommendations for improving the railroad's efficiency and traffic.¹⁵² One of the recommendations Mr. Duggan made for improving the maintenance of the railroad's rolling stock was for CAC to improve its personnel training. In this regard, Mr. Duggan recommended that Mr. Campollo hire a manager who had worked for RDC in Guatemala and was currently working for RDC's railroad operation in Peru, Ronaldo Lacayo.¹⁵³ Mr. Lacayo subsequently forwarded his resume to Steffan Lehnhoff in December 2004.¹⁵⁴

¹⁴⁸ Third Statement of B. Duggan ¶ 7; Ex. C-79, 16 July 2004 email from B. Duggan to J. Senn; Third Statement of J. Senn ¶ 39.

¹⁴⁹ Third Statement of B. Duggan ¶ 8.

¹⁵⁰ *Id.* ¶ 9.

¹⁵¹ *Id.*; Ex. C-78.

¹⁵² Ex. C-78.

¹⁵³ *Id.*

¹⁵⁴ Ex. C-80, 17 Dec. 2004 email from R. Lacayo S. Lehnhoff.

84. On September 29, 2004, Mr. Senn delivered two copies of Mr. Duggan's report to Mr. Lehnhoff.¹⁵⁵ On November 23, 2004, FVG invoiced Mr. Campollo's company, Central Agroindustrial Guatemalteca, Q.46,409.67 for Mr. Duggan's consultancy work on the CAC railroad, which was promptly paid by Mr. Campollo.¹⁵⁶

85. Thus, contrary to Mr. Campollo's "recollection," he in fact had substantial direct contact and business dealings with Claimant immediately prior to his December 2004 meeting with Claimant's representatives, and these dealings were initiated and requested *by Mr. Campollo*, not Claimant. Furthermore, Respondent's assertion that Mr. Campollo "was never interested in and would never have insisted on operating the [Guatemalan] railroad," because, among other things, "Mr. Campollo never has been in the railroad or transportation business, which he understood to require technical and operational knowledge that neither he nor any of his business ventures possess"¹⁵⁷ is demonstrably false.¹⁵⁸ As his ownership and operation of the CAC railroad demonstrates, Mr. Campollo was most definitely in the "railroad business" during the time he was meeting with FVG to discuss his potential investment in the Guatemalan railway.

M. Mr. Campollo Was Interested in Investing in the Guatemalan Railway, But Only if Claimant Was Willing to Surrender Its Rights and Control of the Usufruct to Him

86. Returning to the December 3, 2004 meeting in Miami, Mr. Campollo admits that he unilaterally invited – without informing Claimant – President Berger's son, Juan Esteban Berger Widmann, to attend the meeting.¹⁵⁹ Mr. Campollo claims that Mr. Berger did not attend the meeting as his lawyer or representative and that he did not introduce or refer to Mr. Berger as such during the meeting.¹⁶⁰ Mr. Berger also states that he was not working for Mr. Campollo at

¹⁵⁵ Third Statement of J. Senn ¶ 40; Ex. C-81, 29 Sept. 2004 letter from J. Senn to S. Lehnhoff.

¹⁵⁶ Ex. C-82.

¹⁵⁷ Counter-Memorial on Merits ¶ 137. *See also* Statement of R. Aitkenhead ¶ 19 (falsely stating that Mr. Campollo "has no meaningful experience operating railroads").

¹⁵⁸ Mr. Inngmar Iten also testifies that he sold scrap railway equipment for use on Mr. Campollo's Dominican railway in June 2006. Second Statement of I. Iten, Maya Quetzal ¶ 4.

¹⁵⁹ Statement of R. Campollo ¶ 13.

¹⁶⁰ *Id.*

the time and further asserts that he had no financial interest in Mr. Campollo obtaining access to the railway system.¹⁶¹ According to Mr. Berger, his only interest in attending the Miami meeting was his “desire to see the [sic] Guatemala equipped with an efficient railroad system.”¹⁶²

87. In fact, neither Mr. Campollo nor Mr. Berger – a well-known lawyer in Guatemala – ever stated or explained during the Miami meeting who Mr. Berger was representing or why he was there at all. There was no disclosure of Mr. Berger’s representation of Korean business interests or what connection or interest he had in the South Coast railroad project. Mr. Campollo and Mr. Berger’s protests notwithstanding, the obvious implicit message that was intended and conveyed to Messrs. Duggan and Senn by Mr. Berger’s unexplained presence at the meeting was that Mr. Campollo had close connections to and influence with Mr. Berger’s father, President Berger.

88. Furthermore, Mr. Berger’s claim that he had no financial interest in Mr. Campollo or Mr. Campollo’s businesses obtaining access to the railway is demonstrably false. According to publicly available reports, the family of Mr. Berger’s mother (and President Berger’s wife), the Widmanns, not only own their own sugar mills in Guatemala – and therefore stood to financially benefit from an operating South Coast railway – they are also *shareholders in Mr. Campollo’s sugar mill, Ingenio Madre Tierra*.¹⁶³ Thus, regardless of whether Mr. Berger was ever promised a fee or other remuneration from Mr. Campollo for assisting him in connection with the railroad project, Mr. Berger (as well as President Berger) still had a direct financial stake in and stood to gain personally from Mr. Campollo obtaining access to and/or control of the railway.

89. Mr. Campollo asserts that, at the Miami meeting, he never expressed to Claimant any interest in obtaining control of any portion of the railway or its assets and, in fact, he had no such interest. Messrs. Senn and Duggan both recall quite specifically that, at this meeting, Mr. Campollo expressed interest in using a reopened South Coast corridor to transport sugar cane to

¹⁶¹ Statement of J.E. Berger ¶ 12.

¹⁶² *Id.*

¹⁶³ See Ex. C-83, Plantations for Agro Fuels and Loss of Lands for the Production of Food in Guatemala, ActionAid Guatemala, August 2008, at 11, Table 3.

his mill in Santa Lucia and to transport sugar products from his mill to Puerto Quezta for exporting.¹⁶⁴ Indeed, if he had no such interest, there was no purpose in having the meeting. More importantly, both Mr. Senn and Mr. Duggan recall that Mr. Campollo expressed such interest not in the context of his considering making an investment of his own money in FVG or in the South Coast project, but in terms of FVG *giving him* – for free – a controlling interest in FVG and/or the railroad and its assets.¹⁶⁵ As discussed in paragraphs 107-08 below, Mr. Senn’s and Mr. Duggan’s recollection is expressly confirmed by the terms of the written proposal that Mr. Campollo’s agent, Héctor Pinto, delivered to FVG approximately three months later.

90. In order to demonstrate his purported lack of interest in the railway, Mr. Campollo offers a litany of reasons, none of which withstand even minimal scrutiny and are glaringly lacking in tangible evidentiary support. First, Mr. Campollo asserts that he was not particularly interested in the railway at the time because he was aware of the existence of – but never saw – a purported “feasibility report” that had been commissioned by FVG and which he claims reached the conclusion that the transportation of sugar by railroad was not profitable for sugar mills.¹⁶⁶ Although Mr. Campollo is unable to identify personally who authored this “feasibility report,” Respondent asserts that the report to which Mr. Campollo is referring is one that FVG commissioned an individual by the name of Roberto Morales to conduct in 2003.¹⁶⁷ Respondent presents the testimony of Mr. Morales himself, who, in his statement, describes his purported “feasibility study” in very precise detail. Mr. Morales claims that FVG commissioned him “to examine the viability of the railway as well as competitive transport rates that could be offered to the various mills located within the southern corridor.”¹⁶⁸ He goes on to state that his study concluded that “the activity of the sugar mills by itself would not cover the investment costs necessary to develop the railway route in the southern region of the country and equip it to carry sugar in bulk” and sets forth four very specific reasons supporting his conclusion.¹⁶⁹

¹⁶⁴ First Statement of J. Senn ¶ 22; First Statement of B. Duggan ¶ 6.

¹⁶⁵ First Statement of J. Senn ¶ 23; First Statement of B. Duggan ¶ 7.

¹⁶⁶ Statement of R. Campollo ¶ 17.

¹⁶⁷ Counter-Memorial on Merits ¶ 138.

¹⁶⁸ Statement of R. Morales ¶ 4.

¹⁶⁹ Statement of R. Morales ¶¶ 7-13.

91. Putting aside the critical fact that Mr. Morales is an agricultural engineer¹⁷⁰ who has absolutely no experience or qualifications to assess the potential economics of the Guatemalan sugar industry investing in or operating a railroad, the fundamental problem with Mr. Morales’s testimony – and, by extension, Mr. Campollo’s – is that Mr. Morales was never asked to conduct the feasibility study for FVG that Mr. Campollo describes in his statement. As both Mr. Senn and Mr. Duggan testify, while FVG did request a report from Mr. Morales, it was not a study on the potential economics of the sugar industry investing in or operating a railroad.¹⁷¹ Indeed, although in his statement Mr. Morales purports to describe the contents and conclusions of his “feasibility study” in great detail, he does not actually reference any specific provisions of the study, and Respondent, tellingly, did not produce the study as an exhibit to its Counter-Memorial to support these fictitious conclusions.¹⁷²

92. Fortunately, Claimant does have a copy of the actual “study” Mr. Morales delivered to FVG in September 2003.¹⁷³ By way of background, Roberto Morales is a person who worked for many years in the transportation department of the Pantaleón and Concepción sugar mills, which for years had utilized trucks to transport their export sugar to Puerto Quetzal.¹⁷⁴ After Mr. Morales was laid off from the mills, he began providing consultancy services to all the sugar mills to help make their truck transportation systems more efficient by selecting and using shorter routes to save fuel and time.¹⁷⁵ Based upon his extensive knowledge regarding the respective routes and distances of the sugar mills from the existing right-of-way, and in connection with FVG’s effort to reopen the South Coast corridor through a joint venture with the sugar industry, FVG hired Mr. Morales in 2003 to conduct a relatively minor study to

¹⁷⁰ Statement of R. Morales ¶ 2.

¹⁷¹ Third Statement of J. Senn ¶ 41; Third Statement of B. Duggan ¶¶ 13-15.

¹⁷² Respondent confirmed during the course of document discovery between the parties that Mr. Morales does not even have a copy of his alleged “feasibility study” which he purports to describe in his statement.

¹⁷³ Ex. C-84, “Sugar Transport Project: Ferrovías Transfer System,” September 2003.

¹⁷⁴ Third Statement of J. Senn ¶ 42.

¹⁷⁵ *Id.*

determine *what would be the ideal right-of-way loading points* for the sugar mills to load their export sugar on the train.¹⁷⁶

93. The study that Mr. Morales delivered to FVG in September 2003 is an Excel file that consists of several spreadsheet tabs mainly consisting of numerical data.¹⁷⁷ The second tab of the file lists the “Objectives” of Mr. Morales’ study:

1. Identify potential transfer stations for the different sugar mills in Guatemala.
2. Allow economic evaluation of each transfer station for each of the mills in Guatemala.
3. Identify the best transport system for managing product.
4. Set the amount of equipment used in road transport and basic infrastructure in the transfer stations.
5. To simulate all conditions of sugar transport and assess its economic impact for Ferrovías and sugar mills.¹⁷⁸

None of the report’s five stated objectives even arguably includes “the viability of the railway as well as competitive transport rates that could be offered to the various mills located within the southern corridor.”

94. Moreover, Mr. Morales’s 2003 report contains none of the conclusions or any of the detailed reasons supporting the alleged conclusions that he describes in his sworn statement and of which Mr. Campollo claims he was aware back in 2004. In fact, the report contains *no conclusions* whatsoever, as the tab of Mr. Morales’s report labeled “Conclusions and Recommendations” was *completely blank* when Mr. Morales delivered it to FVG. Furthermore, both Mr. Senn and Mr. Duggan deny that Mr. Morales ever delivered to them the conclusions he describes in his statement, and they both state that they never requested, sought or received any such “feasibility” study or analysis from Mr. Morales.¹⁷⁹ In fact, the only relevant conclusions that could be discerned from Mr. Morales’s report after reviewing the data set forth therein, was

¹⁷⁶ Third Statement of J. Senn ¶ 44.

¹⁷⁷ Ex. C-84.

¹⁷⁸ Third Statement of J. Senn ¶ 45.

¹⁷⁹ Third Statement of J. Senn ¶ 46; Third Statement of B. Duggan ¶ 14-15.

that the best locations for potential transloading stations for the sugar mills along the right-of-way were at Santa Lucía in the route between Escuintla and Tecún Umán, and at Escuintla in the route from Escuintla to Puerto Quetzal. In sum, Mr. Morales was hired to do a transportation logistics study and was never hired by FVG to do a market or economic study to determine whether the railway would be an attractive alternative transportation method for the sugar industry and he never delivered a study which addressed this question. Both Mr. Morales's and Mr. Campollo's purported recollections in this regard are false.

95. Mr. Campollo also argues that he was never interested in investing in the railway or FVG because it would “have been absurd to insist in operating the railroad just to transport the sugar produced at a sugar mill, of which I am a [25%] shareholder, which only produces 6% of the sugar in Guatemala.”¹⁸⁰ This argument is highly dubious both in terms of its factual accuracy and in explaining Mr. Campollo's alleged motivations (or lack thereof).

96. In terms of the facts, Mr. Campollo's assertion that he is only “a 25% shareholder in a company with a 6% share in Guatemala's sugar production”¹⁸¹ is not credible for a number of reasons. First, Mr. Campollo has not cited or provided a single document to support either of these numbers. Second, Mr. Campollo does not explain whether his alleged 25% interest in his sugar mill – presumably he is referring to the Madre Tierra mill – or his mill's alleged 6% market share reflects the situation that existed back in 2004-06 or the current percentages. Third, Mr. Campollo's alleged 25% shareholder position appears to take into account only those shares that he currently holds *directly in his individual personal capacity*; Mr. Campollo does not identify the persons or entities who hold shares in the remaining 75% of his company or whether, as is almost universally common in Guatemala, any of the other outstanding shares are “bearer” shares that are held in nobody's name. Most likely, other than the Berger Widmann family, the vast majority of other shareholders of Ingenio Madre Tierra are members of Mr. Campollo's family and/or other business entities that Mr. Campollo's family owns or controls. Indeed, available public reports consistently identify Mr. Campollo as the representative of the Madre

¹⁸⁰ Statement of R. Campollo ¶ 18.

¹⁸¹ Statement of R. Campollo ¶ 3.

Tierra mill and the Campollo family as the “owner” of the mill.¹⁸² Thus, in the absence of full disclosure of all of the shareholders of Madre Tierra, Mr. Campollo’s assertion is, at best, meaningless and, at worst, intentionally misleading.

97. Fourth, Mr. Campollo’s claim that he holds only a 6% share of the Guatemalan sugar market appears to be based solely upon the alleged market share of Madre Tierra. But Ingenio Madre Tierra is not the only sugar mill in Guatemala in which Mr. Campollo’s family apparently has an ownership interest. According to publicly available reports, the Campollo family is also one of the owners, along with the Weisseberg family (cousins of Mr. Campollo), of Ingenio El Pilar, which, as of 2006-07, was the fourth largest sugar mill in Guatemala and also located in the South.¹⁸³ Thus, based solely on publicly available information, Mr. Campollo’s alleged share of the Guatemalan sugar market is apparently substantially higher than what he has represented to the Tribunal.

98. Mr. Campollo further attempts to downplay his potential interest in controlling the railway by arguing that it would have been absurd for him to insist on operating the railroad “to just transport the sugar produced at a sugar mill.”¹⁸⁴ But, as Mr Campollo well knows, the proposed South Coast railway would have been widely used to transport sugar from *all fourteen* Guatemalan sugar mills, not just his, thereby giving him a powerful position vis-à-vis his competitors. More importantly, as a planned mixed-traffic railway, it would also have been used to transport oil, coal, sugar cane and other commodities. Furthermore, as Mr. Campollo acknowledges elsewhere in his statement and his subsequent proposals to FVG revealed, Mr.

¹⁸² See Ex. C-85, *El Observador*, “Reconversión productiva y agrocombustibles,” September 2006, at 34 (identifying the Campollo Codina family as the owner of Madre Tierra); Ex. C-83, *ActionAid Guatemala*, “Plantations for Agro Fuels and Loss of Lands for the Production of Food in Guatemala,” August 2008, at 11, Table 3 (identifying the Campollo Codina family as the owner of Madre Tierra); Ex. C-86, *Coverco*, “Diagnóstico de la Industria Del Azúcar, Guatemala,” May 2004, at 4, Table 3 (identifying Mr. Campollo as the representative of Madre Tierra); Ex. C-5, *El Periódico*, “The Owners of Central America,” 17 Apr. 2006.

¹⁸³ See Ex. C-85, *El Observador*, “Reconversión productiva y agrocombustibles,” September 2006, at 34 (identifying the Weisseberg/Campollo families as the owners of El Pilar mill); Ex. C-83, *ActionAid Guatemala*, “Plantations for Agro Fuels and Loss of Lands for the Production of Food in Guatemala,” August 2008, at 11, Table 3 (same); Ex. C-87, *Henry M. Jackson School of International Studies Task Force Report*, “Rethinking Sustainability: Human Rights & Biofuel Policy,” 2010, at 49 (“Ingenio El Pilar is owned by the Weisseberg/Campollo capital group, producing 224,082 metric tons of sugar in the 2006-2007 season, making it the fourth largest of Guatemala’s sugar mills.”).

¹⁸⁴ Statement of R. Campollo ¶ 18.

Campollo's primary interest in the South Coast railway was not how it could be used by his sugar mill, but how it could be built – at no cost to him – to develop and serve his planned Ciudad del Sur mixed use real estate development project and how he could benefit from leasing the South Coast real estate parcels and corridors that had been granted in usufruct to FVG.¹⁸⁵

99. Mr. Campollo further argues that he was never interested in investing in the railway or FVG because FVG never supplied him with any data about the company's performance nor did FVG submit detailed information which would have enabled him to consider whether the project made sense.¹⁸⁶ However, the reason FVG never supplied Mr. Campollo with any such information is because Mr. Campollo never requested such information.¹⁸⁷ And the reason Mr. Campollo never requested such information is because Mr. Campollo made it quite clear at both the December 2004 meeting and through subsequent meetings and communications on his behalf by his representative, Héctor Pinto, that he expected nothing less than to be given a stake in FVG or the railway's assets for *nothing*, in return for solving the "problems" which FEGUA had conveniently and contemporaneously created for FVG with the Government.¹⁸⁸

N. The 2005 Squatter Commission and FVG's Simultaneous Dealings with Ramón Campollo/Héctor Pinto

100. In an attempt to demonstrate that FVG was unable to come up with sufficient third-party investment to rebuild and re-open the South Coast corridor, Respondent's Counter-Memorial includes an extensive discussion of the "Railroad Commission" that was convened in early 2005. Because Respondent's characterization of this Commission's objectives and deliberations is so misleading and inaccurate, a lengthy response is warranted.

¹⁸⁵ Statement of R. Campollo ¶ 12.

¹⁸⁶ Statement of R. Campollo ¶ 20.

¹⁸⁷ Third Statement of J. Senn ¶ 57; Third Statement of B. Duggan ¶ 12.

¹⁸⁸ Mr. Campollo's expectation was not as preposterous as it might at first sound given that, three years earlier, the previous President of Guatemala, Alfonso Portillo, had given Mr. Campollo a major oil and gas concession with no public bid and only the most minimal of commitments in terms of its operation. *See* Ex. C-88, *Business News Americas*, "Ministry Authorizes CPA to Begin Izabal Production," 14 May 2002 (reporting on Government's award of major oil and gas concession without a public bid to Mr. Campollo's company, CPA, in exchange for an annual payment of US\$31,000, a 34.1% royalty and a commitment to invest US\$250,000 annually in operations).

101. On January 4, 2005, FVG representatives met with President Berger to discuss the unresolved squatter problem and other ongoing issues between FVG and FEGUA. President Berger agreed at the meeting to form a Government commission to come up with a workable plan to remove the squatters from the South Coast right-of-way (the “Squatter Commission”).¹⁸⁹ The first Squatter Commission meeting took place one week later on January 11, 2005.¹⁹⁰ Contrary to Respondent’s assertion, the subject of FVG’s alleged failure to comply with its contractual obligations – including any alleged breach for having failed to re-open the South Coast railway – was not a recorded topic of discussion at this or any subsequent Squatter Commission meetings and, indeed, Mr. Senn and other Commission participants deny that any such discussion occurred.¹⁹¹ Rather, the entire purpose and focus of these meetings were for the Government to formulate and adopt a comprehensive plan to evict and relocate the squatters in order to advance the South Coast railway project.¹⁹²

102. The second Squatter Commission meeting occurred on January 20, 2005. Mr. Héctor Pinto attended this meeting on behalf of Ramón Campollo’s planned South Coast real estate development project, Ciudad del Sur, and also on behalf of an unknown entity named “FERROSUR.”¹⁹³ Contrary to Respondent’s assertion and Dr. Gramajo’s “impression,”¹⁹⁴ Jorge Senn did not invite Mr. Pinto to this or any of the other Squatter Commission meetings.¹⁹⁵ Mr. Senn understood that Mr. Pinto had learned of the formation of the Squatter Commission

¹⁸⁹ Ex. C-27(g), 2004 FVG Annual Report at RDC001229; Third Statement of J. Senn ¶ 47.

¹⁹⁰ Ex. R-177, Agenda and Minutes from Squatter Commission Meeting, 11 Jan. 2005.

¹⁹¹ Third Statement of J. Senn ¶ 49; Statement of M. Hernández ¶ 7; Statement of H. Valenzuela ¶ 8. *See also* Exs. R-177, R-178, R-179, R-180, R-181, C-89, 3 Mar. 2005 - Agenda for Squatter Commission Meeting; C-90, 10 Mar. 2005 - Agenda for Squatter Commission Meeting; C-91, 31 Mar. 2005 - Agenda for Squatter Commission Meeting; C-92, 3 Apr. 2005 - Agenda for Squatter Commission Meeting; C-93, 14 Apr. 2005 - Agenda for Squatter Commission Meeting; C-94, 31 May 2005 - Agenda for Squatter Commission Meeting; C-95, 21 June 2005 - Agenda for Squatter Commission Meeting.

¹⁹² Ex. R-177, Agenda and Minutes from Squatter Commission Meeting, 11 Jan. 2005.

¹⁹³ Ex. R-178, Agenda and Minutes from Squatter Commission Meeting, 20 Jan. 2005; Ex. R-179, Agenda and Minutes from Squatter Commission Meeting, 27 Jan. 2005; Ex. R-180, Agenda and Minutes from Squatter Commission Meeting, 3 Feb. 2005,

¹⁹⁴ Counter-Memorial on Merits ¶ 72; Second Statement of A. Gramajo ¶ 11.

¹⁹⁵ Third Statement of J. Senn ¶ 50; Statement of M. Hernández ¶ 9. Furthermore, contrary to Mr. Campollo’s and Dr. Gramajo’s assertions (Statement of R. Campollo ¶ 26; Second Statement of A. Gramajo ¶ 11), Mr. Senn and Mr. Pinto were never “friends.” In fact, Mr. Senn hardly knew Mr. Pinto prior to dealing with him in the context of FVG’s discussions and negotiations with Mr. Campollo.

from someone within the Government and had, with the Government’s blessing and concurrence, invited himself to the meetings.¹⁹⁶ Héctor Valenzuela, the Chief Executive Officer of the Inter-Institutional Coordinating Office for Deprived Settlements (CIAPP), who was appointed by the Government to chair the Squatter Commission, confirms that Mr. Pinto was invited by the Government of Guatemala to participate on the Commission.¹⁹⁷

103. During the Squatter Commission meetings, Mr. Pinto presented himself as speaking for the interests of the entire sugar industry.¹⁹⁸ He discussed how the sugar industry was interested in utilizing a revived South Coast railway and how Mr. Campollo’s planned Ciudad del Sur development would be a potential major user.¹⁹⁹ The plans that were discussed at the meetings focused solely on removing squatters from the portion of the South Coast line which ran from Puerto Quetzal through Escuintla to Santa Lucia Cotzumalguapa, which, not coincidentally, is where Mr. Campollo’s sugar mill and Ciudad del Sur properties are located.²⁰⁰

104. Respondent asserts that, by February 2005, the Squatter Commission had come up with a “detailed plan” to evacuate all of the squatter families that were occupying the right-of-way along the South Coast corridor. The “detailed plan” is purportedly set forth in the Commission’s February 17, 2005 meeting minutes, which state that the Government was going to begin execution of its plan four days later, on February 21, with FEGUA obtaining eviction orders from the court and the identification of a relocation site for the squatter families.²⁰¹ Mr. Senn, however, does not recall anyone from the Government informing him around that time that it was about to implement its squatter removal plan, and other Government representatives on the Commission confirm that the Government was never in a position to implement this plan.²⁰²

¹⁹⁶ Third Statement of J. Senn ¶ 50.

¹⁹⁷ Statement of H. Valenzuela ¶ 5.

¹⁹⁸ Third Statement of J. Senn ¶ 51.

¹⁹⁹ *Id.*; Statement of H. Valenzuela ¶¶ 5-6; Statement of M. Hernández ¶ 9.

²⁰⁰ Statement of H. Valenzuela ¶ 7; Statement of M. Hernández ¶ 7. *See also* Exs. R-178, R-179, R-180.

²⁰¹ Ex. R-181, Agenda and Minutes from Squatter Commission Meeting, 17 Feb. 2005.

²⁰² Third Statement of J. Senn ¶ 52; Statement of H. Valenzuela ¶ 10; Statement of M. Hernández ¶ 13.

105. In fact, the Government squatter removal plans discussed during this time were always all talk and no action, and, consistent with its usual attitude and position and notwithstanding its contractual obligations, the Government was unwilling or unable to move forward with any part of its squatter removal plan unless FVG and other private parties agreed to pay for all or a substantial portion of plan's costs to implement.²⁰³ The Government's attitude is seen in the Squatter Commission's February 17, 2005 meeting minutes, where it states that FEGUA was only willing to contribute Q.150,000.00 (approximately \$20,000) to conduct the necessary census of the estimated 4,000 families occupying the South Coast corridor and was requesting that FVG "cover[] the budgetary difference."²⁰⁴ FEGUA, however, never even came forward with the Q.150,000 it had pledged.²⁰⁵ Furthermore, even if a census had been performed and the necessary eviction orders had been obtained (neither of which the Government did), the Government still needed a large amount of land away from the right-of-way to relocate and house the squatter families.²⁰⁶ But, as of February 17, 2005, the Government had not even identified a proper relocation site for the squatters,²⁰⁷ and it apparently did not have the financial wherewithal to acquire such a site and build the necessary housing, facilities and utility infrastructure, which the Government estimated as potentially costing up to Q.140,000,000 (approximately \$18.4 million).²⁰⁸ Tellingly, Respondent has not produced any documentation showing that the Government was ever actually in a position to execute its squatter removal plan at any point in 2005 or thereafter.

106. It was also never discussed or stated during the course of the Squatter Commission meetings that, as maintained by Respondent, the Government was only willing to proceed with removing squatters if FVG demonstrated that it had secured sufficient investment

²⁰³ Third Statement of J. Senn ¶ 53; Statement of M. Hernández ¶¶ 11-15.

²⁰⁴ Ex. R-181; Statement of H. Valenzuela ¶ 10; Statement of M. Hernández ¶ 15.

²⁰⁵ Third Statement of J. Senn ¶ 53; Statement of H. Valenzuela ¶ 15.

²⁰⁶ Statement of H. Valenzuela ¶ 10. *See also* Ex. R-181.

²⁰⁷ Statement of H. Valenzuela ¶ 10. *See also* Ex. R-181.

²⁰⁸ Statement of H. Valenzuela ¶ 10; Ex. C-96, CIAPP-FEGUA Presentation, "Deprived Human Settlements in the Guatemalan Railway Infrastructure," May 2005, slide 35 (estimating the grand total cost for the Project to Relocate Squatters from the Railway Right-of-Way at Q.140,000,000).

and financing to proceed with immediately rebuilding and reopening the South Coast corridor.²⁰⁹ In a classic chicken vs. egg situation, Mr. Senn made clear at the Commission meetings, just as he and others at FVG had done in earlier meetings and communications with Vice-Minister Diaz and President Berger, that potential investors in the South Coast project were looking for the Government to produce and execute a credible plan for removing and permanently relocating the squatters because they were hesitant to take the risk of investing in the project until the Government had demonstrated a commitment to comply with its fundamental contractual obligations.²¹⁰

107. During FVG’s meeting with Ramón Campollo in December 2004, the parties had discussed entering into a letter of intent to define the potential scope of their cooperation.²¹¹ As a result, on February 17, 2005 – the same day as the Squatter Commission meeting where the Government’s “detailed plan” for removing squatters was purportedly presented – Héctor Pinto sent a proposed preliminary agreement to FVG on behalf of Mr. Campollo.²¹² The proposal was presented as between FVG and an entity named “Desarrollos G,” which FVG understood from Mr. Pinto to be an entity that the Campollo group had formed or intended to form for the purposes of his proposed business relationship with FVG.²¹³ Although Mr. Campollo steadfastly denies any knowledge of Desarrollos G or any proposal sent by Mr. Pinto at that time, official Government records show that Desarrollos G was incorporated on March 3, 2005, with the company’s stated purpose to “[c]arry out railway activities, in general, including but not limited to planning, developing and executing projects related to said activities” and to “purchase, sell, exchange, assign, rent or lease or sublease, or use under any other title all kinds of rights and property, such as personal property, *real estate* or real rights.”²¹⁴ In light of all the facts,

²⁰⁹ Statement of H. Valenzuela ¶ 11; Third Statement of J. Senn ¶ 54.

²¹⁰ *Id.*

²¹¹ Third Statement of J. Senn ¶ 55.

²¹² Third Statement of J. Senn ¶ 52-55. FVG has been unable to locate a copy of the original letter Mr. Pinto sent to FVG on February 17, 2005, but was able to locate an internal email to Bill Duggan from that date which attached a rough English translation of Mr. Pinto’s proposed preliminary letter agreement. *See* Ex. C-97, 17 Feb. 2005 Email to B. Duggan attaching translation of H. Pinto proposed agreement.

²¹³ Third Statement of J. Senn ¶ 55.

²¹⁴ Ex. C-98, Corporate Registration of Desarrollos G (emphasis added).

including Mr. Campollo’s Ciudad del Sur real estate project, Mr. Campollo’s testimony is simply not credible.

108. On March 9, 2005, Mr. Pinto followed up on the preliminary proposal he sent to FVG a few weeks earlier with a more detailed draft contract.²¹⁵ President Berger’s son, Juan Esteban, was copied on the March 9, 2005 email which attached Mr. Pinto’s draft contract.²¹⁶ The key terms of the draft contract presented by Mr. Pinto were as follows:

- (i) Desarrollos G 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 first option 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.*²¹⁷

Notably, nowhere did Mr. Pinto’s draft agreement provide for any amount of investment or financial commitment by Desarrollos G to the rebuilding and reopening of the South Coast railway. The draft contract was, however, accompanied by a verbal commitment from Mr. Pinto to Mr. Senn, that all of FVG’s “problems” with the Government would be “resolved” once FVG signed an agreement with Mr. Campollo.²¹⁸ Thus, the proffered contract was a thinly disguised vehicle for Mr. Campollo to obtain essentially all of FVG’s Usufruct rights *for nothing* with only

²¹⁵ First Statement of J. Senn ¶ 25, Ex. C-41.

²¹⁶ See Ex. C-41.

²¹⁷ *Id.*

²¹⁸ First Statement of J. Senn ¶ 25.

a *sotto voce* promise of having the power to make Respondent perform its contractual obligations.

109. Mr. Campollo insists that he never authorized Mr. Pinto to send this draft contract or any other proposals to FVG, and even goes so far to state that he is “absolutely sure” the aforementioned proposals “are not legitimate, and that they were not sent or received by Mr. Pinto.”²¹⁹ The basis for Mr. Campollo’s certitude is puzzling to say the least, because he offers absolutely no evidence that would even arguably suggest that Mr. Pinto’s March 9, 2005 email and its attached draft contract with “*Commentarios Héctor Pinto*” are somehow elaborate fabrications.²²⁰ Mr. Pinto’s personal secretary of 32 years, Olga de Valdéz, confirms that the email address from which the March 9, 2005 email was sent, maprisol@intelnett.com, was the email address that Mr. Pinto personally used and controlled.²²¹ What is more, Mr. Campollo’s attempt to distance himself from Mr. Pinto’s actions during this time is contrary to the recollection of Juan Esteban Berger, who states that it was his understanding that “Mr. Campollo, *by means of Mr. Héctor Pinto* – now deceased – had a series of meetings with Ferrovías staff, in order to reach an agreement to exploit the right to the railway with a view to support his Ciudad del Sur Project.”²²² The chairman of the Squatter Commission meetings, Héctor Valenzuela, also understood that Mr. Pinto was participating in the meetings on behalf of Mr. Campollo’s Ciudad del Sur project.²²³

110. 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 to discuss the offer Mr. Pinto had just presented to FVG. At this meeting, Mr. Pinto outlined how the Campollo Group viewed the railway as the key to the development of the Ciudad del Sur project and diversifying the South Coast economy.²²⁴ He stressed the several reasons why he and the Campollo Group

²¹⁹ Statement of R. Campollo ¶ 25.

²²⁰ See Ex. C-41.

²²¹ Statement of O. de Valdéz ¶ 4.

²²² Statement of J.E. Berger ¶ 13 (emphasis added).

²²³ Statement of H. Valenzuela ¶ 5.

²²⁴ Third Statement of H. Posner III ¶ 17; Ex. C-99, Contemporaneous notes of H. Posner III of March 15, 2005 meeting with Héctor Pinto.

had the necessary connections and capacity to develop everything contained in FVG's Usufruct: (1) he sat on the Squatter Commission; (2) he sat on the FEGUA reform commission; (3) the Campollo Group had direct contact with President Berger; (4) he had new investors interested in the South Coast; and (5) the Campollo Group had the financial capacity and credibility to pull the project together.²²⁵ Mr. Pinto also stressed that, if FVG chose not to "cooperate with Mr. Campollo's companies on joint ventures" for both potential FVG lines of business on the South Coast, *i.e.*, rail operations and real estate development, in accordance with the "option" Mr. Pinto had just sent, Mr. Campollo would "take" the business with or without FVG.²²⁶ In response, Mr. Pietrandrea told Mr. Pinto, in no uncertain terms, that RDC had no interest in Mr. Campollo's "option" proposal as written, but that FVG was, once again, willing to consider Mr. Campollo buying into FVG as an investor and/or business partner.²²⁷

111. A few weeks later, on April 5, 2005, Mr. Pinto called Mr. Senn. In the conversation, Mr. Pinto was quite heavy-handed in asserting, for the first time, 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 [FVG's] contract," but that, "if we reach an agreement maybe we could work out together these illegalities. . . ."²²⁸ Mr. Senn responded to Mr. Pinto that FVG was still uninterested in giving Mr. Campollo the assets of the company as proposed, but repeated that FVG would be open to an investment by Mr. Campollo.²²⁹ On that same day, Mr. Pinto resent to Mr. Posner his proposed agreement which had been discussed at the March 15 meeting.²³⁰ In Mr. Pinto's cover letter to Mr. Posner, he noted that the Squatter Commission was currently working on a strategy to dislodge the squatters in order to pave the way for establishing the railway connection between Puerto Quetzal and Ciudad del Sur and, therefore, it was very important to know Mr. Posner's

²²⁵ *Id.*

²²⁶ First Statement of H. Posner III ¶ 32; First Statement of B. Duggan ¶ 10; First Statement of J. Senn ¶ 27; Ex. C-99.

²²⁷ *Id.*

²²⁸ First Statement of J. Senn ¶ 28; Ex. C-100, 6 Apr. 2005 email from J. Senn to H. Posner III.

²²⁹ *Id.*

²³⁰ Ex. C-31, 5 Apr. 2005 email from H. Pinto to H Posner III.

opinion of his proposed agreement.²³¹ The proposed agreement was sent by Mr. Pinto in Microsoft Word format, and the meta-data contained in this document reveals that the “last author” of the proposed agreement was “JEB,” *i.e.*, Juan Esteban Berger.²³² This evidence gives further lie to Mr. Berger’s and Mr. Campollo’s testimony that Mr. Berger had no interest or direct involvement in Mr. Campollo’s efforts to obtain a controlling interest in the railway usufruct.

112. 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 retained to advise it with regard to the breach of contract arbitrations which were subsequently 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. The meeting was conducted by Luis Pedro Fuxet, who stated that he was there at the request of Juan Esteban Berger.²³³

113. Respondent has submitted a statement from Mr. Fuxet wherein he sets forth his recollection of the April 12, 2005 meeting and the circumstances that led to his attendance. Mr. Fuxet confirms that Mr. Berger requested that he attend the meeting on Mr. Berger’s behalf, ostensibly to disassociate Mr. Berger from any reported threats that Mr. Pinto had been making to FVG.²³⁴ Mr. Fuxet further confirms that, at the April 12 meeting, an FVG representative – Mr. Duggan – was “very upset” about the threats FVG had received from Mr. Pinto that the Government was going to remove the railway concession from FVG if it did not reach an

²³¹ Ex. C-31, 5 Apr. 2005 email from H. Pinto to H Posner III.

²³² Ex. C-101, Document Risk Report for document “*Acuerdo preliminar Ferro at 050405*”.

²³³ First Statement of B. Duggan ¶ 11; First Statement of J. Senn ¶ 29. Mr. Fuxet also suggests that he attended the April 12 meeting in his capacity as outside counsel to FVG’s minority shareholder, Cementos Progreso. Statement of J.P. Fuxet ¶ 7. However, Mr. Fuxet did not disclose or mention his current representation of Cementos Progreso at the meeting. To the contrary, he made clear that he was there at the request of Juan Esteban Berger. The first time that anyone from Claimant was made aware of Mr. Fuxet’s representation of Cementos Progreso was in October 2006, when Mr. Fuxet became involved on Cementos’ behalf in unsuccessfully trying to mediate negotiations between Claimant and the Government after the *Lesivo* Declaration had been issued. Third Statement of J. Senn ¶ 61.

²³⁴ Statement of L.P. Fuxet ¶ 9.

agreement with Mr. Campollo's group.²³⁵ Mr. Fuxet denies other aspects of the April 12 meeting that have been described by Claimant, including whether Mr. Pinto was actually present at the meeting.²³⁶ However, it is important to note that, in contrast to Mr. Fuxet's recollection regarding this meeting well more than five years after it took place, the recollections of Claimant's participants at the April 12 meeting, Messrs. Duggan and Senn, are actually confirmed by their contemporaneous emails from that time.²³⁷

O. After Mr. Campollo Informs FVG and the Squatter Commission that He was no Longer Interested in Partnering with FVG, Dr. Gramajo Immediately Proceeds to Request Meetings and Legal Opinions on Whether Contracts 143 and 158 are *Lesivo*

114. On April 12, 2005, while the Government was purportedly working to implement its plan to remove squatters from the South Coast corridor and only a week after Héctor Pinto had asserted to FVG for the first time that there were unnamed "illegalities" with its Usufruct Contracts, Arturo Gramajo wrote a letter to the Legal Coordinator of the Ministry of Communications, Gabriella Zachrisson, wherein Dr. Gramajo outlined and provided information to Ms. Zachrisson concerning alleged breaches of Contract 402 by FVG, legal issues concerning FEGUA's admitted breach of its obligation to make payments into the Trust Fund and the lack of approval by Executive Resolution of Contracts 143 and 158.²³⁸ No one from FVG was copied on Dr. Gramajo's letter.

115. Dr. Gramajo's April 12, 2005 letter to Ms. Zachrisson attached seven annexes consisting mostly of background documents and information concerning the FEGUA-FVG relationship.²³⁹ The last annex, Annex No. 7, was a document which set forth two potential courses of action for the Government to take with respect to the alleged legal issues concerning

²³⁵ Statement of L.P. Fuxet ¶ 10.

²³⁶ See Statement of L.P. Fuxet ¶¶ 11-12.

²³⁷ See Ex. C-102, 15 Apr. 2005 email correspondence from J. Senn and B. Duggan (describing April 12, 2005 meeting with H. Pinto, L.P. Fuxet at Ricardo Silva's office); Ex. C-103, 12 Apr. 2005 email and letter from H. Pinto to B. Pietrandrea, H. Posner, B. Duggan (confirming that meeting took place on April 12, 2005). See also Memorial on Merits ¶¶ 52-53.

²³⁸ Ex. R-13, 12 Apr. 2005 FEGUA Official Letter No. 140-2005 from A. Gramajo to G. Zachrisson.

²³⁹ Ex. C-104, Annexes No. 1-7 to 12 Apr. 2005 FEGUA Official Letter No. 140-2005 from A. Gramajo to G. Zachrisson.

FVG’s Usufruct Contracts (“Options Paper”).²⁴⁰ The first option presented by Dr. Gramajo was “Terminate the Relationship with [FVG],” either amicably or non-amicably. For a non-amicable termination, the Options Paper noted that Contracts 143/158 had not been approved by Government Resolution, which could be used to argue that the contracts were null.²⁴¹ The Options Paper further noted that the three-year term from the execution of Contracts 143/158 had not yet elapsed.²⁴² The second option presented by Dr. Gramajo was “Continuance of Railway Operations in Guatemala by [FVG].” This option involved FEGUA renegotiating the terms of Contracts 402 and 820 to relieve FEGUA of its outstanding \$2 million debt to the Railway Trust Fund, its obligation to make further contributions to the Trust Fund and its obligation to remove squatters.²⁴³ The second option also involved “Prepar[ing] a New Contract for the Use of Railway Equipment.”²⁴⁴ In particular, Dr. Gramajo stated that “[t]he issue that has to be subject to negotiation is the drafting of a new Contract on the Railway Equipment and the request of Approval by means of the corresponding Government Resolution.”²⁴⁵ However, other than mentioning that the equipment contract needed to be approved by Government Resolution, Dr. Gramajo did not state what, if any, terms of the existing equipment contract needed to be renegotiated.

116. One day after his meeting with FVG at Ricardo Silva’s office (and presumably aware of Dr. Gramajo’s letter to the Ministry of Communications), on April 13, 2005, Mr. Pinto faxed a letter to the Vice-Minister of Communications, Jose Luis Gandara, informing him that negotiations between the company he represented and FVG had concluded without success and, therefore, he requested that he be excused from further meetings of the Squatter Commission.²⁴⁶ Mr. Pinto did not copy FVG on his April 13 letter, and, on the top of it, he included a very compromising handwritten request addressed to Héctor Valenzuela, the Government official who

²⁴⁰ Ex. C-104, Annex No. 7.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Ex. R-189.

had been chairing the Squatter Commission meetings, which stated “*Please destroy [this letter] along with our previous communications, if any.*”²⁴⁷ Mr. Valenzuela considered Mr. Pinto’s request to be highly unusual and decided to ignore it.²⁴⁸

117. On April 15, 2005, Messrs. Senn and Duggan had a meeting with Mr. Berger in Ricardo Silva’s office where Mr. Berger ostensibly apologized for any purported misunderstandings that Mr. Pinto’s threatening statements had created.²⁴⁹ On that same day, a letter from Mr. 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.²⁵⁰ Mr. Campollo claims that he purposefully signed this letter in Mr. Pinto’s presence and instructed him at that time to completely disassociate himself completely from the Ferrovías project and that, under no circumstances, was he authorized to discuss, or negotiate, with FVG on Mr. Campollo’s behalf.²⁵¹ However, Mr. Campollo’s letter made no attempt to address or disassociate Mr. Campollo from Mr. Pinto’s prior proposals or threats, and neither Mr. Campollo nor Mr. Pinto ever informed anyone from FVG that Mr. Pinto had never been authorized, and was no longer authorized, by Mr. Campollo to have any discussions or negotiations with FVG.²⁵² Moreover, as discussed further below, notwithstanding Mr. Campollo’s purported clear directive to him, Mr. Pinto continued to have regular communications with FVG over the next year and a half wherein Mr. Pinto expressed, obviously on behalf of Mr. Campollo, continued interest in the South Coast railway project in furtherance of Mr. Campollo’s Ciudad del Sur project and sugar interests.

118. According to Dr. Gramajo, the Government decided, immediately upon receiving Mr. Pinto’s April 13 letter, that it would no longer move forward with its plan to remove

²⁴⁷ Ex. R-189 (emphasis added).

²⁴⁸ Statement of H. Valenzuela ¶ 12.

²⁴⁹ First Statement of B. Duggan ¶ 13; First Statement of J. Senn ¶ 31; Ex. C-102, 15 Apr. 2005 email correspondence from J. Senn describing April 15, 2005 meeting with J.E. Berger.

²⁵⁰ First Statement of J. Senn ¶ 31; Ex. C-43.

²⁵¹ Statement of R. Campollo ¶ 30.

²⁵² Third Statement of J. Senn ¶ 62.

squatters from the South Coast corridor because the “sugar industry support [had been] withdrawn, including the company represented by Mr. Pinto” and therefore it was not worth it for the Government to comply with its contractual obligations if “Ferrovías was not going to start rehabilitation work immediately.”²⁵³ But the Government’s contractual obligation to remove squatters on the right-of-way was never conditional upon FVG starting rehabilitation work on any segment of the railway.²⁵⁴ Moreover, like many of the assertions and explanations Dr. Gramajo has made in this case, there does not exist a single contemporaneous document or witness which corroborates Dr. Gramajo’s testimony.

119. In fact, contrary to Dr. Gramajo’s testimony, after receipt of Mr. Pinto’s April 13, 2005 letter, the Squatter Commission continued to meet to discuss implementation of a squatter removal plan.²⁵⁵ In May 2005, the Ministry of Communications, CIAPP and FEGUA gave a joint presentation at a Commission meeting which described and documented in detail the widespread extent of the squatter problem throughout the railway network and set forth yet another timetable for execution of a removal plan.²⁵⁶ The presentation now estimated that there were approximately 2,000 squatter families occupying the Santa Lucía-Puerto Quetzal segment of the South Coast right-of-way which had been targeted for restoration, and that the Government estimated that the total cost to relocate and resettle these squatters would be Q.140,000,000 (approximately \$18.4 million), which was an amount of money that the Government did not have and could not afford.²⁵⁷

120. FVG’s principals steadfastly deny that they were ever informed by the Government that it was not going to move forward with removing squatters because “sugar industry support” had been withdrawn from the South Coast project in the form of Mr. Pinto’s

²⁵³ Second Statement of A. Gramajo ¶ 20. As confirmed by Dr. Gramajo’s testimony, the Government of Guatemala obviously understood that Mr. Pinto was serving on the Squatter Commission as an authorized representative of the sugar industry (and, hence, Mr. Campollo).

²⁵⁴ Statement of H. Valenzuela ¶ 11.

²⁵⁵ See Ex. C-94, Agenda and Attendance Page for May 31, 2005 Squatter Commission meeting; Ex. C-95, Agenda and Attendance Page for June 21, 2005 Squatter Commission meeting; Statement of H. Valenzuela ¶¶ 12-14, 15.

²⁵⁶ Ex. C-96, CIAPP-FEGUA Presentation, “Deprived Human Settlements in the Guatemalan Railway Infrastructure,” May 2005; Statement of H. Valenzuela ¶ 14.

²⁵⁷ Ex. C-96, slides 28-29, 35; Statement of H. Valenzuela ¶ 14.

letter and there is no document anywhere, authored by anyone, to support Respondent's position.²⁵⁸ Héctor Valenzuela confirms the recollection of FVG's principals.²⁵⁹ Furthermore, no one from FVG ever told the Government that it no longer had plans to move forward with restoring the South Coast line because of Mr. Campollo's decision.²⁶⁰ Mr. Valenzuela and Mr. Senn both confirm that the Government's squatter removal plan never went anywhere because the Government either did not have, or had no intention of expending, the necessary funds to implement its \$18.4 million plan, including paying for the census and purchasing and developing the necessary land on which to resettle the relocated squatters.²⁶¹ Thus, to the extent Mr. Pinto's letter had anything to do with the Government's decision to abandon its squatter removal plan, it was because the Government had been counting on Mr. Campollo and the other sugar mill owners to pick up the Government's tab for implementing the plan.²⁶² When that potential source of funding was ostensibly withdrawn, the Government quietly abandoned its squatter removal plans.²⁶³ More likely, when FVG rejected Mr. Campollo's attempt to extort FVG's Usufruct rights from FVG, Mr. Campollo simply withdrew his support for the South Coast project and thereafter, as confirmed later, simply urged the Government to take FVG's rights and hand them over to him.

121. According to Respondent's witnesses, shortly after Mr. Campollo informed FVG and the Government that he was no longer interested in partnering with FVG on the South Coast project and in response to Dr. Gramajo's April 12 letter to the Ministry of Communications, representatives of FEGUA and the Legal Department of the Ministry of Communications began meeting to discuss the legal issues concerning FVG's Usufruct Contracts that Dr. Gramajo had raised in his letter.²⁶⁴ It does not require much imagination to infer that, at the very least, Mr.

²⁵⁸ Third Statement of J. Senn ¶ 63.

²⁵⁹ Statement of H. Valenzuela ¶¶ 11, 14.

²⁶⁰ Third Statement of J. Senn ¶ 63.

²⁶¹ Third Statement of J. Senn ¶¶ 53, 63; Statement of H. Valenzuela ¶ 14. *See also* Statement of M. Hernández ¶ 15.

²⁶² Statement of H. Valenzuela ¶ 14.

²⁶³ *Id.* ¶ 15.

²⁶⁴ First Statement of A. Gramajo ¶ 17; Statement of A. Zosel ¶ 8.

Campollo knew he stood to gain from Dr Gramajo’s actions and, more likely, encouraged and supported them.

P. FVG Initiates Local Breach of Contract Arbitrations Against FEGUA While Respondent Secretly Obtains Legal Opinions Regarding Contracts 143/158

122. On May 16, 2005, after extensive efforts to convince FEGUA to meet its undisputed contractual obligations, FVG formally notified FEGUA that it intended to bring local arbitration claims against FEGUA for breach of its obligation under Contract 820 to contribute its lease and usufruct income into the Railway Rehabilitation Trust Fund.²⁶⁵ On June 13, 2005, FVG initiated its local arbitration action against FEGUA for FEGUA’s failure to pay monies owed to the Trust Fund.²⁶⁶ Approximately one month later, on July 25, 2005, FVG filed a second local arbitration action against FEGUA for its failure to remove squatters from the railroad right-of-way pursuant to its obligations under Contract 402.²⁶⁷

123. Sometime in May 2005, the Ministry of Communications requested that the outside law firm of Palacios & Asociados review FVG’s contracts and render a legal opinion on Contracts 143 and 158.²⁶⁸ In June 2005, Palacios & Asociados delivered its legal opinion to the Government.²⁶⁹ The opinion concluded that Contracts 143 and 158 lacked legal validity because they should have been the subject to a new public bidding process before being awarded to FVG and they had not been approved by the President of the Republic.²⁷⁰ The opinion, however, did not conclude that the contracts were *lesivo* for these reasons.²⁷¹ The Government did not disclose or otherwise share the Palacios opinion with FVG.

²⁶⁵ Ex. R-89.

²⁶⁶ Ex. R-44; First Statement of J. Senn ¶ 18; First Statement of H. Posner III ¶ 36.

²⁶⁷ Ex. R-43; First Statement of J. Senn ¶ 18; First Statement of H. Posner III ¶ 36.

²⁶⁸ Statement of J. Berdúo ¶ 8; Statement of A. Zosel ¶ 9; First Statement of A. Gramajo ¶ 18.

²⁶⁹ Statement of J. Berdúo ¶ 12.

²⁷⁰ Ex. C-105, Palacios & Asociados, “Analysis of Contract 143.”

²⁷¹ The only reference to *lesivo* in the Palacios opinion is in reference to the firm’s analysis of FVG’s alleged failure to comply with the terms of Contract 143. In particular, the opinion (falsely) states “it can be inferred that CODEFE failed to comply with most of its obligations; if the contract were not declared *lesivo*, it could otherwise be terminated or resolved.” *Id.*

124. Rather than attempting to cure or fix the alleged legal infirmities that had been identified in Contracts 143/158, on June 22, 2005 – approximately one week after FVG initiated its first local arbitration – Dr. Gramajo requested a legal opinion from Attorney General of Guatemala regarding the legality of Contracts 143/158, arguing that “they fail[ed] to comply with the terms of the bidding conditions.”²⁷² Respondent did not disclose or otherwise inform FVG of this request. Dr. Gramajo insists that it was his solemn legal obligation as a public official to make this request to the Attorney General, and that he would have been subject to some non-specific “personal liability” if he had failed to do so.²⁷³ However, Respondent has not identified – and cannot identify – any Guatemalan law or legal authority which supports Dr. Gramajo’s “personal liability” assertion.²⁷⁴

125. In response to Dr. Gramajo’s June 22, 2005 request, the Attorney General’s Office replied to Dr. Gramajo requesting further information on the status of Contract 143 that was necessary for it to render the requested legal opinion.²⁷⁵ Among the questions asked of Dr. Gramajo by the Attorney General’s Office were: (1) whether Contract 143 was “currently effective or not”; (2) what was the total amount of fees paid by FVG to the State under the terms of Contract 143; and (3) whether FVG had complied with making the fee payments or not and whether those payments were timely.²⁷⁶ On July 18, 2005, Dr. Gramajo responded to the Attorney General’s information requests with an attached opinion from FEGUA’s Legal Department dated July 15, 2005.²⁷⁷ The FEGUA opinion acknowledged that Contract 143 “was *currently in effect*” and that FVG was currently using the FEGUA railway equipment under the terms of this contract.²⁷⁸ The opinion also stated that FVG had paid FEGUA to date Q.596,817.87 in canon fees for use of the FEGUA equipment, which included the fees FVG had

²⁷² Ex. C-106, 22 June 2005 letter from A Gramajo to Attorney General of the Republic, Consultancy Division.

²⁷³ First Statement of A. Gramajo ¶ 22.

²⁷⁴ See fn. 722, *infra*. (rebutting the assertion of Respondent’s Guatemalan law expert, Luis Aguilar, that the President incurs personal liability if he fails to declare a contract *lesivo* once he has been so advised).

²⁷⁵ Ex. C-107, 28 June 2005 letter from Attorney General’s Office, Consultancy Division, to A Gramajo.

²⁷⁶ *Id.*

²⁷⁷ Ex. C-108, 18 July 2005 letter from Dr. Gramajo to Attorney General’s Office, Consultancy Division, attaching 15 July 2005 opinion from FEGUA Legal Department.

²⁷⁸ *Id.* (emphasis added).

paid pursuant to the terms of Contract 41. FEGUA further acknowledged in its opinion that FVG was up to date in the payment of canon fees for use of the equipment.²⁷⁹ The opinion nevertheless concluded by urging the Attorney General’s Office to render an opinion on whether it was necessary for Contract 143 to be approved by *Acuerdo Gubernativo* pursuant to the original bidding conditions of what resulted in Contract 41.²⁸⁰

126. On August 1, 2005, the Attorney General’s office issued its opinion (Opinion No. 205-2005) in response to FEGUA’s request.²⁸¹ Respondent did not disclose or otherwise share this opinion with FVG prior to issuing the *Lesivo* Resolution. The Attorney General’s opinion concluded that Contracts 143/158 were *lesivo* to State interests and that they should be set aside through four possible means: “through formal acknowledgement of its condition as *lesivo* to State interests, *early termination, annulment or mutual agreement*, taking all measures necessary to avoid incurring in acts that may cause greater damage to the assets under usufruct.”²⁸² Thus, the Attorney General acknowledged that the purported legal infirmities of Contracts 143/158 could be resolved through means other than a declaration of *lesividad*, an official concession which is directly contrary to Respondent’s current argument that the only way they could be resolved was through a *lesivo* declaration.²⁸³

127. On January 13, 2006, FEGUA issued a legal opinion in which it agreed with the Attorney General’s August 1, 2005 opinion and argued that additional provisions of Contract 143 were “unfavorable to the interests of the State of Guatemala.”²⁸⁴ In an accompanying cover letter, Dr. Gramajo officially requested that the President of Guatemala declare *lesion*.²⁸⁵

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Ex. C-7, PGN (AG) Opinion No. 205-2005, 1 Aug. 2005.

²⁸² *Id.* (emphasis added).

²⁸³ *See* Counter-Memorial on Merits ¶ 29; Expert Opinion of J.L. Aguilar ¶ 72.

²⁸⁴ Ex. C-6, FEGUA Opinion No. 05-2006.

²⁸⁵ Ex. C-8, FEGUA Official Letter No. 031-2006, 13 Jan. 2006.

Q. President Berger Calls for a High-Level Railroad Commission in March 2006 to Resolve Outstanding Issues Between FVG and FEGUA

128. On March 7, 2006, Henry Posner III and Bill Duggan met with President Berger in his office, along with Dr. Gramajo from FEGUA and Federico Melville and Mario Montano of Cementos Progreso, a minority shareholder in FVG. Contrary to Respondent’s assertion, this meeting with President Berger was not requested by FVG one day before, on March 6,²⁸⁶ but was set up by Mr. Melville several weeks before at his suggestion.²⁸⁷ In his two statements, Dr. Gramajo offers a self-serving recollection of this meeting that differs in some key respects from the recollections of Claimant’s witnesses.²⁸⁸ However, it is important to note that, unlike Dr. Gramajo, Mr. Posner took detailed contemporaneous notes at the meeting.²⁸⁹

129. As confirmed by Mr. Posner’s notes, at the March 7, 2006 meeting with President Berger, Dr. Gramajo spent a considerable amount of time talking about FVG’s alleged failure to invest in the railway and the substantial interest of “other private sector parties” in the development of the South Coast route and the Ciudad del Sur project. On this point, Mr. Melville commented that Ciudad del Sur project was Ramón Campollo, which Dr. Gramajo confirmed.²⁹⁰ Mr. Posner gave a PowerPoint presentation concerning the railroad, describing the work and progress that had been made to date and the current issues and problems that existed.²⁹¹ Regarding restoration of rail service on the South Coast, Mr. Posner noted that there had been “[o]ccasional interest by sugar and power industries” in investing in this project, “but no commitments.”²⁹² He also stated that the World Bank had expressed interested in financing restoration of the South Coast, but that the presence of squatters along the right-of-way was making obtaining such financing more difficult.²⁹³ Towards the end of the meeting, President

²⁸⁶ See Counter-Memorial on Merits ¶¶ 95.

²⁸⁷ First Statement of H. Posner III ¶¶ 37-38.

²⁸⁸ First Statement of A. Gramajo ¶¶ 32-35; Second Statement of A. Gramajo ¶¶ 22-27.

²⁸⁹ See Ex. C-57.

²⁹⁰ Second Statement of H. Posner III ¶ 32; Ex. C-57. Mr. Melville, however, states that he recalls only referring generally to the “Guatemalan Sugar AgroIndustry.” Statement of F. Melville, cl. 2.

²⁹¹ Ex. C-33.

²⁹² Ex. C-33.

²⁹³ Ex. C-33.

Berger pointedly told Dr. Gramajo that “you [FEGUA] should disappear” and indicated his desire to see a commission formed to address both the squatter issue and “to get the railroad working.”²⁹⁴ More concretely, President Berger instructed that a new High-Level Railroad Commission be established to work with FVG to resolve the outstanding contract disputes with FEGUA. At no time during the meeting with President Berger did anyone even mention the usufruct equipment contracts or suggest that any of the usufruct contracts were illegal or *lesivo* or harmful to the interests of the State.²⁹⁵

130. Contrary to Mr. Campollo’s testimony, the continued interest of Mr. Campollo in the South Coast railway and the Ciudad del Sur project had been confirmed to FVG just a week prior to its March 7, 2006 meeting with President Berger, when Héctor Pinto reemerged by sending Mr. Senn a letter (copying Mr. Posner) by email on Ciudad del Sur letterhead expressing interest in having a meeting with FVG to discuss using the railway to connect Mr. Campollo’s planned Ciudad del Sur industrial park development in Santa Lucia with Puerto Quetzal.²⁹⁶ On March 7, 2006, Mr. Senn responded to Mr. Pinto’s inquiry by indicating a willingness to meet with him and setting forth the key parameters and conditions for their discussions, including the potential cost for providing freight service from Mr. Campollo’s mill and properties in Santa Lucia to Puerto Quetzal.²⁹⁷ On March 8, 2006 – one day after Claimant’s meeting with President Berger – Mr. Pinto responded to Mr. Senn’s March 7 letter, copying Mr. Posner and Freddie Pérez of Expogranel. In this letter, Mr. Pinto confirmed his request on behalf of Ciudad del Sur for railway service and connection with Puerto Quetzal, and stated that Ciudad del Sur wanted to be the party, rather than FVG, which would manage the railport and coordinate and render transportation contracts with other potential customers and users of the South Coast railway (*i.e.*, other sugar mills).²⁹⁸ In closing, Mr. Pinto wrote “I believe that we are still in time to rescue the

²⁹⁴ Second Statement of H. Posner III ¶ 10.

²⁹⁵ *Id.* ¶ 11.

²⁹⁶ Ex. C-109, 28 Feb. 2006 email from H. Pinto to J. Senn. Thus, contrary to the assertions of Mr. Campollo, Mr. Pinto was still very much holding himself out to Claimant as an authorized representative of Mr. Campollo and his Ciudad del Sur project almost a year after Mr. Campollo purportedly instructed Mr. Pinto disassociate himself from any further discussions with FVG on Mr. Campollo’s behalf. See Statement of R. Campollo ¶ 30.

²⁹⁷ Ex. C-110, 7 Mar. 2006 email from J. Senn to H. Pinto.

²⁹⁸ Ex. C-111, 8 Mar. 2006 email and letter from H. Pinto to J. Senn.

Railway Project Puerto – Ciudad del Sur.”²⁹⁹ Mr. Campollo’s insistence that Mr. Pinto was not authorized by Mr. Campollo to make these contacts and proposals to FVG is simply not sustainable.

R. None of the High-Level Commission Meetings Concerned or Addressed Any Alleged “Legal Defects” in Contracts 143/158 or the Government’s Secret Plan to Declare Such Contracts *Lesivo*

131. After the High-Level Commission was formed, meetings began on April 3, 2006. Respondent’s witnesses assert that among the main purposes and “negotiation points” of the meetings was “the resolution of several legal and technical defects related to the equipment usufruct contract”³⁰⁰ However, the equipment usufruct contract was never a point of negotiation or discussion during any of the High-Level Commission meetings,³⁰¹ as the minutes of the meetings confirm. The minutes of the April 3, 2006 meeting, which were prepared by the Government, make clear that the intent and purpose of the meetings was to “1) learn the status of the FEGUA-FERROVIAS contract [which we understood to be referring to Contracts 402 and 820 and the breach of contract arbitrations relating to the same] and 2) find out how to have an efficient operation of the railroad according to the country’s needs.”³⁰² These minutes further describe a three-step plan of action advanced by Deputy Commissioner Mario Marroquín at the meeting which contemplated (1) withdrawing the arbitrations, (2) resolving the payments into the Trust Fund, and (3) implementation and operation of the five phases of railroad rehabilitation, the latter being directed to the South Coast line which had been discussed at the March 7 meeting with President Berger.³⁰³ There was no mention whatsoever of the equipment usufruct contracts during the meeting.³⁰⁴ Similarly, as the Government’s minutes of the May 5

299

Id.

300

Statement of S. Pineda ¶ 12.

301

Statement of J.P. Carrasco ¶ 4.

302

Ex. R-23.

303

Ex. R-23.

304

Statement of J.P. Carrasco ¶ 5.

and May 10 meetings reflect, there also was no mention or discussion of the usufruct equipment contracts at these meetings either.³⁰⁵

132. At the same time the Government was engaging in discussions with FVG at the High-Level Commission meetings in a purported good faith attempt to resolve the issues between the parties, behind the scenes the Government continued working to undermine FVG's position. On April 3, 2006 – the day of the first High-Level Commission meeting – three departments of the Ministry of Finance issued a joint opinion concluding that there were sufficient grounds for the State to declare Contracts 143/158 *lesivo* because the contracts had not been awarded pursuant to a new public bidding process and had not been approved by the President.³⁰⁶ Notably, just as the Attorney General acknowledged in its August 1, 2005 opinion,³⁰⁷ the Ministry of Finance opined that the contracts could be set aside through legal means *other than* a *lesivo* declaration, such as rescission, annulment or mutual agreement of the parties.³⁰⁸

133. On April 26, 2006, the Consultative Board of the General Secretariat of the Presidency of the Republic issued an opinion which concluded and recommended that the President declare that Contracts 143/158 caused *lesion* to the interests of the State because of various technical “irregularities” with the contract under the Government Contracting Law.³⁰⁹ Like the Ministry of Finance's joint opinion, the principal “irregularities” identified by the General Secretariat were that the contracts had not been approved by Executive Resolution and that the contracts should have been awarded pursuant to a new public bidding process.³¹⁰ Notably, neither the Ministry of Finance nor the General Secretariat found that Contracts

³⁰⁵ *Id.* ¶ 6. See also Ex. R-26 (Second Meeting Minutes); Ex. R-28 (Third Meeting Minutes).

³⁰⁶ Ex. R-24, Ministry of Finance Legal Department, Joint Opinion No. 181-2006-AJ.

³⁰⁷ Ex. C-7, PGN (AG) Opinion No. 205-2005, 1 Aug. 2005.

³⁰⁸ Ex. R-24, Ministry of Finance Legal Department, Joint Opinion No. 181-2006-AJ.

³⁰⁹ Ex. R-25, General Secretariat Opinion No. 236-2006, 26 Apr. 2006.

³¹⁰ *Id.* Like all of the other legal opinions obtained by Respondent during the course of the *lesivo* process, Respondent insists that the General Secretariat's opinion was independent and objective, and based on “purely technical and legal criteria.” Statement of C. Ozaeta ¶ 19. However, the author of this opinion, Celena Ozaeta, has acknowledged that, in preparing the opinion, she did not operate on a “blank slate,” but, rather, reviewed and necessarily relied upon the several prior legal opinions Respondent had obtained regarding Contracts 143/158. Jurisdiction Hearing Tr. 361(20)-363(19) (Ozaeta); Ex. R-25.

143/158 were *lesivo* because they did not provide adequate protection of railway equipment that had been declared historical and cultural patrimony of the State.³¹¹ Like all of its other previously obtained legal opinions on Contracts 143/158, Respondent did not disclose or otherwise share these two opinions with FVG.

134. The General Secretariat’s opinion also attached a draft Government Resolution of *lesion* for “the *consideration* and signature” of the President.³¹² By using the word “consideration,” the President’s legal advisors were appropriately acknowledging that it was *the President’s decision alone* to sign the declaration of *lesividad* and that, contrary to Respondent’s unsupported position, the President necessarily had the discretion to accept or reject their recommendation.

135. The subject of *lesivo* was never raised between Claimant and Respondent until the May 11, 2006 meeting of the High-Level Railroad Commission. By way of background, while Messrs. Senn and Duggan were driving to this meeting, Mr. Senn unexpectedly received a call on his cell phone from Mr. Mario Fuentes, the Presidential Sub-Commissioner for Megaprojects. Mr. Fuentes called to warn Mr. Senn about “a document” which was being circulated among the Ministers for signature, which document Mr. Fuentes described as intended “to cancel [FVG’s] contract.”³¹³ Mr. Fuentes did not tell Mr. Senn the basis of this document, nor the contract the Government was planning to cancel.³¹⁴ After the call, Mr. Senn told Mr. Duggan what Mr. Fuentes had said. Mr. Senn did not use the word “*lesivo*” or “*lesividad*” or anything like those words to describe the document to Mr. Duggan.³¹⁵

136. Once in the meeting, the Government representatives stated that, having conferred after the lawyers’ meeting the previous day, they were not willing to withdraw FEGUA’s legal

³¹¹ Jurisdiction Hearing Tr. 363(20)-364(19) (Ozaeta).

³¹² Ex. R-25, General Secretariat Opinion No. 236-2006, 26 Apr. 2006 (emphasis added).

³¹³ Second Statement of J. Senn ¶ 22; First Statement of M. Fuentes ¶ 7.

³¹⁴ Second Statement of J. Senn ¶ 22; First Statement of M. Fuentes ¶ 8.

³¹⁵ Second Statement of B. Duggan ¶ 6; Second Statement of J. Senn ¶ 23. Mr. Senn emphasizes that, although he used the word *lesivo*, he only understood the common, everyday translation of the phrase (that the Government was going to move against someone’s contract), and did not have any knowledge about the *lesivo* process or the legal aspects of it. Second Statement of J. Senn ¶¶ 24-25.

actions which sought to annul the arbitration clause in Contracts 402 and 820 and, thereby, defeat FVG’s arbitration claims regarding removal of squatters and Trust Fund payments.³¹⁶ The Government representatives stated that FVG just needed to trust them to do the right thing.³¹⁷

137. In response, Mr. Duggan questioned (in English) how he could trust them, having just heard a rumor earlier that day that some sort of document was being circulated around the Ministers’ offices to support the President in taking away FVG’s railway concession. At no point did Mr. Duggan use the word “*lesivo*” or express any knowledge of the details behind the rumor he had just heard through Mr. Senn.³¹⁸ Indeed, Mr. Duggan did not, at that time, even know what *lesivo* or *lesividad* meant.³¹⁹

138. Both Ms. Pineda and Mr. Marroquín appeared surprised by Mr. Duggan’s statements and quickly excused themselves from the meeting.³²⁰ Both of them acknowledge that, at that moment, they were totally unaware of any ongoing *lesivo* process within the Government and, therefore, had to speak to the Competitiveness Commissioner, Miguel Fernandez, about it.³²¹

139. Upon their return, Ms. Pineda and Mr. Marroquín stated that the persons with whom they needed to talk to were not available. They said they would further investigate the issue Mr. Duggan had raised, but that, in the meantime, as a show of good faith, they would do what they could to stop whatever it was, and that they would get back to the FVG representatives at the next Commission meeting, which was scheduled for later in the month.³²² Mr. Marroquín assured Mr. Duggan that, “if what [Mr. Duggan] had heard is true and that the people from FEGUA and the Government were not negotiating through the Commission in ‘good faith,’ then I [Mr. Marroquín] no longer want to be part of it [the Commission].” Neither Mr. Marroquín nor

³¹⁶ Second Statement of B. Duggan ¶ 7; Statement of J.P. Carrasco ¶ 9.

³¹⁷ Second Statement of B. Duggan ¶ 7. *See also* Statement of J.P. Carrasco ¶ 9.

³¹⁸ Second Statement of B. Duggan ¶ 8; Second Statement of J. Senn ¶ 24; Statement of J.P. Carrasco ¶ 10.

³¹⁹ Second Statement of B. Duggan ¶ 8.

³²⁰ Second Statement of J. Senn ¶ 24; Second Statement of B. Duggan ¶ 9; Statement of J.P. Carrasco ¶ 11.

³²¹ Statement of S. Pineda ¶ 23; Statement of M. Marroquín ¶ 12.

³²² Second Duggan Statement ¶ 9; Second Senn Statement ¶ 26; Statement of J. P. Carrasco ¶ 11.

Ms. Pineda said anything to FVG about “*lesivo*” or that the process to finalize the declaration of *lesividad* was in process. As a result, the FVG representatives left the May 11 meeting under the (mistaken) impression that the rumor which they just had heard was false.³²³ This impression was later reinforced when neither Mr. Marroquín nor Ms. Pineda ever reverted to FVG after the May 11, 2006 High-Level Commission meeting to confirm, deny, explain or expand upon the *lesivo* rumor which FVG had raised.

140. The minutes of the May 11, 2006 meeting prepared by Ms. Pineda confirm the vagueness of what was said there. The Minutes merely note that one of the three issues that are yet to be resolved in order to hold further negotiations was “*Lesividad* of the contract” and that Commissioner Fernandez – who was not present at the May 11 meeting – had offered to “stop the *lesividad* procedure as a token of good intention from the government.” The minutes contain no recorded discussion – even by the Government – of the usufruct equipment contracts or any illegality of FVG’s contracts which might support a declaration that such contracts were “harmful to the interests of the State.” The minutes also do not refer to any pre-conditions for FVG to continue negotiations with the Government. In addition, the stated intent of Mr. Fernandez was “to stop” any [*lesivo*] action “with the intention of showing the State’s good faith.”³²⁴

141. In sum, all of FVG witnesses who were present at any of the meetings of the High-Level Commission expressly deny that anyone ever, in words or substance, said that Contracts 143 and 158 were considered invalid, *lesivo* or harmful to the interests of the State, nor that there was any substantive discussion between the parties regarding resolving any particular deficiencies or illegalities in those Contracts.³²⁵ Indeed, the focus of all these four meetings was the Government’s desire to be rid of the breach of contract arbitrations FVG had filed against FEGUA concerning Contracts 402 and 820, the Government’s desire to have FVG complete

³²³ Second Senn Statement ¶ 27; Second Duggan Statement ¶ 9; Statement of J.P. Carrasco ¶ 11.

³²⁴ Second Statement of J. Senn ¶ 28.

³²⁵ Second Statement of J. Senn ¶¶ 27-28; Statement of J.P. Carrasco ¶ 4; Second Statement of B. Duggan ¶ 4.

further phases of the railroad rehabilitation under Contract 402, and the Government's desire to amend the terms of that contract.³²⁶

S. The Government Avoids Engaging in Negotiations With FVG After the May 11, 2006 High-Level Commission Meeting While Continuing to Proceed With the Declaration of *Lesividad*

142. After the May 11, 2006 meeting, FVG continued to insist that the High-Level Commission meetings continue so the parties could continue their discussions.³²⁷ On May 24, 2006, Ms. Pineda sent an email informing FVG that the Government was unilaterally canceling the Commission meeting that had been scheduled for that day “[d]ue to the fact that [the Government] [is] still carrying out internal consultations” and that it would be rescheduled for the following week.³²⁸ The rescheduled meeting did not occur and throughout the remainder of May and June 2006, FVG's legal counsel, Juan Pablo Carrasco, and Mr. Senn contacted the various members of the Commission in an attempt to reconvene meetings.³²⁹ At no point during this time did any Commission member indicate to either of them that the Government was considering declaring any part of FVG's contracts or Usufruct *lesivo*.³³⁰

143. Having heard nothing from the Government in over a month, on July 6, 2006, Mr. Carrasco emailed the Commission members to insist that the meetings and negotiations resume.³³¹ It was not until August 16, 2006 – five days *after* President Berger had signed the *Lesivo* Resolution – that Ms. Pineda responded to Mr. Carrasco's email, apologizing for her tardy response and stating that the Government was working on a “proposal for negotiations” that they wanted to disclose to FVG.³³² Ms. Pineda, however, made no mention of a declaration of *lesivo* in her email or that President Berger had signed the *Lesivo* Resolution five days earlier.

³²⁶ Second Statement of J. Senn ¶ 27.

³²⁷ Statement of J.P. Carrasco ¶ 12.

³²⁸ Ex. C-54.

³²⁹ Statement of J.P. Carrasco ¶ 13. Unbeknownst to Claimant at the time, during the months of May-July 2006, the Government was internally debating the pros and cons of continuing to negotiate with FVG, and that PRONACOM had been tasked by the Minister of Communications to develop a negotiating proposal.

³³⁰ *Id.*

³³¹ Statement of J.P. Carrasco ¶ 13; Ex. C-55.

³³² *Id.*

As it turned out, the proposal Ms. Pineda was referring to in her August 16 email was the Government's "take it or leave it" settlement offer³³³ that it presented to FVG on August 24, 2006, the day before the *Lesivo* Resolution was published.³³⁴

144. According to internal emails produced by Respondent, the Government's "proposal for negotiations" was initially developed from an earlier "list of negotiation points" that had been prepared by Gabriela Zachrisson of the Legal Department of the Ministry of Communications.³³⁵ Regarding the issues subject to negotiation regarding Contract 402, this list of negotiation points included requiring FVG to "surrender certain railway sections in which other investors may be interested."³³⁶ Regarding the usufruct equipment contracts, the Government's negotiation points vaguely stated that the "contract must be modified to amend the causes whereby it becomes *lesivo* for the State."³³⁷ It further stated in connection with the equipment contracts that "[n]egotiations have been held between FEGUA and Ferrovías; however, *these were suspended after FEGUA did not consent to the arbitration clause claimed by Ferrovías.*"³³⁸ Thus, the Government's own internal negotiation strategy document admits that it was the Government, not FVG, which prevented a negotiated resolution of any still unidentified legal issues surrounding the usufruct equipment contracts.

145. During the same time the Government was ignoring FVG's calls to resume meetings and negotiations, Héctor Pinto sent an email to Mr. Posner III on July 26, 2006, wherein he requested an opportunity to speak with FVG regarding restoring railroad service from Puerto Quetzal to Ciudad del Sur in Santa Lucia.³³⁹ On that same day, Mr. Pinto called Jorge Senn to demand a meeting and threatened that "the rules would change by the end of the

³³³ Ex. C-44.

³³⁴ Statement of J.P. Carrasco ¶ 13.

³³⁵ See Ex. R-100, 26 July 2006 email from M. Marroquín to R. Aitkenhead, M. Fernandez; Ex. R-103, 4 Aug. 2006 email from S. Pineda to G. Zachrisson *et al.*

³³⁶ Ex. C-112, Government's list of "Negotiation Points with Ferrovías" prepared by G. Zachrisson. And, of course, the only other "interested investor" who had ever been identified by the Government was Ramón Campollo.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Ex. C-113, 26 July 2006 email from H. Pinto to H. Posner III.

month.”³⁴⁰ A 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.³⁴¹ At the meeting, Mr. Pinto once again described Mr. Campollo’s interest in rail service to transport his sugar products from his mill at Santa Lucia to Puerto Quetzal. Mr. Pinto also reiterated that Mr. Campollo wanted to build a large container yard at Santa Lucia (the Ciudad del Sur project) and wanted rail service for it. Mr. Duggan ended the meeting by telling Mr. Pinto that FVG would continue to study the possibility of rehabilitating this portion of the 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.”³⁴²

146. Two days later, on July 28, 2006, Mario Montano of Cementos Progreso told Mr. Duggan that “there was a push on within the Government by Ramón Campollo’s group of henchmen” to cancel FVG’s Usufruct and award it to Mr. Campollo.³⁴³ 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.³⁴⁴ Mr. Melville did not comment as to whether the planned *lesivo* declaration was specifically directed towards Contracts 143 and 158. Mr. Carrasco had a separate conversation with Mario Montano on the same day which confirmed Mr. Melville’s report on the President’s action.³⁴⁵

³⁴⁰ First Statement of J. Senn ¶ 35; First Statement of B. Duggan ¶ 20.

³⁴¹ First Statement of J. Senn ¶ 35; First Statement of B. Duggan ¶ 20.

³⁴² First Statement of J. Senn ¶ 35; First Statement of B. Duggan ¶ 20.

³⁴³ First Statement of B. Duggan ¶ 21; Ex. C-114, 28 July 2006 email from B. Duggan to J. Senn *et al.* Mr. Montano states that he cannot confirm or deny that he made this statement to Mr. Duggan. Statement of M. Montano, cl. 3.

³⁴⁴ First Statement of H. Posner III ¶ 41; Ex. C-59. Mr. Melville confirms that he spoke with Mr. Posner on this occasion and informed him about President Berger’s intent. However, he cannot confirm or deny that he also commented during this conversation that the President’s action appeared to be the doing of Mr. Campollo. Statement of F. Melville, cl. 3.

³⁴⁵ Statement of J.P. Carrasco ¶ 14; Statement of M. Montano, cl. 4; First Statement of H. Posner III ¶ 41; Ex. C-115, 11 Aug. 2006 email from J.P. Carrasco to H. Posner III, *et al.*

Mr. Carrasco confirms that it was not until this time that he learned that the *Lesivo* Declaration was anything other than a rumor.³⁴⁶ Messrs. Senn and Duggan concur.³⁴⁷

147. The reports of Messrs. Melville and Montano regarding the declaration of *lesividad* proved to be accurate. On August 11, 2006, President Berger, in joint counsel with certain of his cabinet ministers, signed Government Resolution No. 433-2006, which declared Contracts 143/158 to cause “*lesion*,” *i.e.*, the agreements were “INJURIOUS to the interests of the State of Guatemala.”³⁴⁸

T. Respondent Uses the Statutory Deadline for Issuing the *Lesivo* Declaration Against Contracts 143/158 in an Attempt to Force FVG to Surrender its Rights Under the Other Usufruct Contracts

148. On August 24, 2006, a “settlement” meeting between representatives of the Government and representatives of FVG took place. This meeting was the first *time* that anyone from FVG had been informed (and, then, only orally) that the *Lesivo* Resolution was specifically aimed at the equipment contracts and, even then, there was no notice or discussion of any alleged illegalities or other purported basis for it.³⁴⁹ At the meeting, the Government presented to FVG – again, for the first time – a written “take it or leave it” proposal.³⁵⁰ The proposal consisted of seven items, six of which had nothing to do with the usufruct equipment contracts.³⁵¹ The only mention of the equipment contracts in the Government’s proposal was a minor, non-specific reference to modifying the contracts “in order to rectify the terms which are deemed to cause lesion to the interests of the State of Guatemala.”³⁵² Instead of focusing on fixing the alleged legal defects in the equipment contracts and thereby eliminating the asserted grounds for declaring such contracts *lesivo*, the Government’s proposal demanded that FVG, among other things, renegotiate key terms of Contract 402 and the Railway Trust Fund (Contract 820),

³⁴⁶ Statement of J.P. Carrasco ¶ 14. Mr. Carrasco did not learn until August 24, 2006 that the *Lesivo* Resolution specifically pertained to the usufruct equipment contracts. *Id.* ¶ 15.

³⁴⁷ Second Statement of B. Duggan ¶ 10; Second Statement of J. Senn ¶ 31.

³⁴⁸ Ex. C-1.

³⁴⁹ Second Statement of H. Posner III ¶ 14; Second Statement of J. Senn ¶ 30.

³⁵⁰ Ex. C-44.

³⁵¹ Second Decision on Jurisdiction ¶ 133.

³⁵² Ex. C-44.

dismiss its breach of contract arbitrations against FEGUA, and surrender “railway sections yet to be restored in which other investors may be interested,” a thinly veiled reference to Mr. Campollo, who was the only “other [interested] investor” who had ever been named by the Government.³⁵³

149. Respondent argues that the demand in its proposal that FVG surrender unrestored sections of the railway (*i.e.*, the South Coast) had nothing to do with any Government plan to hand over portions of the railway to Ramón Campollo but, instead, merely reflected Respondent exercising its right under Contract 402 to reclaim the lands on which FVG had not restored the railway.³⁵⁴ Respondent’s explanation rings exceptionally hollow. Mario Fuentes, who had been appointed by President Berger to coordinate negotiations between FEGUA and FVG and attended the August 24 meeting, distinctly recalls that one of the Government’s principal demands was that FVG had to sign a commitment secured by a bond to re-open the South Coast corridor or agree to surrender this railway segment to other interested investors.³⁵⁵ Furthermore, as discussed in paragraphs 19-26 *supra*, Respondent did not have a legal right to reclaim any portion of the railway because, as Respondent had previously acknowledged, FVG had fully complied with its restoration obligations. Moreover, if Respondent had truly believed at the time that it had the contractual right to reclaim any unrestored portions of the railway from FVG, there certainly would have been no need for it to “negotiate” this issue with FVG under the threat of declaring Contracts 143/158 *lesivo*; rather, the Government would have simply asserted this “right” as a defense to and counterclaim in FVG’s pending breach of contract arbitrations.

150. Contrary to the Government’s assertion, the purpose of the “take it or leave it” proposal which it presented on August 24, 2006 was not to cure the alleged legal defects in the usufruct equipment contracts and thereby avoid issuance of the *Lesivo* Resolution. As the Tribunal has already concluded, the grounds for the *Lesivo* Resolution, “even if they had been cured by FVG, would not have satisfied the conditions of the settlement proposed on August 24,

³⁵³ Ex. C-44; First Statement of J. Senn ¶ 40; Second Statement of J. Senn ¶ 32; Statement of J.P. Carrasco ¶ 13.

³⁵⁴ Counter-Memorial on Merits ¶ 108.

³⁵⁵ Second Statement of M. Fuentes ¶¶ 4-5.

2006.”³⁵⁶ Respondent’s own witnesses confirm this conclusion: President Berger’s Planning Commissioner, Richard Aitkenhead, states that the *lesividad* process would have been stopped “[h]ad the parties reached an agreement that would have provided for the cure of the legal defects of the equipment contracts *and for a plan that would ensure the rehabilitation and functioning of the railroad.*”³⁵⁷ Astrid Zosel, Legal Counsel of the Ministry of Communications, testifies that the Government was “prepared to rectify the legal defects that were made when the contracts were entered into by FEGUA and Ferrovías, *provided that the parties settled their disputes. . . .*”³⁵⁸

151. Thus, as the Tribunal has already found, rather than using its settlement proposal as a means to resolve the asserted grounds for the *Lesivo* Resolution, the Government used the *lesividad* process as “an element of pressure to achieve other results which [were] unrelated to the *lesividad* declaration.”³⁵⁹ At the August 24 meeting, the Government informed FVG that it would issue the *Lesivo* Resolution against the equipment contracts the next day unless FVG agreed to *all* of the demands in its proposal.³⁶⁰ After FVG refused the Government’s demands, the *Lesivo* Resolution issued the next day, on August 25, 2006, by publication in the Guatemala Official Gazette, *Diario de Centro América*.³⁶¹

152. The President’s “*Exposición de Motivos*” which accompanied the *Lesivo* Resolution – but was not published in the Official Gazette or otherwise disclosed at the time – lists the grounds upon which the Government based its declaration that Contracts 143 and 158 were “harmful to the interests of the State.”³⁶² It asserts that the contracts caused “*lesion* to the interests of the State” because they were not awarded pursuant to a new public bidding process

³⁵⁶ Second Decision on Jurisdiction ¶ 134.

³⁵⁷ Statement of R. Aitkenhead ¶ 11 (emphasis added).

³⁵⁸ Statement of A. Zosel ¶ 17 (emphasis added); *see also* Counter-Memorial on Merits ¶ 110 (Government representatives came to the August 24, 2006 meeting “prepared to negotiate and brought a draft contract that proposed solutions to the various disputes between the parties, *including those with respect to Contract 402, the trust fund and the legal defects giving rise to the Lesivo Declaration*”) (emphasis added).

³⁵⁹ Second Decision on Jurisdiction ¶ 134.

³⁶⁰ Second Statement of J. Senn ¶ 32.

³⁶¹ Ex. C-1.

³⁶² Ex. C-10.

and were never approved by Executive Resolution.³⁶³ Notably, the *Exposición de Motivos* does not list grounds such as failure to protect railway equipment declared historic and cultural patrimony as a ground for *lesividad*, nor does it list the other six items that were part of the “take it or leave it” proposal Respondent made on August 24, 2006.³⁶⁴

U. Respondent Continues to Exhibit Bad Faith in Its Negotiations with FVG After *Lesivo* was Declared

153. After the *Lesivo* Resolution was issued and published, FVG continued to meet with Government representatives in an attempt to reach a settlement under the threat that, if no settlement was reached, the Government would proceed with filing an action in the *Contencioso Administrativo* court to confirm the Resolution. Respondent argues that the fact that it continued to negotiate with FVG after issuing the *Lesivo* Resolution demonstrates its “good faith” intentions.³⁶⁵ Respondent further insists that it engaged in good faith negotiations with FVG after issuing the *Lesivo* Resolution. Neither assertion is true.

154. After the Government issued the *Lesivo* Resolution, the Government continued to use the *lesivo* process as a threat to achieve concessions from FVG that had nothing to do with the alleged legal infirmities in the usufruct equipment contracts. On August 28, 2006, a discussion table was set up between the parties consisting of Arturo Gramajo, Gabriela Zachrisson and Jorge Senn, with Mario Fuentes serving as a mediator.³⁶⁶ According to the Government’s internal meeting minutes – which were given to Claimant only in this arbitration – the main issues identified for discussion between the parties concerned not only “[e]valuating the execution of a new contract for Usufruct of Railroad Equipment,” but also (i) cancellation of the arbitration proceedings between the parties; (ii) negotiation of amendments to Contract 402 for

³⁶³ *Id.*

³⁶⁴ Second Decision on Jurisdiction ¶ 133.

³⁶⁵ Counter-Memorial on Merits ¶¶ 112-13.

³⁶⁶ Ex. R-36.

the purpose of rescheduling the railroad rehabilitation phases,³⁶⁷ and (iii) renegotiation of the amounts FEGUA was obligated to contribute to the Railway Trust Fund.³⁶⁸

155. On September 5, 2006, Héctor Pinto wrote Emmanuel Seidner, an official working for the Competitiveness Commissioner, Miguel Fernandez, informing Mr. Seidner 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. In an act of supreme arrogance, Mr. Pinto sent a blind copy of his correspondence to Mr. Senn.³⁶⁹ In its Counter-Memorial, Respondent attempts to cast doubt on the authenticity of this correspondence from Mr. Pinto, arguing that "there is no indication that the supposed communication from Pinto was ever sent to or received by Mr. Seidner" and the document does not contain information "that is typically found on email messages."³⁷⁰ Respondent's attempt to question this document is meritless. Mr. Pinto's personal secretary, Olga de Valdéz, states that she personally sent this correspondence on Mr. Pinto's behalf to Government officials, including Susan Pineda of PRONACOM, as an attachment to a September 5, 2006 email she sent from her email address.³⁷¹ Mr. Senn is not shown as a recipient of Ms. de Valdéz's email because, as described above, he was blind copied on it. Mr. Senn then forwarded Mr. Pinto's letter to others at RDC by copying and pasting the letter's text into an email.³⁷² Nevertheless, to dispel any question regarding the authenticity of this document, Claimant has produced a copy of the original email Ms. de Valdéz sent to Mr. Senn with Mr. Pinto's September 5, 2006 letter to Mr. Seidner attached.³⁷³

156. Respondent also questions the authenticity of Mr. Pinto's September 5, 2006 letter because Mr. Campollo asserts that the Ciudad del Sur project had already, by then, been

³⁶⁷ The fact that rescheduling the railroad rehabilitation phases remained a topic of negotiation between the parties once again confirms that the Government did not believe that it had an existing legal right to reclaim lands on unrestored portions of the railway on the ground that FVG had not complied with its restoration obligations under Contract 402.

³⁶⁸ Ex. R-36. *See also* Second Statement of M. Fuentes ¶ 9.

³⁶⁹ Ex. C-45; First Statement of J. Senn ¶ 43.

³⁷⁰ Counter-Memorial on Merits ¶ 160.

³⁷¹ Statement of O. de Valdéz ¶ 5; Ex. C-45.

³⁷² Third Statement of J. Senn ¶ 67.

³⁷³ Ex. C-116, 5 Sept. 2006 email from O. de Valdéz to S. Pineda *et al.*

abandoned for a year.³⁷⁴ However, as demonstrated in paragraph 130 and 145 *supra*, the falsity of Mr. Campollo's testimony in this regard is demonstrated by the fact that Mr. Pinto had engaged in correspondence and meetings with FVG in February-March 2006 and July 2006 in the name and on behalf of Mr. Campollo's Ciudad del Sur project. Further undermining the credibility of Mr. Campollo is the fact that, on September 18, 2006, Mr. Pinto sent Mr. Posner a direct email requesting a meeting among representatives of Ciudad del Sur, FVG and the Presidential Commissioner to discuss the possibility of establishing rail service to Ciudad del Sur.³⁷⁵

157. The next "discussion table" meeting between FVG and the Government took place on September 8, 2006 and was attended by Dr. Gramajo, Mr. Senn and Mr. Fuentes.³⁷⁶ According to the Government's internal minutes of that meeting, the negotiation topics that were discussed were: (i) FVG presenting a business plan which would include the rescheduling of the railroad rehabilitation phases under Contract 402; (ii) renegotiation of the amounts owed by FEGUA under the terms of Contract 820 (the Railway Trust Fund); and (iii) the contract for usufruct of the railroad equipment.³⁷⁷ Regarding the latter, FEGUA suggested that a new equipment contract should be drafted "to correct the deficiencies which motivated the lesivo declaration."³⁷⁸ However, the Government's internal meeting minutes confirm that "*as a strategy of the government*," FEGUA did not disclose to FVG what were the specific alleged deficiencies in the current usufruct equipment contract.³⁷⁹ Thus, rather than demonstrating the Government's good faith and "willingness to continue negotiating to try to resolve the defects in Contract 143/158,"³⁸⁰ the September 8 meeting minutes confirm that, after issuance of the *Lesivo* Resolution, the Government's *bad faith* intention was to continue to withhold from FVG the asserted grounds which motivated the declaration, and to use such declaration as leverage to

³⁷⁴ Counter-Memorial on Merits ¶ 161; Statement of R. Campollo ¶ 35.

³⁷⁵ Ex. C-117, 18 Sept. 2006 email from H. Pinto to H. Posner III; Third Statement of H. Posner III 21; Statement of O. de Valdéz ¶ 5.

³⁷⁶ Ex. R-36.

³⁷⁷ *Id.* See also Second Statement of M. Fuentes ¶ 9.

³⁷⁸ Ex. R-36.

³⁷⁹ *Id.*

³⁸⁰ Counter-Memorial on Merits ¶ 113.

extract significant concessions from FVG regarding the economic terms of the Usufruct Contracts.³⁸¹

158. The Government's bad faith negotiating strategy is further confirmed by the minutes of an internal Government meeting at the Offices of the Attorney General held at FEGUA's request on September 28, 2006. As this Tribunal previously noted in its Second Decision on Objections to Jurisdiction, at this meeting, Attorney General Mario Gordillo stated his belief that initiation of the *lesivo* action in the *Contencioso Administrativo* court would "increase pressure to advance the negotiations" with FVG.³⁸²

159. On October 4, 2006, another "discussion table" meeting occurred between Respondent and FVG, attended by Dr. Gramajo, Ms. Zachrisson, Mr. Senn and Mr. Fuentes.³⁸³ The purpose of this meeting was to obtain the opinion of FVG regarding the negotiation proposals that had been presented by the Government.³⁸⁴ The Government's internal meeting minutes once again confirm that the Government was not willing to dismiss the declaration of *lesividad* against the equipment contracts unless FVG was willing to agree to significant, substantive changes in the Government's favor to the economic terms of Contracts 402 and 820.³⁸⁵

160. Respondent, however, focuses on the section of the October 4 meeting minutes where it cryptically reports that "Ferrovías [Mr. Senn] finds that amendent of [Contract 143] is of secondary priority, in view of the plans to change the railroad system to wide gauge." Respondent asserts that this statement "reveals that FVG had very little use for the FEGUA usufruct equipment that was declared *lesivo*" because the equipment FVG would need for Phase II had to operate on standard gauge track, while the FEGUA equipment was narrow gauge.³⁸⁶

³⁸¹ See also Second Statement of M. Fuentes ¶ 10 (confirming that the usufruct equipment contracts were never discussed during these meetings and that none of the Government's proposals focused on removing the grounds for the declaration of *lesividad*).

³⁸² Ex. R-36; Second Decision on Jurisdiction, n.97.

³⁸³ Ex. R-37.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ Counter-Memorial on Merits ¶ 115.

Respondent’s grasp at this straw has no basis in reality. First, FVG obviously needed the FEGUA narrow gauge equipment for its then-ongoing operations on the Atlantic corridor, which was never considered for standard gauge. Second, regarding Contract 143, the October 4 meeting minutes also state immediately above the “secondary priority” observation that “Ferrovías does not think it advisable to draft a new contract for Usufruct of Railroad Equipment *without having in-depth knowledge of the technical and legal causes which led to the lesivo declaration.*”³⁸⁷ Thus, Mr. Senn’s purported statement that amending Contract 143 was of “secondary priority” was made in the context of his *still not knowing why Respondent had declared this contract lesivo*. It was also made in the context of the Government’s position that its dismissal of the *Lesivo* Resolution hinged not on fixing the alleged technical defects in the equipment contracts, but on FVG committing to complete the Phase II rehabilitation according to the Government’s terms.³⁸⁸

161. Thus, any purported statement by Mr. Senn that amending the equipment contracts was a “secondary priority” was the obvious consequence of the Government’s, intentional, bad faith strategy to keep Claimant in the dark about the terms of the *Lesivo* Resolution. The Government’s strategy to withhold such information from Claimant is demonstrated by the fact that, *at no point* during the parties’ discussions – either before or after the *Lesivo* Resolution issued – did Respondent ever disclose the grounds for *lesividad* or present FVG with a stand-alone proposal or option to fix the alleged legal defects in Contracts 143/158 and, therefore, resolve the purported grounds for the *Lesivo* Resolution.³⁸⁹

V. The *Lesivo* Resolution, Not FVG, Emboldened Squatters and Vandals and Caused the Government to Disregard FVG’s Usufruct Rights

162. Respondent has concocted yet another preposterous theory in an attempt to rebut Claimant’s evidence that, following and as a result of the *Lesivo* Resolution and Government actions in furtherance of the Resolution, the railway right-of-way faced a substantial increase in

³⁸⁷ Ex. R-37 (emphasis added).

³⁸⁸ Third Statement of J. Senn ¶ 69; Second Statement of M. Fuentes ¶ 10 (confirming that the usufruct equipment contracts were never discussed during these meetings and that none of the Government’s proposals focused on removing the grounds for the declaration of *lesividad*).

³⁸⁹ Third Statement of J. Senn ¶ 70.

public interference from locals who vandalized the tracks, stole the railroad materials and set up living quarters along the tracks as squatters.³⁹⁰ Indeed, the FEGUA Overseer specifically acknowledged this surge in railway thefts and squatters in a July 2008 letter to FVG.³⁹¹ Respondent posits that these damaging actions should not be attributed to the Government, but to Claimant, because, according to Respondent, FVG “has been charging rent from the same squatters it blames Guatemala for not removing.”³⁹² Respondent argues that, “[b]y turning squatters into tenants, FVG not only legitimized the illegal occupation of their right-of-way, but also sent a clear message to other individuals that they could similarly invade the lands around the railway so long as they paid rent to FVG.”³⁹³ Respondent’s theory is ridiculous.

163. FVG does not dispute that it charged rent to certain persons and families that were occupying railway-related buildings that had been granted in usufruct. However, FVG never attempted to charge or collect rent from squatters who were physically occupying or interfering with the right-of-way, which was Respondent’s obligation to clear. Respondent was well aware of this situation for years and never once complained or asserted that such actions were “emboldening squatters.” The reason Respondent never made such an accusation was because none of the persons or families to whom FVG was charging rent were individuals who were occupying the railway tracks or living on or along the tracks and thereby impeding or potentially impeding the operation and safety of the railroad.³⁹⁴ Rather, the vast majority of persons to whom FVG charged rent were individuals who were living in or occupying old existing houses, shacks and rooms in the railroad station yards or parking vehicles or kiosks on railroad station property, from whom FEGUA had collected rent prior to FVG’s Usufruct.³⁹⁵ A large number of these persons were former FEGUA railroad employees and/or their families who had been living as tenants in these houses, shacks and rooms for a number of years prior to FVG taking over the

³⁹⁰ Memorial on Merits ¶ 92.

³⁹¹ Ex. C-118, 3 July 2008 letter from FEGUA Overseer E. Martinez to J. Senn (“I am concerned about the increasing reports of railroad depredation and FEGUA’s real property occupation.”).

³⁹² Counter-Memorial on Merits ¶ 181.

³⁹³ Counter-Memorial on Merits ¶ 182.

³⁹⁴ Third Statement of J. Senn ¶ 71.

³⁹⁵ *Id.*; see also Ex. R-229.

railway.³⁹⁶ FVG also granted rentals that had been requested for the Bananera station yard which allowed individuals to construct and/or operate stands or structures to sell food or other consumer goods in an existing open-air market.³⁹⁷ None of these stands or structures were ever allowed to interfere with the operation or movement of the trains.³⁹⁸

164. The influx of squatters which occurred after the *Lesivo* Resolution issued in late August 2006 had nothing to do with the station yard tenants from whom FVG had been collecting rent. In contrast to the station yard tenants, these persons were directly occupying and interfering with the right-of-way and the operation of the trains. FVG did not charge or attempt to collect rent from these persons. To the contrary, FVG consistently filed claims and demanded that the Government take immediate action to remove these squatters, which demands the Government ignored.

165. What is more, Respondent's theory that FVG's act of charging rent to station yard tenants encouraged illegal squatting along the right-of-way is illogical on its face. No rational person could possibly be incentivized to trespass and illegally squat on someone else's property when he knows that the landlord enforces its property rights and collects rent from its tenants. Indeed, under the flawed logic of Respondent's theory, the best and proper way for FVG to discourage illegal squatters would have been for it to *not charge rent* to its station yard tenants and thereby convey the message to the local citizenry that they could squat for *free*. It therefore should come as no surprise that Respondent, having contacted and collected documents from numerous station yard tenants in connection with its Counter-Memorial submission, was not able to obtain the testimony of a single tenant who was willing to support its preposterous theory.

166. Equally fallacious is Respondent's contention that it was "dilligent and proactive" in taking measures to prevent and respond to reports of squatters and vandalism both before and after the issuance of the *Lesivo* Declaration.³⁹⁹ As discussed above, prior to the *Lesivo* Declaration, the Squatter Commission organized by the Government in 2005 never went forward

³⁹⁶ Third Statement of J. Senn ¶ 71.

³⁹⁷ *Id.*; see also Ex. R-229; Ex. R-230; Ex. R-231; Ex. R-233.

³⁹⁸ Third Statement of J. Senn ¶ 71.

³⁹⁹ Counter-Memorial on Merits ¶ 184.

with implementing its purported plan for removing squatters from the South Coast right-of-way. Respondent's *post-hoc* justification for not doing so – because Ramón Campollo/Héctor Pinto withdrew support for the South Coast project – is not supported by any contemporaneous evidence and, even if it was, it did not excuse Respondent from complying with its unconditional contractual obligation.

167. Respondent argues that its efforts at protecting the right-of-way from squatters and thieves after the *Lesivo* Resolution were reasonable by pointing to the more than 50 legal proceedings it commenced in relation to theft of rails and the more than 50 proceedings it commenced seeking the removal of squatters.⁴⁰⁰ Closer examination of this evidence reveals otherwise.

168. Regarding the over 50 actions Respondent claims it commenced in relation to theft of rails after the *Lesivo* Resolution, Respondent's summary chart shows that only *five of those actions* (of 45, not 50) were commenced from the time Respondent published the *Lesivo* Resolution in late August 2006 until FVG shut down its commercial railway operations in September 2007.⁴⁰¹ The remaining 40 actions were commenced after September 2007, *i.e.*, after the irreparable damage to Claimant's investment had been done and Claimant had commenced this arbitration. The timing of those actions leads to the reasonable inference that, knowing Claimant's contentions, Respondent sought to manufacture its defense. Moreover, only one of these actions – Case File No. 35 – concerned a theft of rails that occurred on the operating Atlantic/North Coast right-of-way.

169. Likewise, Respondent's own summary chart shows that, from late August 2006 through September 2007, Respondent commenced *only two actions* to evict squatters from the right-of-way, and they were both brought in August 2007.⁴⁰² In fact, Respondent commenced *only five legal actions* against squatters during the entire period FVG operated the entire railway,

⁴⁰⁰ Counter-Memorial on Merits ¶ 185.

⁴⁰¹ See Ex. R-184, Excel Chart of Criminal Proceedings For Theft/Rail Removal.

⁴⁰² See Ex. R-182, Excel Chart of Criminal Proceedings For Removal of Squatters. This chart also reveals that, from January 2000, when FVG commenced railway operations on the North Coast line, until the *Lesivo* Resolution in late August 2006, Respondent commenced *only three legal actions* to remove squatters, thus further confirming Respondent's complete and utter abdication of this fundamental contractual obligation.

in contrast to the 52 actions brought by Respondent after ICSID registered this claim.⁴⁰³ This record either confirms the substantial increase in squatter activity complained of by Claimant, or demonstrates that the only thing that Respondent was “diligent and proactive” about after the *Lesivo* Resolution was in manufacturing a post-litigation evidentiary record in an attempt to obscure its miserable failure to evict squatters and prevent thieves and vandals.

170. Of course, not all of the squatters were ordinary citizens. After the *Lesivo* Resolution, the Government itself also became a major squatter and trespasser on lands granted in usufruct to FVG. Respondent takes issue with some of the specific incidents described by Claimant concerning Government entities trespassing upon or destroying portions of the right-of-way after the *Lesivo* Resolution.⁴⁰⁴ Respondent argues that the action of the Municipality of San Antonio La Paz’s action to install a drinking water pipeline alongside the railway in January 2009 without FVG’s permission or authorization was not motivated by the *Lesivo* Resolution because the Municipality had previously requested permission from FVG in November 2008.⁴⁰⁵ However, the facts show that, less than two months later, the Municipality ultimately chose to install the pipeline on the right-of-way without FVG’s authorization not because of FVG’s failure to respond to its request, but because the Municipal Council specifically determined that FVG was not able to grant such authorization *as a result of the Lesivo Resolution*.⁴⁰⁶

171. It is not surprising that the Municipality would conclude that FVG had lost its rights under the Usufruct Contracts as a result of the *Lesivo* Resolution given that the District Attorney made the same claim in a case FVG had brought against the industrial squatter, EEGSA.⁴⁰⁷ While Respondent dismisses this action by asserting that the court ultimately ruled against the District Attorney,⁴⁰⁸ in fact, the court *did not reject the District Attorney’s assertion*

⁴⁰³ *Id.*

⁴⁰⁴ Memorial on Merits ¶¶ 93-95.

⁴⁰⁵ Counter-Memorial on Merits ¶ 188; Ex. R-148. Respondent also cites Ex. R-116 as another letter where the Municipality requested permission from FVG for access. However, this letter was not addressed to FVG, but, rather, is a letter dated March 4, 2007 from the Government agency COCODE to the San Antonio La Paz Municipal Department of Urban and Rural Development.

⁴⁰⁶ *See* Ex. C-50.

⁴⁰⁷ Memorial on Merits ¶ 96; Ex. C-51.

⁴⁰⁸ Counter-Memorial on Merits ¶ 531.

that the issuance of the *Lesivo* Resolution adversely affected Claimant’s legal rights but, rather, ruled on the technicality that the issue before the court involved Contract 402 and the *Lesivo* Resolution was against a different contract, Contract 143.⁴⁰⁹

172. Respondent argues that Claimant was also misleading in its characterization of the Government’s actions (or inactions) in connection with the paving over and conversion of the railroad tracks into a public street and green spaces in the Municipality of Puerto Barrios.⁴¹⁰ Respondent points out that the local court ultimately dismissed the claim against the Mayor of Puerto Barrios for authorizing these actions and that FEGUA initiated a criminal investigation against a private party for paving over the right-of-way.⁴¹¹ Respondent’s irrelevant argument glosses over the relevant fact that, when FVG initially protested these actions to the Mayor of Puerto Barrios, he told FVG that he did not care about the Municipality’s lack of authorization – thereby conceding the Municipality’s involvement in these expropriatory actions – and challenged FVG to file a claim in the local courts.⁴¹² Respondent’s argument also overlooks the fact that it was FVG – not FEGUA – which initially filed a claim against the Mayor in April 2008.⁴¹³ Respondent does not explain why it has yet to take any action to reclaim the portions of the right-of-way that were paved over in Puerto Barrios.

173. Finally, Respondent takes exception to characterizing the Guatemalan Army’s takeover of the Palin station in Escuintla as a Government action that was taken as a result of the *Lesivo* Resolution, pointing out that the army’s occupation of the station began in April 2006, four months before the publication of the *Lesivo* Resolution.⁴¹⁴ While this is true – and Claimant never suggested otherwise – it does not obviate the fact that the military occupation of the Palin station continued after the *Lesivo* Resolution issued and *continues to this day*, long after the

⁴⁰⁹ See Ex. R-200.

⁴¹⁰ Counter-Memorial on Merits ¶ 189.

⁴¹¹ *Id.*

⁴¹² First Statement of J. Senn ¶ 52.

⁴¹³ Ex. C-49(a).

⁴¹⁴ Counter-Memorial on Merits ¶ 190.

purported local crime emergency that motivated the initial occupation had subsided.⁴¹⁵ The only reasonable explanation for the Army's continued occupation of the station – *and renaming it as the Headquarters for the 4th Squadron* – is that it understands that, as a result of the *Lesivo* Resolution, FVG no longer has the ability to enforce its contractual rights against the Government.⁴¹⁶

W. There is no Evidence that FVG's Loss of Business After the *Lesivo* Resolution is Attributable to FVG's Rehabilitation, Maintenance or Operation of the Railway

174. Respondent also attempts to explain away the irreparable damage the *Lesivo* Resolution caused to Claimant's investment by arguing that Claimant's failure to maintain, repair and operate the railway was a principal cause of the dramatic loss of business FVG experienced after publication of the Resolution.⁴¹⁷ This is yet another litigation-inspired theory of Respondent that has no basis in reality.

175. The fundamental flaw in Respondent's theory is that it has not produced any evidence that a single existing or potential customer, lender or supplier of FVG stopped doing, or was not willing to do, business with FVG after the *Lesivo* Resolution because FVG did a poor job operating, maintaining and/or repairing the railway. Certainly none of Claimant's third party witnesses has stated that this was the case. To the contrary, each of these witnesses confirm that Respondent's *Lesivo* Resolution was the driving factor in its decision to cease doing or not do business with FVG, and not one of these witnesses stated that its decision had anything at all to do with acts or omissions by FVG.

⁴¹⁵ See Ex. C-119 (photographs of Palin station dated January 20, 2011 showing continued occupation of station by Guatemalan Army); Respondent also makes the scurrilous charge that the Army was forced to occupy Palin station because FVG had left the station abandoned and unprotected from squatters, criminals and gang members. Counter-Memorial on Merits ¶ 190. But the news article Respondent cites in support of this assertion makes no reference to this, but, instead, states that the local citizenry requested the military's presence after gang members had instigated riots by setting fire to houses used as criminal hideouts. See Ex. R-243.

⁴¹⁶ For the purposes of its Counter-Memorial, Respondent has obtained a self-serving letter from the Mayor of Palin Municipality dated September 28, 2010, which asserts with certainty that the Army will voluntarily vacate the Palin station whenever requested to do so by FEGUA or FVG. See Ex. R-283.

⁴¹⁷ Counter-Memorial on Merits ¶¶ 170-73, 191.

176. Moreover, the only evidence that Respondent has presented which even marginally concerns FVG’s customers is the statement of Mr. Oswaldo R. Morales, the Executive Director of the Metallurgical Union, who was never a customer of FVG. In his statement, Mr. Morales describes that, at the request of the Ministry of Economy and Finance of Guatemala, he contacted the main companies that comprise the Union who had used the railway under FVG operation to transport their iron and steel products and materials.⁴¹⁸ The management of these companies each informed Mr. Morales that they had used the railway to transport their products and materials because, for them, it was a more cost-efficient and economic transport method than the alternatives they had.⁴¹⁹ They each further stated that they would have continued to use the railway if FVG had not stopped providing service in 2007.⁴²⁰ Thus, Respondent’s own witness confirms that FVG’s customers viewed FVG’s service as being a cost-efficient and economic method of transportation, and not the unreliable and dangerous operation as Respondent attempts to portray it.

177. Despite the fact that it has not presented any evidence which even suggests that FVG lost business after the *Lesivo* Resolution because of its poor operation and maintenance of the railway, Respondent nevertheless devotes a significant portion of its Counter-Memorial attempting to demonstrate that FVG did a substandard job in rehabilitating, operating and maintaining the railway prior to the *Lesivo* Resolution.⁴²¹ Putting aside the irrelevance of this issue to the merits of any of Claimant’s claims, nothing could be further from the truth.

178. Of course, if Respondent had been truly interested in presenting a fair and proper picture of FVG’s performance, it would have measured FVG’s performance based upon the situation FVG inherited from FEGUA when it took over the defunct national railway in 1998. On this point, the Government’s Bidding Terms for the Railway Usufruct candidly admitted that the railroad was in extraordinarily poor condition. The Bidding Terms state that, as of February 1997, the railway infrastructure was “generally in poor condition,” was “of a very old design”

⁴¹⁸ Statement of O. Morales ¶ 3.

⁴¹⁹ *Id.* ¶ 4.

⁴²⁰ *Id.*

⁴²¹ *See* Counter-Memorial on Merits ¶¶ 165-74.

and that only 10% out of 170,000 ties throughout the track system were considered to be in good condition.”⁴²² In fact, the infrastructure was so old that it was “obsolete and non-economical for commercially favorable operations.”⁴²³ The Bidding Terms further noted that the average age of the rails was 50 years and that, as of the end of 1996, “in no portion of the track was there a properly prepared embankment and the ties fixed to the ground.”⁴²⁴ Further, “[t]he lack of an adequate track [had] caused a loss in the elastic and effort-distribution function, thus causing many problems of poor security on the trains, a definite reduction in speeds, noise, high frequency of derailments, etc.”⁴²⁵

179. The dilapidated and deteriorated condition of the railway while it was under FEGUA management is further confirmed by the testimony of Louis T. Cerny, an expert on railroad track and bridge rehabilitation and maintenance. In his capacity as executive director of the American Railway Engineering Association (AREA), Mr. Cerny rode on the Guatemalan railway in 1992 and 1994 while it was still operated by FEGUA.⁴²⁶ On these two trips, Mr. Cerny observed that the railway track was in overall very poor condition, poorly maintained and derailment-plagued. He saw a large track buckle on jointed track, indicating that rail was crowded together for a long series of joints. He also observed improper and dangerous maintenance procedures such as stones substituting for crossties and saw poor bridge tie conditions, which created grave risks because each bridge tie was in itself a small bridge carrying the weight of the train from the rails, which were three feet apart, to longitudinal bridge beams which were sometimes about eight feet apart.⁴²⁷ Given the fact that the railway went out of service in 1996, it is highly unlikely that conditions observed by Mr. Cerny in 1992 and 1994 had improved between 1994 and 1996, and, obviously, the track could do nothing but deteriorate further while it lay idle without maintenance and subject to the elements from 1996 to 1999. Thus, FVG was handed a very poor out-of-service railway on which to start its operations.

⁴²² Ex. R-1, Bidding Rules, § 4.1.3.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ Statement of L. Cerny ¶ 3.

⁴²⁷ *Id.* ¶¶ 12-13. *See also* Ex. C-120, L. Cerny photographs of FEGUA track condition in 1994.

180. FVG's performance in rehabilitating and maintaining the railway must also be measured against what FVG actually promised to do in the rehabilitation plan it submitted to Guatemala as part of its successful bid for the railway usufruct, and not what Respondent unrealistically and improperly later demanded. The rehabilitation plan FVG presented sought to achieve the following stated goals:

- Offer a safe operation;
- Significantly reduce the risks of derailment;
- Allow a maximum operative train speed of 40 km/25 mph per hour; and
- Repair the railway to an adequate condition to manage the estimated traffic.⁴²⁸

181. The only major track work that was contemplated under FVG's rehabilitation plan was the replacement of 500 to 700 crossties (sleepers) per mile.⁴²⁹ Because the Guatemalan railway has 2,880 ties per mile (22-inch spacing), the FVG plan was to remove and replace only 17-24% of the total number of crossties on the railway.⁴³⁰ These replacement ties were intended to be used to fix weak spots in the track.⁴³¹ The FVG plan was quite specific in not promising to replace any significant percentage of the existing rails, but rather, was focused on replacing broken or damaged rails, repairing separations, changing broken joint bars and replacing missing bolts.⁴³² Thus, FVG did not promise to rehabilitate the railway in a manner that created an overall *facial* appearance that was significantly different from what it was before.⁴³³ FVG was always interested in substance, not appearances for appearances' sake.

182. FVG's rehabilitation plan sought to obtain a *maximum* operative train speed of 40 kph/25 mph.⁴³⁴ A maximum operative train speed means an operating speed at which there are no other overriding factors that would mandate a lower train speed, such as grades, curvature or

⁴²⁸ Ex. C-15, Envelope A: Technical Offer, § 4.1; Statement of L. Cerny ¶ 8.

⁴²⁹ Ex. C-15, Envelope A: Technical Offer, § 4.1; Statement of L. Cerny ¶ 9.

⁴³⁰ Statement of L. Cerny ¶ 9.

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ Ex. C-15, Envelope A: Technical Offer, § 4.1.

urban safety restrictions.⁴³⁵ FVG certainly did not promise an *average* or *continuous* operative train speed of 40 kph, as Guatemala's witnesses suggest. Thus, for example, it was never FVG's plan or intention to obtain speeds of 40 kph in the mountainous sections of the railway, where the sharpness of the curvature or allowable speed on downgrades made this impossible, or in urban environments such as Guatemala City.⁴³⁶

183. Another item in the FVG rehabilitation plan involved leveling and alignment. In connection with its crosstie replacement program, FVG promised to correct existing deviations on leveling and alignment.⁴³⁷ Importantly, the rehabilitation plan did not state that the rails would be made level with each other, only that they would be adequately level for the intended train operation speeds.⁴³⁸

184. In accordance with other rehabilitation plans Claimant had previously executed successfully in the United States and elsewhere, FVG's initial rehabilitation strategy for the Atlantic/North Coast corridor was to do only the things that were *necessary* to enable operations to start.⁴³⁹ This involved pinpointing and fixing those specific spots along the track that could potentially cause a derailment, not doing a general, full-blown rehabilitation of the entire line.⁴⁴⁰ This plan was primarily achieved by replacing *some* crossties at each potential derailment location rather than replacing *all* of the crossties.⁴⁴¹ Of course, because this type of rehabilitation work did not significantly change the overall surface appearance of the line, it would be easy for someone not particularly knowledgeable about or experienced in railway rehabilitation to assume

⁴³⁵ Statement of L. Cerny ¶ 10.

⁴³⁶ *Id.*

⁴³⁷ Ex. C-15, Envelope A: Technical Offer § 4.1. FVG also intended to conduct an extensive overhaul on the Plasser & Theurer leveler in the FEGUA workshop. *Id.* However, as it turned out, this leveler was not able to align and surface the track under the conditions encountered, and, therefore, FVG ended up performing leveling by hand. Statement of L. Cerny ¶ 11.

⁴³⁸ Statement of L. Cerny ¶ 11.

⁴³⁹ *Id.* ¶ 15.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

that nothing had been done, when in fact the track had been made much more safe, reliable and operable.⁴⁴²

185. After FVG took over the Guatemalan railway, Mr. Cerny had the opportunity to ride and observe operations on the railway on five separate occasions, in 2001, 2003, 2004, 2005, and 2007.⁴⁴³ His 2001 and 2007 visits also included consulting work for FVG regarding the condition of the North Coast corridor bridges.⁴⁴⁴ Contrary to the testimony of Guatemala's witnesses, Mr. Cerny is of the opinion that, despite the difficult situation that FVG inherited from FEGUA – which was made significantly more difficult after Hurricane Mitch struck Guatemala in 1998 – FVG rehabilitated, operated and maintained the North Coast line in a reasonable and proper manner.⁴⁴⁵

186. During his five separate trips on the FVG railway over a six-year period, Mr. Cerny saw that FVG had fulfilled the goals of its rehabilitation plan and he personally observed hundreds of spots at which track work and repairs had been done by FVG.⁴⁴⁶ The observed work consisted, in large part, of replacement crossties placed at the track spots where they were needed most, which were usually the worst alignment and unlevel sections of the railway.⁴⁴⁷ These spots were repaired to the extent necessary to allow trains to travel at the commercial speeds required at that location.⁴⁴⁸ In addition to observing that FVG had complied with its rehabilitation plan, Mr. Cerny also saw during his trips that FVG also did a 100% renewal of crossties on almost all high bridges.⁴⁴⁹ That FVG ultimately took the extra step of almost 100% renewal of crossties on these high bridges demonstrates its concern for the safety of its crews and

⁴⁴² *Id.*

⁴⁴³ *Id.* ¶ 4.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* ¶¶ 6-7, 16, 19.

⁴⁴⁶ *Id.* ¶ 16.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

the public and its desire to eliminate the risks of fatalities that derailments could cause, as stated in its operating plan.⁴⁵⁰

187. Another strong indication of FVG’s seriousness of purpose regarding maintaining the railway was its monitoring of the steel bridge structures on the railroad. FVG engaged Mr. Cerny as a consultant in 2001 and 2007 to inspect the bridges between Guatemala City and El Rancho, which consisted of 15 major named steel bridges and over 30 additional smaller steel bridges.⁴⁵¹ During his 2001 inspection of the bridges, Mr. Cerny found that the condition of the steel structures was very good, and that they were in generally excellent condition.⁴⁵² In addition to replacing the bridge ties as mentioned above, FVG did the maintenance work he recommended, which included cleaning places where moisture had been accumulating.⁴⁵³ During his 2007 inspections, Mr. Cerny found that FVG had maintained the bridges properly so that no significant additional deterioration to the steel structures had occurred since 2001.⁴⁵⁴

188. Mr. Cerny also personally experienced the FVG trains operating at speeds of least 40 kph.⁴⁵⁵ In sharp contrast to the contentions of Guatemala’s witnesses, he experienced only one very minor derailment on his five separate trips, and only once did he observe track repairs underway as a result of a derailment.⁴⁵⁶

189. The foregoing discussion demonstrates that the various criticisms of FVG’s performance lodged by Guatemala’s witnesses, Mr. Pedro Barrientos and Mr. Miguel Ángel Samayoa, are unfounded and based upon their unrealistic demands that FVG never agreed to undertake.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* ¶ 17.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* The fact that FVG continued to engage Mr. Cerny to conduct bridge inspections in 2007 after the *Lesivo* Resolution demonstrates Claimant’s focus on safety until the very end of its operations and also rebuts Respondent’s theory that Claimant was operating under an “exit strategy.”

⁴⁵⁵ *Id.* ¶ 18.

⁴⁵⁶ *Id.*

190. With regard to Mr. Barrientos, he worked as a Track Supervisor for FVG from late 1998 to 2001 and then subsequently as an external contractor who coordinated track laborers until September 2006.⁴⁵⁷ Prior to working for FVG, Mr. Barrientos worked for FEGUA for 22 years as a track laborer and supervisor.⁴⁵⁸ Thus, Mr. Barrientos began working for FEGUA in 1976, not many years after nationalization, and was most likely trained at that time by employees whose careers extended back to the time when IRCA was the unquestioned backbone of Guatemala's transportation network.⁴⁵⁹ His various criticisms about the quality of FVG's rehabilitation work evidence unrealistic demands that were far beyond what was actually promised in Claimant's rehabilitation plan or what was necessary to enable the railroad to operate safely.

191. Mr. Barrientos complains that the replacement sleepers (crossties) used by FVG were of poor quality and "not treated ones like the ones used by IRCA" when it had control of the railway.⁴⁶⁰ However, it is hardly surprising that FVG did not use replacement crossties that were like the ones used by IRCA because, when FVG started operations, there was no existing supplier-purchaser relationship for crossties in Guatemala.⁴⁶¹ Mr. Barrientos's assertion that most of the replacement crossties used by FVG were of "poor quality" is not accurate; of the 160,000 ties that were purchased and installed by FVG, only about 1,800 crossties (out of a domestic order of 15,000) were considered deficient (*i.e.*, approximately 1%), and these were replaced when they became rotten.⁴⁶² Furthermore, the 4,000 to 6,000 used ties that FVG installed were creosoted hardwood of very good quality.⁴⁶³

192. Mr. Barrientos also complains that there was "not adequate leveling of the road," which, according to him, "means placing both tracks at the same level of each other."⁴⁶⁴

⁴⁵⁷ Statement of P. Barrientos ¶ 4.

⁴⁵⁸ *Id.* ¶ 5.

⁴⁵⁹ Statement of L. Cerny ¶ 22.

⁴⁶⁰ Statement of P. Barrientos ¶¶ 7-8.

⁴⁶¹ Statement of L. Cerny ¶ 23.

⁴⁶² *Id.*; Third Statement of B. Duggan ¶ 16.

⁴⁶³ Statement of L. Cerny ¶ 23; Third Statement of B. Duggan ¶ 16.

⁴⁶⁴ Statement of P. Barrientos ¶ 9.

However, as Mr. Cerny points out, the proper leveling standard for an operator wanting to restore and maintain rail operations, is to correct it to a safe situation, not to make sure both rails are at exactly the same elevation.⁴⁶⁵ Thus, Federal Railroad Administration (FRA) regulations in the United States allow leveling deviations between rails. Specifically, at 40 kph (25 mph), FRA regulations allow the rails to be 2 inches (51 mm) different in elevation on straight standard gauge track.⁴⁶⁶ An equivalent figure for narrow gauge would be 1¼ inches (32 mm).⁴⁶⁷ Thus, trying to get the level of both rails to be exactly the same is simply not necessary and would be a waste of resources.⁴⁶⁸

193. Mr. Barrientos’s personal belief that FVG’s rehabilitation works “were not strong enough to withstand the passage of the train in the medium term”⁴⁶⁹ is, again, lacking in any proof. In addition, Mr. Barrientos’s opinion that FVG should have employed 10 track laborers every 20 miles is well beyond industry standards for basic staffing of operations comparable to FVG’s.⁴⁷⁰ A labor force of that magnitude would have required 100 track laborers on the Atlantic line,⁴⁷¹ which is well more than what the FVG operating plan showed for all employees on the entire railroad.⁴⁷²

194. Equally unpersuasive and unwarranted are the various criticisms of FVG’s performance lodged by Miguel Ángel Samayoa, the head of FEGUA’s Engineering Department since 2000. Mr. Samayoa is an Agricultural Engineer who has never been responsible for any actual rehabilitation or operation of a railroad.⁴⁷³ His educational background and work experience prior to FEGUA (which had no operations at the time he joined in 2000) do not give

⁴⁶⁵ Statement of L. Cerny ¶ 24.

⁴⁶⁶ *Id.* (citing 49 C.F.R. § 213.63).

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ Statement of P. Barrientos ¶ 11.

⁴⁷⁰ Statement of L. Cerny ¶ 26.

⁴⁷¹ *Id.*

⁴⁷² *See* Ex. C-15, Envelope A: Technical Offer, § 3.0 (FVG operation plan consisting of a total of 80 employees).

⁴⁷³ *See* Statement of M. Samayoa ¶¶ 3-4.

him any expertise in railroad rehabilitation, maintenance or operations.⁴⁷⁴ Thus, his criticisms of FVG for its alleged “lack of rehabilitation, maintenance and investment” do not reflect the opinions of an experienced or knowledgeable railway engineer, let alone someone who has actually tried to rehabilitate a railroad after it had fallen into an advanced state of deterioration.⁴⁷⁵

195. Throughout his statement, Mr. Samayoa improperly attempts to attribute what he describes as the poor condition of the track and railway to FVG and to conditions that existed prior to the *Lesivo* Resolution, when, in fact, many of the alleged conditions he describes were either caused by or were the responsibility of FEGUA and/or were observed *after* the *Lesivo* Resolution. For example, in his statement, Mr. Samayoa references an inspection FEGUA conducted in June 2005 of an unrestored segment of the right-of-way on the South Coast line (Escuintla to San Jose) that had “plantations on the right-of-way, squatters, houses and other constructions”⁴⁷⁶ However, it was FEGUA’s contractual obligation, not FVG’s, to remove and protect the right-of-way from squatters and other physical trespassers and third party intrusions. Likewise, Mr. Samayoa also refers to two reports from 2005 and 2006 in which he observed a few railway bridges in poor condition.⁴⁷⁷ However, the bridges he references (in Retalhuleu and Chiquimula) were on unrestored segments of the railway, and Mr. Samayoa makes no effort to describe the condition these bridges were in at the time FVG took over the railway.

196. Mr. Samayoa also describes an inspection of the Puerto Barrios-Zacapa railway segment that he performed in late September 2007, which was over one year after the *Lesivo* Resolution, three months after Claimant initiated this arbitration and approximately two weeks

⁴⁷⁴ Statement of L. Cerny ¶ 29.

⁴⁷⁵ Nor are Mr. Samayoa’s criticisms those of an objective observer. In an internal FEGUA memo to Overseer Gramajo, Mr. Samayoa took personal umbrage at a press report in which Mr. Senn had stated that FVG hoped FEGUA would be replaced by another entity to speed up railroad development, and advanced the disingenuous idea that FVG had distorted its Phase III obligation by claiming the wrong Cementos Progreso branch line, despite the fact that Cementos Progreso had made no such claim and that Mr. Samayoa himself had been Chief Engineer when FEGUA had “verified all issues regarding the Technical Study” which FVG had provided on this matter. *See* C-104, 11 Apr. 2005 letter from M. Samayoa to A. Gramajo.

⁴⁷⁶ Statement of M. Samayoa ¶ 8; Ex. R-256.

⁴⁷⁷ Statement of M. Samayoa ¶ 8; Ex. R-257; Ex. R-265.

after FVG had ceased railway operations.⁴⁷⁸ According to his October 1, 2007 inspection report, Mr. Samayoa observed “fractured rails, tracks of different gauge, misaligned tracks” and other items.⁴⁷⁹ Mr. Samayoa’s inspection report, however, is hardly a model of clarity, as it consists entirely of conclusory statements, with no accompanying details or photographs.⁴⁸⁰ Moreover, based upon his lack of railroad engineering background, there is strong reason to doubt Mr. Samayoa’s ability to distinguish between railway sections which were poor in appearance and those which were in poor condition or unsafe. One good example is his reference in his October 1, 2007 inspection report to “tracks of different gauge.” The report states that one of the deficiencies in FVG track maintenance was that the “width” of the track (*i.e.*, the gauge) “ranges from 912 to 916 mm; it should be 914 mm.”⁴⁸¹ This observation reveals that Mr. Samayoa did not understand what level of gauge variation actually constitutes a problem. Even for 80 mph (129 kph) freight trains and 90 mph (145 kph) passenger trains, the FRA in the U.S. allows a variation of 1/2 inch (12 mm) narrow and one inch (25 mm) wide, substantially above the 2 mm narrow and 2 mm wide found by his inspection.⁴⁸² Thus, a gauge variation of 912 to 916 mm is a testament to the *excellence* of track maintenance, not a *deficiency*.⁴⁸³

197. Mr. Samayoa also attempts to attribute several “major derailments” between 2001 and 2007 to FVG’s lack of repairs and proper maintenance.⁴⁸⁴ He then goes on to assert that he “understand[s]” that FVG “began to lose customers because [they] were no longer interested in using [the railway] due to uncertainty about the time of delivery of goods, or whether the goods would reach their destination due to the derailments.”⁴⁸⁵ Mr. Samayoa, however, does not identify a single customer that stopped doing business with FVG because of its alleged poor

⁴⁷⁸ Statement of M. Samayoa ¶ 9.

⁴⁷⁹ *Id.* ¶ 9; Ex. R-188.

⁴⁸⁰ Ex. R-188.

⁴⁸¹ *Id.*

⁴⁸² Statement of L. Cerny ¶ 32.

⁴⁸³ *Id.*

⁴⁸⁴ Statement of M. Samayoa ¶¶ 11-20.

⁴⁸⁵ *Id.* ¶ 20.

maintenance or operation of the railway or any other evidence to support his “understanding.”⁴⁸⁶ Indeed, as discussed above, the FVG customers who have testified in this case have all indicated that they were more than satisfied with FVG’s service and that they would have continued to do business with FVG but for the *Lesivo* Resolution.

198. Furthermore, Respondent’s derailment evidence is highly misleading. The Government relies substantially upon a FEGUA “report” that purports to document the “worst derailments” that occurred on the railway from 2001-07 (“FEGUA Derailment Report”).⁴⁸⁷ FEGUA never shared this report with FVG and, based upon its date and content, it is apparent that it was created solely for the purposes of this litigation.

199. The FEGUA Derailment Report inaccurately attributes – without any proof whatsoever – the cause of almost every derailment described therein as due to “inadequate embankment, poor state of crossties, anchors and accessories, fatigued rails, and uneven, misaligned track.”⁴⁸⁸ As Mr. Duggan explains in detail in his Third Statement, the truth is that almost all of the “worst derailments” depicted in this report were the result of human errors or negligence and/or extreme weather conditions and had very little or nothing to do with the quality of the infrastructure or FVG’s rehabilitation or maintenance of the railway.⁴⁸⁹

200. In addition, to the extent some of the alleged “worst derailments” were caused in whole or in part by poor track conditions, this was in many cases the fault of FEGUA, not FVG, because FEGUA failed to protect the railway from theft and squatters per its contractual obligations.⁴⁹⁰ As Mr. Duggan explains, these squatters would build or place structures too close

⁴⁸⁶ Mr. Samayoa also describes and references in his statement various inspection reports he prepared over the years to document what he characterizes as FVG’s failure to preserve and protect certain rail stations. *See* Statement of M. Samayoa ¶¶ 24-27. Putting aside the utter irrelevancy of this evidence to any of the issues before this Tribunal, it is worth noting that almost all of the stations that are the subject of Mr. Samayoa’s reports are located on non-operating segments of the railway. Moreover, none of Mr. Samayoa’s reports attempts to compare the current condition of the subject rail station to the deteriorated and abandoned condition the station was in when it had been granted in usufruct to FVG.

⁴⁸⁷ Ex. R-111, Report on Major Derailments: Guatemala-Puerto Barrios 2001-2007, FEGUA’s Engineering Department, 17 July 2007.

⁴⁸⁸ *See id.* at pp. 8, 9, 11, 12, 14, 15, 16.

⁴⁸⁹ Third Statement of B. Duggan ¶ 19.

⁴⁹⁰ *Id.* ¶ 20.

to the track and they often plugged drains and culverts along the track which would result in flooding and washouts.⁴⁹¹ Squatters would also steal railroad ties so they could be used as charcoal or for fences. It was also commonplace for thieves to remove rails, railroad ties, tie plates and spikes and sell them for scrap value.⁴⁹² As a result, frequently a train would travel safely over a track segment in one direction and, on its return trip, it would derail on that same segment because a piece of track infrastructure had been removed and stolen.⁴⁹³ This lack of security allowed theft and vandalism to flourish while the railroad infrastructure became less stable.

201. Moreover, despite the foregoing and the alleged frequent derailments cited by FEGUA, FVG was still able to maintain a reliable train schedule in accordance with its operation plan throughout its entire operation, whereby a train would travel from one end of the Guatemala City-Puerto Barrios line to the other within a 24-hour period or less. In contrast, during the time that FEGUA operated the same route, it was not uncommon for a train to leave Puerto Barrios only once every *seven days*.⁴⁹⁴ Clearly, FVG dramatically improved upon FEGUA's dismal operational record despite derailments, the vast majority of which were caused by factors that had nothing to do with FVG's rehabilitation and maintenance practices.

202. Finally, it is also worth noting that Respondent's unfounded and inaccurate assertions regarding FVG's derailment record ignores the exemplary safety record achieved by FVG during its operation. In 2002, FVG recorded six accidents and a total of 207 lost working days as a result of such accidents.⁴⁹⁵ However, by 2005, only one accident and only three lost working days were recorded during the entire year. By August 29, 2006, FVG had gone 572 consecutive days without an accident.⁴⁹⁶ By any measure, this was an extraordinary record for a railway operation in this type of environment.

⁴⁹¹ *Id.*

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* ¶ 21.

⁴⁹⁵ *Id.* ¶ 22.

⁴⁹⁶ *Id.*

X. FEGUA’s Purported Concerns About the Railroad Equipment Assets as the Historical and Cultural Patrimony of Guatemala Were Never Conveyed to FVG

203. FVG was specifically obligated in Contract 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.”⁴⁹⁷ However, it is undisputed that, prior to the publication of the *Lesivo* Resolution, the Government never officially declared or designated any of the FEGUA railway equipment or rolling stock to be part of the country’s cultural and historic patrimony under the Law for the Protection of the Cultural Heritage of the Nation.⁴⁹⁸ Moreover, protection of the railroad equipment assets as the historical and cultural patrimony of Guatemala is not listed as one of the bases for the *Lesivo* Resolution in the President’s *Exposición de Motivos* that was appended to the Resolution.⁴⁹⁹

204. Far from alerting FVG to his purported cultural patrimony concerns, in March 2005, Dr. Gramajo personally presented RDC and FVG Chairman Henry Posner III with an award on behalf of Guatemala’s Railroad Museum, which is an affiliate of FEGUA. The award states “The Railroad Museum awards this acknowledgment to Mr. Henry Posner III for his impartial collaboration *in the rescue and restoration of the Historic Railway Patrimony of Guatemala*.”⁵⁰⁰

205. Mr. Posner’s award was well-deserved, because all of the steam locomotives and rail cars that were delivered to FVG in usufruct were, as FEGUA expressly recognized in the Usufruct Contracts, in a condition of “obsolescence” and “deterioration.”⁵⁰¹ The Usufruct

⁴⁹⁷ Ex. C-10, Contract 143, cl. 10(I).

⁴⁹⁸ Second Statement of J. Senn ¶ 7. Registration of historical assets by the Institute of Anthropology and History, which Dr. Gramajo cites in paragraph 28 of his First Statement, describes only the first step under the Law for the Protection of the Cultural Heritage of the Nation. Article 25 of that Law requires that, in order for there to be an official designation, a declaration must be issued through Ministerial Resolution and published in the Official Gazette, none of which occurred prior to the *Lesivo* Resolution for any of the railway equipment conveyed to FVG under the Usufruct. Ex. C-12; Second Statement of J. Senn ¶ 7; Second Statement of H. Posner III ¶ 5.

⁴⁹⁹ See Ex. C-10. See also Second Decision on Jurisdiction ¶ 133.

⁵⁰⁰ Second Statement of H. Posner III ¶ 5.

⁵⁰¹ See Ex. C-22, Contract 402, cl. 1; Ex. C-25, Contract 143, cl. 1.

Bidding Rules stated, "...the rolling materials, and equipment are in a terrible state,"⁵⁰² and all of the railroad equipment had sat idle or been abandoned by the Government for the 27 months between the time FEGUA ceased rail operations in March 1996 and when the railway privatization became effective in May 1998. Some of the assets had been abandoned by the Government for over 25 years before FVG received them.⁵⁰³ The reality, as reflected in the above Railroad Museum award, is that, from 1998 through 2007, FVG restored and operated 15 locomotives and 200 rail cars, and, indeed, restored over 200 miles of railway previously abandoned by the Government.⁵⁰⁴

206. In addition, Mr. Posner personally arranged, at RDC's expense, for several entities from the United States, including the Smithsonian Institution, to work with the Government of Guatemala to increase awareness and appreciation of the importance of the long abandoned Guatemalan railway rolling stock as part of the cultural and historic patrimony of the country.⁵⁰⁵ In August 2003, FEGUA and FVG entered into a Cultural Cooperation Agreement in which FVG granted FEGUA the right to display several historical locomotive and rail cars which had been restored by FVG at the Guatemala City and Zacapa Railroad Museums.⁵⁰⁶ Mr. Posner also engaged in personal outreach on this subject to Guatemalan organizations such as the Railway Friends Foundation, of which Dr. Gramajo was a member, and the Guatemalan historical preservation program, RenaCENTRO.⁵⁰⁷

207. Moreover, for any asset to be considered cultural and historical patrimony under Guatemalan law, it must be at least 50 years old. Of all the railway equipment granted in usufruct to FVG, the only items which met this description were some steam locomotives. Of these, two had been renovated by FVG, and the remainder, at the urging of Mr. Posner, had been

⁵⁰² Ex. C-14, Bidding Rules, Annex 5.2, ¶ 4.1.

⁵⁰³ Second Statement of J. Senn ¶ 19.

⁵⁰⁴ Second Statement of H. Posner III ¶ 5.

⁵⁰⁵ *Id.*

⁵⁰⁶ Second Statement of J. Senn ¶ 7. *See also* Ex. C-29.

⁵⁰⁷ Second Statement of H. Posner III ¶ 5.

delivered for display at the Railroad Museum in Guatemala City.⁵⁰⁸ Among the historic steam locomotives that Mr. Posner had moved to the Railroad Museum were the only two Krupp locomotives in Central America (Nos. 165 and 168).⁵⁰⁹ These locomotives were moved at Mr. Posner's behest from Zacapa to Guatemala City in November 2007, after FVG had been forced to shut down its commercial operations due to the *Lesivo* Resolution, with the cost split equally between FVG and the German Embassy.⁵¹⁰

208. Despite these efforts by FVG in collaboration with or on behalf of FEGUA, Dr. Gramajo states that he began a surreptitious investigation by FEGUA into FVG's use and conservation of the railway equipment mere months after presenting Mr. Posner with the previously mentioned award in August 2005.⁵¹¹ Dr. Gramajo's secret project culminated in an internal FEGUA report documenting the problems,⁵¹² a further investigation by a new Supervisory Commission,⁵¹³ a report by Dr. Gramajo to the Director of Cultural and Natural Assets of the Ministry of Culture and Sports,⁵¹⁴ a formal criminal complaint against FVG in December 2005,⁵¹⁵ and a presentation by Dr. Gramajo to the Ministry of Communications in April 2006.⁵¹⁶ Notably, the results of these many investigations, reports and presentations were never disclosed to or shared with FVG.⁵¹⁷ Further, FVG was *never notified* of the 2005 criminal

⁵⁰⁸ Second Statement of J. Senn ¶ 7. While not explicitly relevant to the issue of the railroad rolling stock, part of the railroad assets was a one-of-a-kind Edwards motor car which FEGUA believed had been scrapped years before the usufruct was granted to FVG. In fact, FVG located the car (which had been abandoned by FEGUA and was in the Guatemala City station complex behind piles of scrap and weeds) and restored it. *Id.*

⁵⁰⁹ Ex. C-60, *Trains Magazine*, "Two Krupp Steam Locomotives Preserved by Ferrovías Guatemala, 26 Nov. 2007.

⁵¹⁰ *Id.*

⁵¹¹ First Statement of A. Gramajo ¶ 28.

⁵¹² Ex. R-16, 19 Aug. 2005 FEGUA Engineering Department Report.

⁵¹³ First Statement of A. Gramajo ¶ 29.

⁵¹⁴ Ex. R-18, 21 Oct. 2005 Report by A. Gramajo to A. Paz.

⁵¹⁵ Ex. R-19, 2 Dec. 2005 Request of Protective Order of Railway Equipment from A. Gramajo to A. Paz.

⁵¹⁶ Ex. R-22, April 2006 FEGUA Presentation at the Ministry of Communications.

⁵¹⁷ Second Statement of J. Senn ¶ 17.

action initiated by Dr. Gramajo until March 2008, and the court has yet to issue a final ruling in that case.⁵¹⁸

Y. Freddie Pérez’s Testimonial *Volte-Face*

209. In a remarkable feat of testimonial *volte-face*, Respondent has obtained a sworn statement from Freddie Pérez, the former General Manager of Expogranel, in which he recants the testimony he previously submitted in this proceeding in connection with Claimant’s Memorial on the Merits. In his first statement dated May 19, 2009 (“First Statement”), Mr. Pérez affirms that his principal, Expogranel, a company which coordinates the collection, storage and shipment of sugar exports produced by Guatemalan sugar mills, was, at the time of the *Lesivo* Declaration in August 2006, in discussions with FVG to enter into a joint venture whereby Expogranel or its affiliates were contemplating participation in an investment of up to \$100 million to rehabilitate and resume railway service in the South Coast corridor.⁵¹⁹ Mr. Pérez further states that, because of the declaration of *lesividad*, Expogranel made the unilateral decision in September 2006 to withdraw from such negotiations and to halt any potential investment in the South Coast project, because it was evident that the actions and clear opposition of the Government of Guatemala against FVG would put FVG out of business.⁵²⁰ Mr. Pérez’s sworn testimony in his First Statement is entirely consistent with a September 16, 2006 letter – a letter that Mr. Pérez *admits he signed* on behalf of Expogranel⁵²¹ – which he sent to FVG shortly after the *Lesivo* Resolution issued:

This is to inform you about our company’s position on the project to restore the railway system from Guatemala City to the southern area of the country.

I am afraid that after the Government of Guatemala’s declaration that *lesion* has been caused by one of the contracts involving your company and FEGUA, we may no longer bring any proposal to a close, for it is uncertain that Ferrovías

⁵¹⁸ Second Statement of J. Senn ¶ 18. The protective measure that was ordered by the Court in May 2006 (Ex. R-27) was based entirely on Dr. Gramajo’s misrepresentations, as FVG had not been legally notified of the suit. *Id.*

⁵¹⁹ First Statement of F. Pérez, cl. 2.

⁵²⁰ *Id.* at cl. 3.

⁵²¹ Second Statement of F. Pérez ¶ 18.

Guatemala will continue operating for the next few years, as required to implement the project.⁵²²

210. In response to Mr. Pérez's First Statement, Respondent has submitted a Second Statement from Mr. Pérez dated September 27, 2010. In his Second Statement, Mr. Pérez disavows the contents of his First Statement in their entirety, claiming that, "[w]hile it is true that the signature at the end of the [First Statement] appears to be mine," he has "no recollection" of having signed the statement.⁵²³ Mr. Pérez also denies having appeared on May 19, 2009 before the notary identified in his First Statement, Mr. Guillermo Iturriaga, to sign the statement. Based upon this new statement of Mr. Pérez, Respondent has accused Claimant of submitting "falsified evidence" in this proceeding.⁵²⁴

211. Mr. Pérez either has a very faulty memory or, perhaps with the encouragement of Respondent and its lawyers, he is simply not telling the Tribunal the truth regarding his First Statement. Claimant has submitted a few documents to help "refresh" Mr. Pérez's recollection. These documents serve to demonstrate that, not only did Mr. Pérez sign his First Statement, he actively participated in its preparation.

212. First, attached is a copy of a portion of Jorge Senn's business appointment calendar from 2009, which shows that Mr. Senn met with Mr. Pérez on April 14, 2009.⁵²⁵ The purpose of that meeting was for Mr. Senn to discuss the proposed statement with Mr. Pérez, and the meeting, in fact, took place on that date.⁵²⁶ Second, attached is a June 12, 1998 notarized statement from Expogranel which appointed Mr. Pérez as General Manager and Legal Representative of Expogranel.⁵²⁷ Mr. Pérez provided this document to Mr. Senn at their April

⁵²² Ex. C-37(b). Unlike his First Statement, Mr. Pérez acknowledges that he signed his September 16, 2006 letter to FVG, but he also incredibly asserts that he signed it only as a "favor" to Jorge Senn, even though he also claims he told Mr. Senn around that very same time that Expogranel had no current interest in pursuing the South Coast project with FVG. Second Statement of F. Pérez, ¶¶ 17-18.

⁵²³ Second Statement of F. Pérez ¶¶ 6, 8.

⁵²⁴ Counter-Memorial on the Merits ¶ 204.

⁵²⁵ Ex. C-121, J. Senn April 2009 business appointment calendar; Third Statement of J. Senn ¶ 79.

⁵²⁶ Third Statement of J. Senn ¶ 79.

⁵²⁷ Ex. C-122, Expogranel appointment of F. Pérez as General Manager and Legal Representative, 12 June 1998.

14, 2009 meeting to assist in the preparation of his First Statement, and the appointment document is specifically referenced at the beginning of that statement.⁵²⁸ Third, attached is email correspondence between FVG’s legal assistant, Pablo Alonzo, and Mr. Pérez, which shows that, on April 15, 2009 – one day after Mr. Senn’s meeting with Mr. Pérez – Mr. Alonzo requested from Mr. Pérez his personal information such as his age, profession, marital status and nationality so it could be used for inclusion in “the **statement** that **you will kindly sign for us**.”⁵²⁹ Mr. Alonzo also notes to Mr. Pérez in his April 15 email that Mr. Senn had already provided him (Mr. Alonzo) with a copy of Mr. Pérez’s record of appointment by Expogranel. After Mr. Pérez failed to respond to Mr. Alonzo, Mr. Alonzo sent him a follow-up email on April 24, 2009, in which he requested the same personal information. Mr. Pérez responded to Mr. Alonzo on the same day with the requested personal information, and that information is set forth in Mr. Pérez’s First Statement.⁵³⁰

213. After Mr. Pérez provided FVG with his requested personal information, Mr. Senn, with Mr. Alonzo and the notary, Mr. Iturriaga, present and listening, called Mr. Pérez on his mobile telephone on or around April 17, 2009 from Mr. Iturriaga’s office and had a conversation with him.⁵³¹ During this conversation, Mr. Senn went over with Mr. Pérez the contents of his proposed witness statement to confirm that it reflected the facts he had personally stated to Mr. Senn at their April 14, 2009 meeting.⁵³² Mr. Pérez confirmed to Mr. Senn and Mr. Iturriaga that the statement accurately reflected what had previously been discussed.⁵³³ The statement that Mr. Pérez confirmed to Mr. Senn and Mr. Iturriaga is Mr. Pérez’s First Statement.⁵³⁴

214. Finally, lest there still be any doubt that Mr. Pérez in fact personally signed his First Statement, we urge the Tribunal to examine the original of this document, which is currently on file with ICSID and contains the original signatures of each of the signatories, and

⁵²⁸ Third Statement of J. Senn ¶ 79. *See also* First Statement of F. Pérez, cl. 1.

⁵²⁹ Ex. C-123, 15 Apr. 2009 email from P. Alonzo to F. Pérez (emphasis added).

⁵³⁰ Ex. C-124, 24 Apr. 2009 email correspondence between P. Alonzo and F. Pérez.

⁵³¹ Third Statement of J. Senn ¶ 81.

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ Third Statement of J. Senn ¶¶ 81-82.

compare it both to Mr. Pérez's original signature on his Second Statement as well as his acknowledged signature on Claimant's Exhibit C-37(b). (For ease of reference, Claimant has included a comparison of these three signatures on one document.⁵³⁵) Claimant respectfully submits that any fair-minded person comparing these three signatures could reach only one conclusion: *they are the signatures of the same person.*

215. In light of the incontrovertible fact that Mr. Pérez personally signed his First Statement after fully reviewing its contents, Respondent's accusation that the First Statement is somehow "falsified" because Mr. Pérez did not personally appear before the notary when he signed is both incorrect and irrelevant. Of course, Mr. Pérez was personally before the notary when he confirmed the contents and accuracy of his statement in a telephone conversation with Mr. Senn during which Mr. Iturriaga was present and listening. Further, by signing his First Statement, Mr. Pérez necessarily accepted, ratified and endorsed its contents. Rather than demonstrating "falsified evidence" on the part of Claimant, what Mr. Pérez's Second Statement actually demonstrates is how the Government of Guatemala has used its tremendous power to pressure one of its citizens to recant and explain away (using truly preposterous reasons) his previous sworn testimony and prior admissions. It serves as a stark reminder of why the Government's declaration of *lesivo* had such a profound effect on Claimant's current and potential customers, investors, suppliers and lenders and such devastating consequences on Claimant's investment.

216. Furthermore, it is worth noting again that Expogranel was not the only potential investor or joint venture partner which promptly withdrew its interest in the South Coast project because of the *Lesivo* Resolution. On September 11, 2006, ITI Development Corporation, a company that had already arranged for debt financing in an amount up to US\$630 million for the South Coast reconstruction project,⁵³⁶ informed FVG that

[t]he issue regarding the concession and the disagreement between the Government of Guatemala and your organization is an obvious impediment to the

⁵³⁵ See Ex. C-125.

⁵³⁶ Ex. C-126, 24 Aug. 2006 letter from ITI Development Corp. to FVG (expressing interest in financing and developing the South Coast railroad reconstruction project and stating that its sister organization had already lined up debt financing in an amount of US\$630 million for the project).

[South Coast] Project on a going forward basis which will, in our view, obstruct your ability to attract investors. . . . We will halt any activity related to the Project until the issues have been permanently resolved at which time we will revisit the potential for our participation therein.⁵³⁷

Z. Claimant’s Press Release Regarding the *Lesivo* Resolution did not Cause Damage to FVG’s Business

217. In its Memorial on the Merits, Claimant explained how the *Lesivo* Resolution placed unbearable financial pressure on FVG by causing a critical number of FVG’s existing and potential customers, suppliers and lenders to refuse to do further business with a private entity in a legal battle with the Government of Guatemala.⁵³⁸ As part of its desperate attempt to deflect responsibility for its own actions, Respondent argues that the damage that resulted to FVG after the Government’s issuance of the *Lesivo* Resolution was not caused by the *Lesivo* Resolution, but by Claimant’s *issuance of a press release* concerning the *Lesivo* Resolution. (In other words, it was not the bullet that killed John, it was the newspaper report on the shooting!) Apparently, according to Respondent, if Claimant had just kept quiet and said nothing about the *Lesivo* Resolution, nothing bad would have happened to it. Respondent’s fanciful theory is errant nonsense with absolutely no factual support.

218. It is certainly true that, on August 28, 2006, FVG issued a press release in English entitled “Guatemalan Government Violates Terms of Railroad Privatization Agreement.”⁵³⁹ FVG also published a Spanish version of this press release in Guatemalan newspapers on September 4, 2006.⁵⁴⁰ Respondent’s argument strongly suggests that the issuance of the *Lesivo* Resolution was not a newsworthy event in Guatemala and that, but for Claimant’s press release, no one in Guatemala – and especially FVG’s customers, suppliers and lenders – would have been made aware of it. Respondent’s argument conveniently ignores the reality that, in addition to Claimant’s press release, as described in detail below, there were numerous newspaper, television and radio reports issued in Guatemala concerning the *Lesivo* Resolution in the days and

⁵³⁷ Ex. C-37(b).

⁵³⁸ Memorial on Merits ¶ 87.

⁵³⁹ Ex. R-190.

⁵⁴⁰ Ex. R-105.

weeks after it issued. Almost all of these local media reports did not quote or rely upon any statements from Claimant’s press release, but, instead, reported on the statements of President Berger and other senior Government officials. Most importantly, these media reports consistently conveyed the foreboding message that the Government had already taken or was about to take away the railway usufruct from FVG. They also consistently reported that the President’s decision to declare the usufruct equipment contract *lesivo* had nothing to do with any alleged legal defects in this contract and everything to do with the Government’s desire to extract major concessions from FVG on the terms of the other usufruct contracts.

219. For example, on August 29, 2006, a *Prensa Libre* article reported that the President’s *lesividad* decision was made “as a result of Ferrovías’ failure to give maintenance to the rails and lack of investment in FEGUA.”⁵⁴¹ Attorney General Mario Gordillo commented in the same article that in the next few days he would “undertake measures to file the process that *will eventually render the [FVG] contract invalid.*”⁵⁴² Attorney General Gordillo made similar statements in which he repudiated FVG’s Usufruct rights in a September 7, 2006 news article.⁵⁴³ On August 30, 2006, an article in *El Periodico* bore the headline “Ferrovías de Guatemala *No Longer Has Locomotives,*” thereby conveying the message that the Government had already taken away the rolling stock FVG needed to operate the railroad.⁵⁴⁴ On September 6, 2006, *Siglo XXI* reported on the Government’s “take it or leave it” settlement proposal that was presented to FVG on August 24, 2006.⁵⁴⁵ The article accurately reported that the Government made its proposal to FVG just before it published the *Lesivo* Resolution and that the proposal contemplated at least *14 amendments* to the usufruct contracts.⁵⁴⁶ The 14 amendments demanded by the Government included (i) not holding the State responsible for evicting squatters from the railway tracks, (ii) changing (*i.e.*, increasing) the profit percentage that FVG

⁵⁴¹ Ex. C-127, *Prensa Libre*, “Berger Declares *Lesividad* of Ferrovías Contract,” 29 Aug. 2006 (emphasis added).

⁵⁴² *Id.*

⁵⁴³ Ex. C-128, *Prensa Libre*, “Actions to Recover FEGUA: The PGN Will File Suit to Rescind Ferrovías Contract,” 7 Sept. 2006.

⁵⁴⁴ Ex. C-129, *El Periodico*, “Ferrovías de Guatemala No Longer Has Locomotives,” 30 Aug. 2006 (emphasis added).

⁵⁴⁵ Ex. C-130, *Siglo XXI*, “Ferrovías’ Contracts: 14 Changes Intended,” 6 Sept. 2006.

⁵⁴⁶ *Id.*

paid to the Government, (iii) modification of the Government's Trust Fund contribution obligations, (iv) abandonment of the breach of contract arbitrations FVG had brought against FEGUA, and (v) allowing "other [interested] investors" (*i.e.*, Ramón Campollo) to take part in unrestored sections of the railway.⁵⁴⁷ Notably, no specific changes to the usufruct equipment contracts are mentioned in the article. Instead, the article vaguely states in a sidebar that the Government wants to "amend the causes that make the contract *lesivo* to the State" and "modify [*i.e.*, increase] the annual payment that the usufructary must pay to FEGUA."⁵⁴⁸

220. On September 8, 2006, President Berger gave an interview regarding the declaration of *lesividad* and the situation with FVG and, according to numerous news reports, he emphatically stated that the reason *lesivo* had been declared had nothing to do with any alleged "legal defects" in the equipment contracts, but because FVG had not fulfilled its alleged commitment under Contract 402 to reopen the South Coast corridor.⁵⁴⁹ As importantly – and reflective of the Government's bad faith negotiation posture – President Berger made clear in this interview that FVG had 90 days (*i.e.*, the statutory deadline for the Government to file its *lesivo* action in the *Contencioso Administrativo* court) to guarantee a \$50 million investment to

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ Ex. C-131, *Diario de Centro América*, "Guatemala Needs a Competitive Railroad," 5 Sept. 2006 ("Berger explained that the declaration of *lesividad* arises from the fact that the US\$50 million investment under said contract did not occur. However, he added, Ferrovías has a 90-day term to enter into dialogue with the corresponding authorities."); Ex. C-132, *El Independiente* report, third broadcast, 8 Sept. 2006 ("[I]f Ferrovías wants to continue managing the Guatemalan railroad, it should start the construction of a wide gauge; otherwise, they should better start packing up, as understood from the remarks of the Head of State, Oscar Berger."); Ex. C-133, *La Hora*, "Berger Underestimates Ferrovías," 8 Sept. 2006 (stating that President Berger declared FVG's contract *lesivo* because it had not invested the \$50 million required to carry out railroad operations in the country); Ex. C-134, *Prensa Libre*, "Ferrovías Objects *Lesividad*," 8 Sept. 2006 ("Berger declared *lesividad* of the contract based on the corporation's failure to provide maintenance to the rails and lack of investment in FEGUA."); Ex. C-135, *El Periódico*, "Ferrovías Had Been Warned, Says Berger," 9 Sept. 2006 ("Oscar Berger stated that the decision of declaring that two contracts granting equipment Ferrovías are *lesivos* is the result of the corporation's failure to comply with investments in 'new cars and improvements to the services.'"); Ex. C-132, *Noticiero Guatevisión* report, 8 Sept. 2006 (President Berger stating that "the rights of the Guatemalan people have been harmed, as it [FVG] has failed to make the investment or render the services. I respect Ferrovías very much, but I think it does not have the financial capability to do what it has to do.").

rebuild the South Coast corridor and, if FVG failed to do so, he would take away the railway concession from FVG and call for a new bidding process.⁵⁵⁰

221. Thus, around the same time FVG issued its press release, the citizens of Guatemala and FVG's customers were bombarded by a virtual avalanche of newspaper, television and radio reports where the President of the Republic and other high-level Government officials stated, in no uncertain terms, that the Government was at war with FVG and that it was going to repudiate and take the railway usufruct away from FVG and award it to someone else (*i.e.*, Ramón Campollo) unless FVG paid the Government's \$50 million ransom demand in 90 days. It was these types of statements *by Respondent*, not any press release from FVG, which confirmed to the entire country that FVG was, in fact, a "dead man walking."

222. Moreover, Respondent's theory that Claimant's damages were an intentional, self-inflicted wound, is fundamentally flawed because Respondent has not presented *any evidence* – no witnesses and no documents – that any current or prospective customer, supplier, lender or lessee of FVG first learned about the *Lesivo* Declaration from FVG's August 28, 2006 press release or took any action as a result of it. To the contrary, Claimant's third party witnesses state that they first learned about the declaration of *lesividad* from media reports quoting President Berger and other Government sources such as the ones described above.⁵⁵¹

⁵⁵⁰ Ex. C-136, *Siglo XXI*, "Dispute Between the Government and Ferrovías Gets Worse," 5 Sept. 2006 ("The president assures that the problem would be solved if Ferrovías gives a formal statement to guarantee a \$50-million (around Q.380-million) investment in the Pacific route."); C-137, *Siglo XXI*, "Seeking an Agreement With Ferrovías," 9 Sept. 2006 ("President Oscar Berger assured that the declaration of *lesividad* involving the contract of Ferrovías' operations granted in 1998 could be revoked, provided that this corporation is committed to invest \$50 million."); Ex. C-135, *El Periódico*, "Ferrovías Had Been Warned, Says Berger," 9 Sept. 2006 ("President Berger accepted that, during a meeting held with representatives of the corporation, he proposed that if the company makes an investment of some US\$50 million he would no longer invoke *lesividad*."); C-133, *La Hora*, "Berger Underestimates Ferrovías," 8 Sept. 2006 (President Berger quoted as stating "If [FVG] comes to us saying that they will invest \$50 million, and then I see works being carried out on the broad-gauge railroad, they will have our support."); Ex. C-131, *Diario de Centro América*, "Guatemala Needs a Competitive Railroad, 5 Sept. 2006 ("Berger explained that the declaration of *lesividad* arises from the fact that the US\$50 million investment under said contract did not occur. However, he added, Ferrovías has a 90-day term to enter into dialogue with the corresponding authorities."); Ex. C-132, *Los Reporteros* report, 4 Sept. 2006 ("the President of the Republic referred to the problem that exists in connection with Ferrovías, who has 90 days to comply with the commitment of investing in the rehabilitation projects of the railroad."); Ex. C-138, *Prensa Libre*, "Railway Concession: Berger Considers Another Bidding Process," 9 Sept. 2006 ("President Oscar Berger does not discard the possibility of calling for a new bidding process for railway concession").

⁵⁵¹ First Statement of Planos y Puntos/Generadora del Sur (Gesur), cl. 3; Second Statement of Planos y Puntos/Gesur ¶ 6; Second Statement of M. Recinos, ALTRACSA ¶ 7; Second Statement of M. Jiménez, Reinter ¶ 5;

These witnesses further state that their respective decisions to stop doing or not do business with FVG were not influenced or encouraged by anything Claimant said or did, but because, as established businesspeople in Guatemala, they each well knew and understood that, once the Government declares any aspect of a private party's concession or usufruct to be *lesivo*, then that party immediately becomes too risky to do business with.⁵⁵² Importantly, these witnesses affirm that, but for the *Lesivo* Resolution, they would have continued to do business with FVG.⁵⁵³

AA. The *Contencioso Administrativo* Proceeding has not Afforded Claimant Due Process and Remains Unresolved to this Day

223. The *Contencioso Administrativo* proceedings have not only failed to comply with the mandatory procedural due process requirements of Guatemalan law, they have also not provided Claimant with any semblance of substantive due process. Respondent and its expert, Mr. Aguilar, assert that the *Contencioso Administrativo* process has been conducted in accordance with the procedural due process requirements of Guatemalan law and has afforded FVG with a full and fair opportunity to be heard and assert counterclaims against the Government seeking compensation.⁵⁵⁴ Nothing could be further from the truth.

224. First of all, Mr. Aguilar's assertion that Guatemalan law grants an affected private party with the right to assert counterclaims against the Government in a *Contencioso Administrativo* action seeking confirmation of a declaration of *lesividad* is simply incorrect. The provision which Mr. Aguilar cites, Article 40 of the Law of the *Contencioso Administrativo*, states "[i]n the cases to which subsection 2) of Article 19 refers, the counterclaim may be made in the answer to the complaint, in the same cases in which it may be made in the civil

Second Statement of M. Cifuentes, MAQCISA ¶ 4; Second Statement of A. Arriola, Grupo Unisuper ¶ 5. *See also* Exs. C-34, C-35(c), C-35(e), C-35(g), C-36 (letters from existing and potential FVG customers and suppliers informing it of their respective decisions to not do further business with FVG based upon local news and media reports concerning the *Lesivo* Resolution).

⁵⁵² First Statement of Planos y Puntos/Gesur, cl. 3; Second Statement of Planos y Puntos/Gesur ¶¶ 4, 7; Second Statement of M. Recinos, ALTRACSA ¶¶ 3, 7; Second Statement of M. Jiménez, Reinter ¶ 4; Second Statement of M. Cifuentes, MAQCISA ¶ 4; Second Statement of A. Arriola, Grupo Unisuper ¶ 6.

⁵⁵³ Second Statement of Planos y Puntos/Gesur ¶ 7; Second Statement of M. Recinos, ALTRACSA ¶ 7; Second Statement of M. Jiménez, Reinter ¶ 3; Second Statement of M. Cifuentes, MAQCISA ¶ 3; Second Statement of A. Arriola, Grupo Unisuper ¶ 6.

⁵⁵⁴ Counter-Memorial on Merits ¶¶ 32, 303-04; Expert Report of J.L. Aguilar ¶¶ 51, 54-57.

proceeding.”⁵⁵⁵ Thus, this provision only allows counterclaims to be asserted in cases brought pursuant to Article 19, subsection 2) of the *Contencioso Administrativo* law. Article 19, subsection 2) cases are those which concern “disputes stemming from administrative contracts and concessions,” *i.e.*, *breach of contract* disputes between the Government and private parties.⁵⁵⁶ Actions to confirm a declaration of *lesividad*, however, are not brought pursuant to Article 19, subsection 2) of the *Contencioso Administrativo* law but, rather, are brought pursuant to Article 19, subsection 1), which covers “disputes over *acts* or resolutions of the administration and the *decentralized and autonomous state entities*,” *i.e.*, actions to confirm declarations of *lesividad*.⁵⁵⁷ In other words, Guatemalan law only allows counterclaims to be asserted by a private party in a breach of contract dispute with the Government. There is no corresponding private party right to assert a counterclaim or claim for compensation against the Government in a *Contencioso Administrativo* action to confirm a *lesivo* decree.⁵⁵⁸

225. Respondent and Mr. Aguilar assert that Guatemala “strictly observed the established procedure to *declare* FVG’s usufruct contracts *lesivo*,”⁵⁵⁹ but, notably, make no mention of the numerous procedural violations that have occurred in the *Contencioso Administrativo* proceedings to confirm the *Lesivo* Resolution. Under the terms of the Administrative Litigation Law of Guatemala and the supplementary rules of the Judicial Branch Law, a *Contencioso Administrativo* litigation, including an action to confirm a declaration of *lesividad*, must be resolved by judgment approximately *six months* (137 business days) from the commencement of the action.⁵⁶⁰ However, with regard to the Government’s action to confirm the *Lesivo* Resolution, more than *four years* have elapsed since the Government first filed the suit on November 24, 2006, and *no judgment* has been rendered to date.⁵⁶¹ Furthermore, in conducting an administrative litigation, Guatemalan law requires that the *Contencioso*

⁵⁵⁵ RL-49, Contentious Administrative Law, Executive Order No. 119-96 (21 Nov. 1996) (“Executive Order No. 119-96”), art. 40.

⁵⁵⁶ RL-49, Executive Order No. 119-96, art. 19(2).

⁵⁵⁷ RL-49, Executive Order No. 119-96, art. 19(1) (emphasis added); Third Opinion of E. Mayora ¶ 47.

⁵⁵⁸ First Opinion of E. Mayora ¶ 8.2.3.

⁵⁵⁹ Counter-Memorial on Merits ¶ 392 (emphasis added).

⁵⁶⁰ Statement of C. Franco ¶¶ 8, 16.

⁵⁶¹ Statement of C. Franco ¶¶ 9, 10(h).

Administrativo court meet several mandatory procedural deadlines throughout the process, *none of which have been met in FVG's case*. In particular:

- After a *Contencioso Administrativo* litigation is filed, the court is required to serve the complaint and summons on the plaintiff, defendants, and other parties within two business days.⁵⁶² In violation of this procedural requirement, FVG was not served with the Government's complaint and summons until May 15, 2007, which was 100 business days after the case was first filed on November 24, 2006.⁵⁶³
- Once the Administrative Court has received the parties' responses to the complaint, it is required to issue the corresponding resolutions within one business day, and then it must serve the plaintiff, the defendant and summoned third parties within two business days, ordering the receipt of evidence for a period of 30 business days, unless the litigation exclusively involves matters of law.⁵⁶⁴ In FVG's case, its response to the Government's complaint was filed on May 12, 2008.⁵⁶⁵ The Administrative Court, however, did not order the receipt of evidence until March 3, 2009, over 182 business days after all responses to the Government's complaint were received.⁵⁶⁶
- Upon the expiration of the 30-day evidentiary period, the Administrative Court has one business day to set the time and date for a judgment hearing and a maximum of two business days to serve such resolution to the plaintiff, the defendant and other summoned parties, taking into account that the judgment hearing must be held within a 15 business days after the expiration of the evidentiary period.⁵⁶⁷ In FVG's case, the evidentiary period in the *Contencioso Administrativo* proceedings concluded on April 16, 2009. The Administrative Court, however, did not set the date of the judgment hearing until April 12, 2010, and the judgment hearing did not take place until May 19, 2010, over 256 business days after the conclusion of the evidentiary period.⁵⁶⁸
- Finally, the Administrative Court has a period of 15 business days to issue its judgment after the conclusion of the judgment hearing.⁵⁶⁹ In violation of this due process requirement, the court in FVG's case has *yet to issue its judgment*, more

⁵⁶² Statement of C. Franco ¶ 10(c).

⁵⁶³ *Id.*; Ex. C-160; Ex. C-11.

⁵⁶⁴ Statement of C. Franco ¶ 10(e).

⁵⁶⁵ *Id.* ¶ 10(d); Ex. C-139.

⁵⁶⁶ Statement of C. Franco ¶ 10(e); Ex. C-140.

⁵⁶⁷ Statement of C. Franco ¶ 10(f).

⁵⁶⁸ *Id.*; Ex. C-141.

⁵⁶⁹ Statement of C. Franco ¶ 10(h).

than 184 business days after the judgment hearing concluded, and more than four years since the action to confirm the *Lesivo* Resolution was first filed.⁵⁷⁰

226. Respondent and Mr. Aguilar are equally disingenuous in asserting that Claimant has been afforded a full and fair opportunity to be heard in the *Contencioso Administrativo* proceedings. The one and only evidentiary proceeding in the case took place on April 28, 2009 – almost two and half years after the case was first brought. This proceeding consisted of FEGUA propounding leading questions to four Government witnesses – América Gonzalez, Oscar Cruz Tello, Francisco Alberto Aldana and Arturo Gramajo – and one FVG witness, Jorge Senn. The questions asked of each of these witnesses focused almost exclusively on having them confirm the basic facts and allegations underlying the Government legal opinions that served as the basis for the *Lesivo* Resolution. Among the identical questions that were asked of América Gonzalez, Oscar Cruz Tello and Francisco Alberto Aldana, each of whom were involved in the rendering of the Government’s legal opinions on Contracts 143/158, were:

- “Answer whether there had to be a new bidding process for the execution of [Contract 143], as amended by [Contract 158].”
- “Answer whether a new bidding process was carried out for the execution of [Contract 143], as amended by [Contract 158].”
- “Answer whether [Contract 43], as amended by [Contract 158], was approved by Government Resolution.”
- “Answer whether Hugo René Sarceño Orellana, who as Overseer of [FEGUA] signed [Contract 143], as amended by [Contract 158], had the authority to approve the same.”
- “Answer whether Hugo René Sarceño Orellana, who as Overseer of [FEGUA] signed [Contract 143], as amended by [Contract 158], complied with and applied the procedure provided for by the Government Contracting Law for the execution of the aforesaid instruments.”⁵⁷¹

⁵⁷⁰ *Id.*

⁵⁷¹ Ex C-142, *Contencioso Administrativo* Case No. 389-2006, 13 Apr. 2009 deposition questions propounded by FEGUA to A. Gonzalez, O. Cruz, F. Alberto, A. Gramajo, J. Senn.

Dr. Gramajo and Mr. Senn were also asked these questions, even though, as a non-lawyers, they were clearly unqualified.⁵⁷² Notwithstanding this fact, Dr. Gramajo, unlike Mr. Senn, proceeded to answer several questions that called for legal conclusions over FVG's objections.⁵⁷³ Dr. Gramajo was also allowed, over FVG's objections, to answer several questions of which he had no personal knowledge, because the events in question took place before he had assumed the position of FEGUA Overseer.⁵⁷⁴

227. Further, the witnesses' responses to the deposition questions were limited by the *Contencioso Administrativo* court to "yes," "no" or "I don't know" responses, with little or no opportunity to explain their answers and no requirement that they provide any legal or evidentiary support for their answers.⁵⁷⁵ Claimant was allowed to conduct limited cross-examination of the witnesses at the April 28, 2009 hearing, but, unlike FEGUA's questions (all of which were allowed by the court), most of Claimant's questions were overruled by the court, principally on grounds that they called for legal conclusions or personal judgment.⁵⁷⁶

228. Thus, rather than a search for the truth, the focus of the *Contencioso Administrativo* proceedings has been on simply repeating and restating the Government's baseless allegations that underlie the *Lesivo* Resolution. There has been no attempt or allowance by the court to go beyond the surface of Government's allegations to determine whether, as a substantive matter, Contracts 143/158 did not comply with the technical requirements of Guatemalan law, why the Government accepted FVG's performance under the contracts while doing nothing to fix their alleged legal defects, or why Overseer Sarceño decided to enter into these contracts in the first place. Indeed, Overseer Sarceño was *never called as a witness in the case*. And, perhaps most egregiously, not a single Government witness was ever asked to explain how the alleged defects in Contracts 143/158 rendered these contracts substantively "harmful to the interests of the State."

⁵⁷² *Id.*

⁵⁷³ *See, e.g.*, Ex. C-143, Case No. 389-2006, Judicial Deed of 28 Apr. 2009 testimony, A Gramajo responses to questions VII, VIII, XVIII, XIX, XX, XXI, XXII, XXIII, XXVII, XXIX, XXXIII.

⁵⁷⁴ *Id.*

⁵⁷⁵ Ex. C-143.

⁵⁷⁶ *Id.*

III. LEGAL ARGUMENTS

229. The *Lesivo* Resolution violated the foreign investment protections of CAFTA because, although the Resolution, in of itself, did not amount to a *de jure* nullification of Claimant's investment under Guatemalan law, it was well understood and correctly perceived in Guatemala, by both the Government and citizens alike, that the *de facto* effect of the President's declaration of *lesividad* against FVG was to make that company too risky to do business with on a going forward basis, thereby destroying the value of Claimant's investment. All concerned understood the practical effect of the *Lesivo* Resolution for at least two key reasons: *First*, the President and other senior Government officials made it crystal clear, by numerous public statements against FVG which followed the publication of the *Lesivo* Resolution, that the Government had repudiated FVG's usufruct rights *in their entirety* without distinguishing between the various Usufruct Contracts or articulating the technical legal distinctions that Respondent is now attempting to draw in this proceeding. In particular, the Government linked its publication of the *Lesivo* Resolution not to any alleged technical legal defects in the usufruct equipment contracts, but to FVG's failure to restore and re-open the entire South Coast corridor and stated the Government's intention to take the railway usufruct away from FVG and give it to "other [interested] investors" unless FVG came up with an additional investment of \$50 million and acceded to the Government's demands for significant changes in the terms of the right-of-way and trust fund contracts.

230. *Second*, it is beyond peradventure that the *Contencioso Administrativo* court proceedings that are used by the Government to confirm a declaration of *lesividad* are, in practice, a futile exercise. Such proceedings are either settled on the Government's terms or fall into a legal black hole. Based on substantial research, Claimant is aware of only one instance in which a declaration of *lesividad* was confirmed by a *Contencioso Administrativo* court, and *no instance* in which a declaration of *lesividad* has been rejected on substantive grounds. In all of the other known *lesividad* cases which were not settled or dismissed on technical legal grounds, final judgments still remain pending (at least one of which has been pending for more than two decades). The futile nature of the *Contencioso Administrativo* proceedings has been amply confirmed in the present case: with absolutely no dilatory actions by Claimant, only one evidentiary hearing has taken place in the case – and that hearing did not address the substantive

merits of the Government’s allegations. In clear violation of the express procedural requirements of Guatemalan law, the Administrative Court’s decision to confirm the *Lesivo* Resolution still remains pending more than four years after the Government first initiated the proceedings and more than three years after FVG suspended railway operations in the wake of the unsustainable losses and operational difficulties it experienced as a result of the *Lesivo* Resolution.

231. Thus, regardless of whatever technical legal effect the *Lesivo* Resolution had or didn’t have on Claimant’s investment under Guatemalan law, the practical effect of the Resolution was to cause the financial and commercial decimation of Claimant’s investment. The Government’s attempt to attribute such decimation to Claimant’s own actions rather than the *Lesivo* Resolution, is feckless.

A. Respondent Misstates and Mischaracterizes the Nature of the Law of *Lesividad* in Guatemala

232. As a starting point, it is important to note that Respondent’s asserted legal bases for the *Lesivo* Resolution against Contracts 143/158 – (1) lack of Presidential approval by *Acuerdo Gubernativo* and (2) failure to subject the contracts to a new public bidding process – rest upon a premise that, under Guatemalan law, the “interests of the State” and “legality” are one in the same, and, therefore, Respondent had no choice but to declare *lesivo* once it had identified the alleged illegalities in these contracts. As Dr. Mayora explains this is simply not the case.

233. Under Guatemalan law, the concepts of “legality” and “harmfulness to the interests of the State” are two separate and distinct legal concepts. *Lesividad* is a legal *procedure* under Guatemala law; it is not part of the substantive law of contracts, but part of the *Ley de lo Contencioso Administrativo* (Administrative Procedures and Review Act) (“APRA”).⁵⁷⁷ Article 20 of the APRA requires the existence of some identifiable harm to the interests of the State, as determined by the President and his Cabinet Ministers.⁵⁷⁸ In other words, by definition, a declaration of *lesividad* concerns not the validity of a contract *per se*, but whether the contract

⁵⁷⁷ CL-43, Administrative Procedures and Review Act, Decree 199-96, Title II, Ch. 1 (21 Nov. 1996) (“Decree 119-96, Title II, Ch. 1”).

⁵⁷⁸ *Id.*

which resulted from the act of a public official or entity is substantively harmful to the interests of the State.

234. *Lesividad* is not intended to address or resolve *illegalities* of administrative contracts because, under Guatemalan law, the State has available to it separate and distinct remedies in the civil and administrative courts to declare a contract void *ab initio* or voidable due to various legal defects.⁵⁷⁹ Respondent's wrongheaded notion that a declaration of *lesividad* is the only means available to the State to dispute or address the legality of a Government contract would render useless, meaningless, and purposeless these substantial areas of Guatemalan law.⁵⁸⁰

235. Thus, under Guatemalan law, a contract may be technically illegal and void or voidable, but still not be harmful to the interests of the State. Conversely, a perfectly lawful contract may still be *lesivo* to the interests of the State. In contrast, under Respondent's nonsensical interpretation, where harm to the interests of the State is coextensive with any form of *illegality*, the State is *required* to declare a legally defective contract *lesivo* even though it is otherwise substantively *favorable* to the interests of the State.⁵⁸¹

B. Guatemala Has Indirectly Expropriated Claimant's Investment

236. In its Counter-Memorial, Respondent argues that Claimant has failed to demonstrate any of the elements of an indirect expropriation pursuant to CAFTA and customary international law. As discussed below, Respondent's arguments rest upon misstatements and mischaracterizations of what CAFTA and the applicable law require and the actual factual record before this Tribunal.

237. Before addressing the specific flaws with Respondent's arguments, it bears repeating the definition of an indirect expropriation under CAFTA: an indirect expropriation occurs where a Government action or series of actions has an "effect equivalent to direct

⁵⁷⁹ See Claimant's Post-Hearing Brief on Jurisdiction, 31 Mar. 2010, ¶¶ 2-6 (discussing remedies available under the Civil Code of Guatemala for seeking the nullity of an illegal or legally defective contract); Third Opinion of E. Mayora ¶¶ 16-17.

⁵⁸⁰ Third Opinion of E. Mayora ¶ 22.

⁵⁸¹ Third Opinion of E. Mayora ¶ 20.

expropriation *without formal transfer of title or outright seizure*.⁵⁸² This obvious point is overlooked in light of various arguments Respondent raises throughout its indirect expropriation analysis, which emphasize and rely upon the point that, after the *Lesivo* Resolution (and even up until this day), the Government has not formally dispossessed FVG of its rights under the Usufruct Contracts.⁵⁸³ *By definition*, Claimant is not required to show that the Government has ever formally seized or terminated FVG’s rights under any of the Usufruct Contracts, but, rather, must only demonstrate that an indirect expropriation occurred under the three-factor test set forth in CAFTA Annex 10-C.

1. Respondent’s Five-Point “Effects Test” is Not Found in or Supported by the Plain Text of CAFTA or Customary International Law

238. CAFTA Annex 10-C states that, in order for a State action or series of actions to constitute an expropriation, it must “interfere[] with a tangible or intangible property right or property interest in an investment.”⁵⁸⁴ For a claim of indirect expropriation, Annex 10-C sets forth three specific factors this Tribunal must consider as part of its *fact-based inquiry*:

(i) the economic impact of the government action . . . (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.⁵⁸⁵

239. Rather than following CAFTA’s clear guidance on the appropriate indirect expropriation standard and factors, Respondent insists that customary international law requires Claimant to satisfy an “effects test,” which Respondent asserts is comprised of the following five factors:

⁵⁸² RL-61, CAFTA Annex 10-C, ¶ 4 (emphasis added).

⁵⁸³ *See, e.g.*, Counter-Memorial on Merits ¶ 263 (“Contract 143/158 indisputably remains in effect. Until that determination is made, [Claimant] retains all rights it may have under Contract 143/158.”); ¶ 264 (“Claimant remains in full possession of its rights pending the decision of the *Contencioso Administrativo* court regarding Contract 143/158’s validity.”); ¶ 267 (“well after the *Lesivo* Declaration, Claimant maintained all of its rights pursuant to Contract 143/158”); ¶ 330 (“Also relevant here is the fact that, while the administrative phase of the *lesividad* process is pending, Claimant retains full ownership and possession of the rights granted pursuant to each of the Usufruct Contracts.”); ¶ 339 (“Claimant’s alleged right to compensation is not yet ripe, because the *Contencioso Administrativo* court has not yet decided the matter and thus Contract 143/158 remains valid and in full force”).

⁵⁸⁴ RL-61, CAFTA Annex 10-C, ¶ 2.

⁵⁸⁵ RL-61, CAFTA Annex 10-C, ¶ 4(a).

First, [Claimant] must demonstrate that it possesses rights in the investment under domestic law. *Second*, Claimant must show that Guatemala’s action . . . have (sic) interfered with the rights outlined by Claimant under the first element. *Third*, Claimant must prove that Guatemala’s interference with its rights meet the high degree of interference required to constitute an expropriation. *Fourth*, Claimant must prove that the interference is irreversible or irrevocable. *Fifth*, and finally, Claimant must prove that the matter is ripe.⁵⁸⁶

240. Respondent’s five-point “effects test” for indirect expropriation finds no support in CAFTA or customary international law. Although Respondent cites certain investment awards where tribunals discussed or applied what purports to be an “effects test,” none of these cases articulate all of the five individual elements that Respondent presents here as necessary requirements to prove an indirect expropriation. For example, *National Grid, P.L.C. v. Argentine Republic*, cited by Respondent,⁵⁸⁷ does not use the term “effects test,” and merely discusses what other international tribunals have found to be the necessary level of economic impact or deprivation a State action must have on an investor’s investment in order to constitute an indirect expropriation.⁵⁸⁸

241. With respect to the first element of Respondent’s alleged “effects test” – the investor must demonstrate that it possesses rights in the investment under domestic law – *EnCana Corporation v. Republic of Ecuador* merely states that, for there to be an expropriation of an investment, “the rights affected must exist under the law which creates them.”⁵⁸⁹ However, the *EnCana* tribunal did not raise this condition in the context of a purported “effects test” but, rather, in the context of considering the preliminary question of whether, under the terms of the subject BIT, it could determine and apply the relevant taxation law of Ecuador to analyze and decide the claimant’s expropriation claim.⁵⁹⁰ As discussed below, the meaning of the *EnCana* tribunal’s dictum is akin to CAFTA’s requirement that, for there to be an expropriation, there

⁵⁸⁶ Counter-Memorial on Merits ¶ 231.

⁵⁸⁷ See Counter-Memorial on Merits ¶ 227.

⁵⁸⁸ RL-115, *National Grid, P.L.C. v. Argentine Republic*, UNCITRAL, Award (3 Nov. 2008) (“*National Grid Award*”), ¶ 149.

⁵⁸⁹ RL-98, *EnCana Corp. v. Republic of Ecuador*, UNCITRAL, Award (3 Feb. 2006) (“*EnCana Award*”), ¶ 184.

⁵⁹⁰ *Id.*

must be a property right or property interest with which the government's actions interfere; it does not impose a strict requirement that the investment must be technically valid under the host State's domestic law as Respondent purports.⁵⁹¹

242. Nor do Respondent's other legal authorities support this characterization. *International Thunderbird*,⁵⁹² *Plama*⁵⁹³ and *Phoenix Action*⁵⁹⁴ all considered the question of whether property rights existed in the context of deceitful conduct on the part of the investor,⁵⁹⁵ while *Generation Ukraine*⁵⁹⁶ analyzed the nexus between the expenditure of funds by the investor and its acquisition of a legal right in an investment.⁵⁹⁷ None of these situations are at issue in the present case, nor do these awards support Respondent's contention that this Tribunal must find that technical illegalities under Guatemalan law deprive RDC's investment of its property rights under CAFTA. In fact, as specifically stated by the tribunals in *International Thunderbird* and *Generation Ukraine*, an international tribunal has no jurisdiction to investigate and determine the legality under domestic law of an investment that alleges harm from a government measure,⁵⁹⁸ but rather "[t]he perspective is of an international law obligation examining national conduct as a 'fact.'"⁵⁹⁹

243. There is also no legal support whatsoever for the last two points of Respondent's "effects test," viz., that Claimant must prove that the State's interference is "irreversible or

⁵⁹¹ Counter-Memorial on the Merits ¶ 236.

⁵⁹² RL-104, *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, Award (26 Jan. 2006) ("*International Thunderbird Award*").

⁵⁹³ RL-122, *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award (27 Aug. 2008) ("*Plama Award*").

⁵⁹⁴ RL-121, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) ("*Phoenix Action Award*").

⁵⁹⁵ See RL-104, *International Thunderbird Award*, ¶¶ 164, 166, 208; RL-122, *Plama Award*, ¶¶ 135-46; R-121, *Phoenix Action Award*, ¶¶ 101-13.

⁵⁹⁶ RL-7, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 Sept. 2003) ("*Generation Ukraine Award*").

⁵⁹⁷ RL-7, *Generation Ukraine Award*, ¶¶ 18.3-18.4.

⁵⁹⁸ RL-104, *International Thunderbird Award*, ¶¶ 125-127 (stating that it was not the tribunal's role to determine if Respondent's gambling equipment was prohibited under Mexican law); RL-7, *Generation Ukraine Award*, ¶ 9.3 (stating the tribunal has no jurisdiction to investigate and rule upon the alleged formal defect raised by the Respondent).

⁵⁹⁹ RL-104, *International Thunderbird Award*, ¶ 127.

irrevocable” and that a claim must be “ripe.” Regarding Respondent’s “irreversible or irrevocable” requirement, while customary international law holds that an indirect expropriation cannot take place where the Government’s interference with an investment is “ephemeral,” it is also well-established that “[a] taking of property includes ... any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property *within a reasonable period of time after the inception of such interference.*”⁶⁰⁰ How long is “reasonable” will “*depend on the specific circumstances of the case.*”⁶⁰¹ As the tribunal in *Azurix Corp. v. Argentine Republic* noted:

Arbitral tribunals have considered that a measure is not ephemeral if the property was out of the control of the investor for a year (*Wena*) or an export license was suspended for four months (*Middle East Cement*), or that the measure was ephemeral if it lasted for three months (*S.D. Myers*). These cases involved a single measure. When considering multiple measures, it will depend on the duration of their cumulative effect. Unfortunately, there is no mathematical formula to reach a mechanical result. How much time is needed must be judged by the specific circumstances of each case. As expressed by the tribunal in *Generation Ukraine*: “The outcome is a judgment, *i.e.*, the product of discernment, and not the printout of a computer program.”⁶⁰²

244. Thus, customary international law rightly recognizes that indirect expropriation is a fact-specific inquiry and that there is no hard and fast rule that an indirect expropriation can only occur where the Government’s interfering measure is “irreversible and permanent.” In this regard, Respondent’s reliance on the award in *Tecmed v. United Mexican States* is misplaced.⁶⁰³ In *Tecmed*, the tribunal noted that an indirect expropriation *can* occur where the challenged State measure is “irreversible and permanent.”⁶⁰⁴ However, as the foregoing discussion demonstrates,

⁶⁰⁰ CL-184, Louis B. Sohn and R. R. Baxter, *Responsibility of States for Injuries to Aliens*, 55 Am. J. Int’l L. 545, 553 (1961) (emphasis added).

⁶⁰¹ RL-85, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (“*Azurix Award*”), ¶ 313 (emphasis added).

⁶⁰² *Id.*; See also RL-126, *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award (12 Nov. 2000) (“*S.D. Myers First Partial Award*”), ¶ 283 (“in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or *temporary*”) (emphasis added).

⁶⁰³ See Counter-Memorial on Merits ¶ 328.

⁶⁰⁴ RL-133, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 Award (29 May 2003) (“*Tecmed Award*”), ¶ 116 (“Therefore, it is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that . . . the economic

the *converse is not necessarily true, i.e.*, indirect expropriations *can* still occur and have been found to occur where the State action is *not* irreversible or permanent. This conclusion was acknowledged by the *Tecmed* tribunal itself, which, in the same paragraph cited by Respondent, stated, “[u]nder international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and *so long as the deprivation is not temporary.*”⁶⁰⁵

245. Moreover, even if there were a requirement under customary international law that, to prove an indirect expropriation, an aggrieved investor must show that the State’s interfering measure is permanent and irreversible, Claimant has satisfied this supposed requirement here. As discussed in further detail *infra*, the failure of the *Contencioso Administrativo* court to issue its ruling on the *Lesivo* Resolution, or even render any meaningful review, more than four years after the action was first filed by Respondent and more than three years after FVG was forced to shut down its rail operations, makes the holding of the tribunal in *Santa Elena v. Costa Rica* particularly relevant to Claimant’s situation:

A decree which heralds a process of administrative and judicial consideration of the issue in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking.⁶⁰⁶

246. Further, tribunals have recognized that government actions are not easily reversible with the passage of time. Thus, in an analogous situation, the tribunal in *Middle East Cement* found:

As to the Respondent’s argument that Claimant could have resumed its activities after the lifting of the ban in 1992, the Tribunal does not consider this to be persuasive. 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

value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.”)

⁶⁰⁵ *Id.*

⁶⁰⁶ CL-154, *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 Feb. 2000) (“*Santa Elena Award*”), ¶ 76. *See also* Second Opinion of M. Reisman ¶ 29.

that, after that experience, it shall not continue with the investment activity, after the activity is again permitted.⁶⁰⁷

As important, notably absent from Respondent's argument and the factual record is any statement by Respondent that it has withdrawn the *Lesivo* Resolution or that it ever intends to do so.

247. There is also no support under CAFTA or customary international law for the "ripeness" requirement that Respondent includes as part of its indirect expropriation "effects test." Respondent characterizes this alleged element as requiring Claimant to demonstrate that "it is owed compensation, and that this compensation has not yet been paid."⁶⁰⁸ But nowhere does CAFTA require that a *Claimant* has to request and be denied compensation in order to have an actionable claim for expropriation. CAFTA's only mention of payment of compensation in the context of expropriation is in Article 10.7, which provides that the payment of prompt, adequate and effective compensation is one of the four required elements for a *host State* to prove that its actions constituted a *lawful* expropriation under the Treaty.⁶⁰⁹ Thus, far from providing that there can be no expropriation unless the State has denied compensation requested by the Claimant, CAFTA specifically provides that there can still be an expropriation even where the host State has already paid "prompt, adequate, and effective compensation." And, indeed, despite Claimant's Notice of Claim to Respondent 90 days before this arbitration was initiated, the unquestioned absence of any offer of compensation by Respondent since then demonstrates that it has no intention of ever offering compensation and renders its expropriation here *illegal*.

248. Furthermore, none of the cases cited by Respondent in support of its "ripeness" requirement suggest that customary international law requires that Claimant must demonstrate that compensation has been demanded and refused in order to maintain an indirect expropriation claim.⁶¹⁰ *EnCana* merely states the unremarkable proposition that a Government's mere refusal

⁶⁰⁷ RL-109, *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No ARB/99/6 Award (12 Apr. 2002) ("*Middle East Cement Award*"), ¶ 169.

⁶⁰⁸ Counter-Memorial on Merits ¶ 234.

⁶⁰⁹ RL-61, CAFTA art. 10.7.1(d).

⁶¹⁰ See Counter-Memorial on Merits ¶¶ 229, 339, 340.

to pay a claim lodged by an investor, by itself, does not support of finding of expropriation.⁶¹¹ Of course, Claimant has never made such an assertion to the contrary. Furthermore, *EnCana* concerned an expropriation claim based upon the government’s denial of a tax refund. The tribunal in that case noted at the outset of its reasoning that “from the perspective of expropriation, taxation is a special category,”⁶¹² making the award of questionable relevance to Claimant’s expropriation claim.

249. The portion of the award of *Waste Management II* relied upon by Respondent⁶¹³ also does not discuss anything about a requirement that there be a refusal by the host State to pay compensation but, instead, concerns the circumstances under which a *breach of contract* by a host State can potentially rise to the level of an expropriation, *i.e.*, where there has been an “effective repudiation” of the contract by the State that cannot be remedied in the local courts of law.⁶¹⁴ Here, Claimant is not claiming expropriation based upon a breach of contract by the Government of Guatemala, but based upon an Executive decree. The *Waste Management II* tribunal explicitly recognized that there is no ripeness requirement for an alleged investment treaty breach taking the form of “an exercise of government prerogative,” such as a Government decree.⁶¹⁵

250. Likewise, *Generation Ukraine* makes no mention of a “ripeness” requirement and does not hold that “an international delict can come only from a *final decision* affecting the investor’s rights”;⁶¹⁶ rather, it merely and unremarkably states that an international tribunal *may* reject a claim for indirect expropriation if a foreign investor chooses to abandon its investment in the face of alleged Government interference without first undertaking a *reasonable* – but not necessarily *exhaustive* – effort to avail itself of its opportunities to seek redress locally.⁶¹⁷ Thus,

⁶¹¹ RL-98, *Encana Award*, ¶ 194.

⁶¹² *Id.* ¶ 176.

⁶¹³ See Counter-Memorial on Merits ¶ 339.

⁶¹⁴ RL-136, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3 Award (30 Apr. 2004) (“*Waste Management II Award*”), ¶¶ 174-75.

⁶¹⁵ RL-136, *Waste Management II Award*, ¶ 174.

⁶¹⁶ Counter-Memorial on Merits ¶ 340 (emphasis added).

⁶¹⁷ RL-7, *Generation Ukraine Award*, ¶ 20.30.

as Respondent acknowledges in its Counter-Memorial, *Generation Ukraine* does not set forth an exhaustion of local remedies requirement to maintain an indirect expropriation claim but, rather, requires that an investor must undertake a reasonable effort to seek available local remedies before abandoning its investment in the face of Government interference.

251. Nonetheless, even the ruling in *Generation Ukraine* went too far for the recent annulment committee in *Helnan International Hotels A/S v. Arab Republic of Egypt*. Relying on *Generation Ukraine*, the tribunal on the merits in *Helnan* had rejected all of Helnan's claims (including expropriation and fair and equitable treatment) because Helnan did not challenge the administrative downgrade in the rating of its hotel in the Egyptian courts.⁶¹⁸ The *Helnan* tribunal had disclaimed that its finding was not the same thing as requiring an exhaustion of local remedies, but the annulment committee disagreed, and found that the *Helnan* tribunal had manifestly exceeded its powers when it applied the “reasonable effort” requirement in *Generation Ukraine* to the decision of a Government Minister taken at the end of an administrative process because “[s]uch a decision... is one for which the State is undoubtedly responsible for at administrative law... [i]t would inject an unacceptable level of uncertainty into the way in which an investor ought to proceed when faced with a decision on behalf of the Executive of the State, replacing the clear rule of the Convention which permits resort to arbitration.”⁶¹⁹

252. In any event, Claimant here has undoubtedly undertaken such a reasonable effort in Guatemala. After the *Lesivo* Resolution was published, Claimant brought an *amparo* action in the Constitutional Court seeking to have the Resolution declared unconstitutional. The Constitutional Court dismissed Claimant’s action, stating that it could not rule on this question until after the *Lesivo* Resolution was confirmed by the *Contencioso Administrativo* court. However, the Catch-22 reality is that the *Contencioso Administrativo* court almost never issues a decision on *lesivo* cases, leaving them to languish unless an out-of-court settlement in the

⁶¹⁸ CL-144, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. 05/19, Award (3 July 2008) (“*Helnan* Award”), ¶ 148.

⁶¹⁹ CL-145, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Ad Hoc Committee, Annulment Proceeding (14 June 2010) (“*Helnan* Annulment Decision”), ¶¶ 39, 46-54, 73(1).

Government's favor is reached. In Claimant's case, more than four years after the Government brought its action to confirm the *Lesivo* Resolution, the *Contencioso Administrativo* court has not issued its ruling, and there has been no indication when – or even if – it will ever rule. Under such circumstances, Claimant's expropriation claim is plainly ripe.⁶²⁰

2. Claimant Possesses Rights in the Usufruct Contracts That Were Indirectly Expropriated

253. In order for there to be an indirect expropriation, CAFTA requires that the host State's actions interfere "with a tangible or intangible property right or property interest in an investment."⁶²¹ Based upon its assertion that "validity of an investment under domestic law is *an implicit element of substantive BIT protection*,"⁶²² Respondent argues that Claimant cannot maintain an indirect expropriation claim with regard to Contracts 143/158 because these contracts are not valid, never came into force and, therefore, do not constitute a property right under Guatemalan law.⁶²³ This argument is essentially a rehash of Respondent's *ratione materiae* jurisdictional objection which the Tribunal has already rejected.

254. As an initial matter, it is worth noting that Respondent's argument is directly inconsistent with the other arguments it presents against Claimant's expropriation claim. On the one hand, Respondent argues that Claimant cannot maintain its expropriation claim because Contracts 143/158 were void *ab initio* and, therefore Claimant never had rights under those contracts which could be expropriated. On the other hand, Respondent insists elsewhere in its Counter-Memorial that it did not expropriate Claimant's investment because Claimant "retains full ownership and possession of the rights granted pursuant to each of the Usufruct Contracts," including Contracts 143/158, and that these contracts remain "valid and in full force."⁶²⁴

⁶²⁰ Second Opinion of M. Reisman ¶ 45.

⁶²¹ RL-61, CAFTA Annex 10-C, ¶ 2.

⁶²² Counter-Memorial on Merits ¶ 240 (emphasis in original).

⁶²³ Counter-Memorial on Merits ¶ 234.

⁶²⁴ Counter-Memorial on Merits ¶ 330; ¶ 339 ("the *Contencioso Administrativo* court has not yet decided the matter and thus Contract 143/158 remains valid and in full force"). See also *id.* ¶ 263 ("Contract 143/158 indisputably remains in effect"); ¶ 264 ("Claimant remains in full possession of its rights pending the decision of the *Contencioso Administrativo* court regarding Contract 143/158's validity."); ¶ 265 ("The *Contencioso Administrativo* court remains free to find that Contract 143/158 was not, in fact, *lesivo*, and to leave this contract permanently in

Obviously, if Claimant continued to retain full ownership and possession of its rights under Contracts 143/158 after the *Lesivo* Resolution then, by definition, those rights must exist under Guatemalan law and are capable of being expropriated.

255. Respondent’s argument that Contracts 143/158 are not valid investments under Guatemalan law are based entirely on the various legal opinions it obtained pursuant to its secret *lesivo* process, which concluded that the contracts were *lesivo* because they were not subject to a new public bid and were never approved by *Acuerdo Gubernativo*.⁶²⁵ However, as Respondent stresses elsewhere in its Counter-Memorial, those one-sided, conclusory legal opinions have never been confirmed by the Administrative Court or any other court of law in Guatemala.⁶²⁶ Thus, there has never been any final judicial determination on the legality of Contracts 143/158 under Guatemalan law. What is more, FEGUA has specifically acknowledged that Contracts 143/158 were “in effect” and that FVG was allowed to use the FEGUA equipment pursuant to the terms of this contract.⁶²⁷

256. In any event, even if Contracts 143/158 are technically invalid or illegal under Guatemalan law, Respondent cannot use this as a basis for avoiding expropriation liability or any other liability under CAFTA. Guatemalan law provides that the party who has caused the lack of validity of a contract (“*dado motivo para la falta de validez*”) may not invoke that lack of validity in its favor in order to seek the termination of the contract.⁶²⁸ Customary international law likewise holds that a host State cannot invoke the invalidity of an investment under its domestic laws to avoid its investment treaty obligations where the invalidity or illegality was caused by the Respondent’s own *ultra vires* actions or inaction or where it chooses to endorse

force.”); ¶ 267 (“well after the *Lesivo* Declaration, Claimant maintained all of its rights pursuant to Contract 143/158”).

⁶²⁵ See Counter-Memorial on Merits ¶ 242.

⁶²⁶ See, e.g., Counter-Memorial on Merits ¶¶ 263, 264, 265, 330, 339.

⁶²⁷ Ex. C-108, 18 July 2005 letter from A. Gramajo to Attorney General’s Office, Consultancy Division, attaching 15 July 2005 opinion from FEGUA Legal Department.

⁶²⁸ CL-37, Civil Code, art. 1537

and benefit from an investment that it knew was not in compliance with the law.⁶²⁹ The tribunal's words in *ADC Affiliate, Ltd. v. Republic of Hungary* are particularly relevant here:

These Agreements were entered into years ago and both parties have acted on the basis that all was in order. Whether one rests this conclusion on the doctrine of estoppel or a waiver it matters not. *Almost all systems of law prevent parties from blowing hot and cold.* If any of the suite of Agreements in this case were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined to enter into such an agreement. However, when, after receiving top class international legal advice, Hungary enters into and performs those agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. *These submissions smack of desperation. They cannot succeed because Hungary entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. Hungary cannot now go behind these Agreements. They are prevented from doing so by their own conduct.* In so far as illegality is alleged, they would in any event be seeking to rely upon their own illegality.⁶³⁰

257. Respondent takes issue in its Counter-Memorial with Claimant's use of the *ADC* award in its Memorial.⁶³¹ First, Respondent argues that the portion of the award cited by Claimant did not come from an interpretation of reasonable expectations, or even of expropriation or fair and equitable treatment claims.⁶³² To the contrary, the *ADC* tribunal ruled in a section explicitly titled "Conclusion on Matters Other Than Quantum" that "all of the [miscellaneous] points raised by Hungary as set out in paragraph 446 above (*whether going to liability or quantum*) are rejected."⁶³³ Second, Respondent argues that this case is not a true

⁶²⁹ See CL-9, *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007) ("Kardassopoulos Jurisdictional Decision"), ¶¶ 182-186 (holding that, even if the subject joint venture agreement and concession were void *ab initio* under Georgian law, Georgia could not avoid liability under the BIT where Georgia argued that its State-owned enterprises did not have authorization to enter into such agreements and had never protested or claimed the agreements were illegal under Georgian law); CL-16, *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/13, Award (20 May 1992) ("Southern Pacific Award"), ¶¶ 81-85 (holding that Egypt was estopped from denying responsibility for the *ultra vires* acts of its officials upon which the investor had relied upon in making its investments).

⁶³⁰ RL-77, *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (27 Sept. 2006) ("ADC Award"), ¶ 475.

⁶³¹ See Counter-Memorial on Merits ¶¶ 289-90.

⁶³² *Id.* ¶ 290.

⁶³³ RL-77, *ADC Award*, ¶ 476 (emphasis added).

analogy to the facts in *ADC*, because the *ADC* tribunal found that Hungary's arguments were time-barred, while Guatemala acted within the required three-year window for a declaration of *lesividad*.⁶³⁴ However, as the quote above makes clear, the *ADC* tribunal took a much more expansive view of "Hungary's conduct" and found that, even if Hungary were correct in any of its submissions on the miscellaneous points, Hungary's actions were still not sustainable under international law principles of estoppel or waiver.

258. Accordingly, as this Tribunal held in its Second Decision on Objections to Jurisdiction, "[e]ven if FEGUA's actions with respect to Contract 41/143 and its allowance to use the rail equipment were *ultra vires* (not 'pursuant to domestic law'), principles of fairness should prevent the government from raising violations of its own law as a defense when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law."⁶³⁵

259. Respondent also argues that Claimant's expropriation claim is unsustainable with respect to Contract 402 because Claimant never completed restoration of the South Coast corridor (Phase II).⁶³⁶ As discussed above in paragraphs 19-26, Respondent's argument is flawed both as a matter of fact and law. Claimant fully complied with its Phase II restoration obligations under Contract 402 and Respondent acknowledged Claimant's compliance. Respondent is estopped from contending otherwise. In addition, the principal impediment to Claimant's completion of Phase II was Respondent's own failure to remove squatters; Respondent cannot defend against Respondent's expropriation claim on the ground of its own default. Finally, prior to the *Lesivo* Resolution, Respondent never once attempted to reclaim any Phase II properties that had been granted in usufruct to FVG. Thus, at the time of the *Lesivo* Resolution, FVG continued to hold *all* of its rights granted under Contract 402.

⁶³⁴ Counter-Memorial on Merits ¶ 290.

⁶³⁵ Second Decision on Jurisdiction ¶ 146 (citing and quoting *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 Aug. 2007), ¶ 346. (internal quotations omitted)).

⁶³⁶ Counter-Memorial on Merits ¶¶ 243-44.

3. The *Lesivo* Resolution Directly Interfered With Claimant's Investment

260. Having established that Claimant has property rights or property interests in its investment in Guatemala, Claimant will now rebut Respondent's contention that the Declaration of *Lesividad* and subsequent actions by the Government of Guatemala did not interfere with those rights. Respondent argues that the *Lesivo* Declaration "had no effect whatsoever upon Claimant's rights under Contract 402" because the Resolution was directed solely at Contracts 143/158 and Contract 402 is not dependent upon Contracts 143/158 and continues to remain in effect.⁶³⁷ Respondent's argument, once again, elevates form over substance and ignores the reality of the Government's own statements and actions. Respondent's admitted motivation and strategy in issuing the *Lesivo* Resolution and the numerous public statements it made in connection with the Resolution all inextricably linked the issuance of Resolution not to any alleged legal defects in Contracts 143/158, but to FVG's alleged failure to comply with its rehabilitation obligations under the Contract 402 and its unwillingness to surrender substantial rights under that contract.⁶³⁸ That the Government obviously perceived the *Lesivo* Resolution as squarely interfering with Claimant's rights under Contract 402 is demonstrated by the fact that it used the Resolution as its principal means to attempt to pressure FVG into agreeing to major amendments to Contract 402, including surrendering unrestored portions of the railway to "other investors."

261. Furthermore, Respondent's argument that FVG's performance under Contract 402 was not dependent on Contracts 143/158 defies common sense and is inconsistent with the terms of Contract 402. At the time of the *Lesivo* Resolution, the only operating portion of the railway utilized the FEGUA narrow gauge equipment which is the subject of Contracts 143/158 and, therefore, FVG's business was obviously dependent on the use of such equipment in order to keep its then-ongoing railway business operating. The fact that FVG would not have needed the FEGUA equipment for the eventually restored South Coast right-of-way is irrelevant; if FVG did not have the FEGUA equipment, it could not fulfill its performance obligations under Contract 402 because there was not a sufficient inventory of replacement narrow gauge rolling stock

⁶³⁷ Counter-Memorial on Merits ¶¶ 246-61.

⁶³⁸ See Sections II.T, II.U, and II.Z.

available elsewhere in the world that could be obtained at a reasonable cost.⁶³⁹ Thus, had the Government taken away the FEGUA equipment from FVG, FVG could have immediately exercised its right under Clause 18 of Contract 402 to terminate that contract without further liability or obligation.⁶⁴⁰

262. More importantly, a declaration by the Government of Guatemala that it intended to take away the railway rolling stock from FVG was rightly perceived by FVG's customers and suppliers that FVG would soon no longer be in business.⁶⁴¹ Notably, not once in the weeks after it issued the *Lesivo* Resolution did the Government publicly withdraw or repudiate any of its statements regarding its intent to use the declaration of *lesividad* to force FVG into acceding to the Government's demands for major concessions and amendments to Contract 402 under the threat of terminating the usufruct contracts and taking the entire railway usufruct away from FVG. Indeed, President Berger's Secretary General admitted that the Government's strategy involved declaring the equipment contracts *lesivo* to prevent FVG from further rendering railway services and, consequently, give the Government sufficient legal grounds to terminate the other two Usufruct Contracts.⁶⁴²

263. Thus, even though the *Lesivo* Resolution on its face only concerns Contracts 143/158, the Government's action in issuing the *Lesivo* Resolution was rightly perceived by a critical number of FVG's current and potential customers, suppliers and lenders as not just a Government repudiation of Claimant's rights to use the FEGUA rolling stock (which it obviously was), but also a Government repudiation of Claimant's rights to the *entire railway usufruct*, including Contract 402. In other words, in the minds of FVG's customers, suppliers and lenders, the President had declared the *entire Usufruct* – not just the equipment contracts – “harmful to the interests of the State” and, as a result, they decided it was too risky to continue doing business with FVG. Put another way, while Claimant could still exercise its rights under

⁶³⁹ Third Statement of H. Posner III ¶¶ 54-61. Of course, Claimant was not required by any contract to obtain replacement rolling stock elsewhere.

⁶⁴⁰ Third Statement of H. Posner III ¶ 61.

⁶⁴¹ First Statement of Planos y Puntos/Gesur, cl. 3; Second Statement of Planos y Puntos/Gesur ¶¶ 4, 6; Second Statement of M. Recinos, ALTRACSA ¶¶ 3, 7; Second Statement of M. Jiménez, Reinter ¶ 4.

⁶⁴² First Statement of M. Fuentes ¶ 12.

Contract 402 and Contracts 143/158 after the *Lesivo* Resolution, those rights became effectively *worthless* because of the *Lesivo* Resolution.

4. The *Lesivo* Resolution and Subsequent Acts in Furtherance of the Resolution Substantially Deprived Claimant of the Reasonably Expected Economic Benefits of Its Investment

264. When examining an indirect expropriation, CAFTA charges the Tribunal, as part of its fact-based inquiry, to examine the economic impact of the Government action on the Claimant's investment.⁶⁴³ Respondent asserts, as part of its "effects test," that there must be a high degree of interference: to prove an indirect expropriation, Claimant must demonstrate that Respondent's interference caused "complete destruction" or "virtual annihilation" of its investment.⁶⁴⁴ The bar, however, is not as high as Respondent seeks to convince the Tribunal. And, as demonstrated below, even if this were the standard (and it is not), Claimant has met it.

265. International jurisprudence has consistently held that the standard for indirect expropriation is whether the State measure resulted in "*substantial deprivation*" or "*substantial impairment*" of the investor's economic rights or reasonably expected economic benefits from its investment, even if the investor still retains nominal or legal ownership of the investment or investment assets. As the tribunal in the recent award in *Vivendi III* explained:

International tribunals treat the severity of the economic impact caused by a regulatory measure as an important element in determining if the measure constitutes an expropriation requiring compensation. One question often asked is whether the challenged governmental measure resulted in "substantial deprivation" of the investment or its economic benefits. . . . Thus, in applying the provisions of the three BITs applicable to these cases, this Tribunal will have to determine whether they effected a *substantial, permanent deprivation of the Claimants' investments or the enjoyment of those investments' economic benefits*.⁶⁴⁵

⁶⁴³ RL-61, CAFTA Annex 10-C, ¶ 4(a)(i).

⁶⁴⁴ Counter-Memorial on Merits ¶ 311.

⁶⁴⁵ CL-159, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award (30 July 2010) ("*Vivendi III* Award"), ¶ 134 (emphasis added).

266. In applying customary international law, NAFTA tribunals have held that the deprivation must be both lasting and substantial to constitute an expropriation.⁶⁴⁶ For example, the *Pope & Talbot* tribunal stated:

While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been “taken” from the owner. Thus, the *Harvard Draft* defines the standard as requiring interference that would justify an inference that the owner will not be able to use, enjoy, or dispose of the property. . . . The *Restatement*, in addressing the question whether regulation may be considered expropriation speaks of “action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property.” Indeed . . . under international law, expropriation requires a “*substantial deprivation*.”⁶⁴⁷

267. Likewise, in *Rumeli Telekom*, the tribunal explained that an indirect expropriation is an “indirect taking that *substantially deprives* the investor of the use or enjoyment of its investment, including deprivation of the whole or a significant part of the economic benefit of property.”⁶⁴⁸ In *Azurix*, the tribunal phrased the standard as whether the State measure deprived the investor “in whole or significant part, of the use or reasonably-to-be-expected economic benefit of its investment.”⁶⁴⁹ *Middle East Cement* describes measures constituting indirect expropriation as measures with the effect of “depriv[ing] the investor of the use and benefit of its investment.”⁶⁵⁰ And the tribunal in *Metalclad* stated that an indirect expropriation under NAFTA involves “covert or incidental interference with the use of the property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-

⁶⁴⁶ CL-126, *Pope & Talbot Inc. v. Government of Canada*, Interim Award (26 June 2000) (“*Pope & Talbot Interim Award*”)

⁶⁴⁷ *Id.* at ¶ 102 (emphasis added).

⁶⁴⁸ CL-153, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S., v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (“*Rumeli Telekom Award*”), ¶ 685 (emphasis added).

⁶⁴⁹ RL-85, *Azurix Award*, ¶ 316.

⁶⁵⁰ RL-109, *Middle East Cement Award*, ¶ 107.

expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁶⁵¹

268. Claimant here has demonstrated that the *Lesivo* Resolution and actions taken in furtherance of the Resolution substantially deprived it of its expected economic benefits under the railway usufruct and, in particular, under Contract 402, the Master Usufruct Contract. Respondent once again attempts to argue that the *Lesivo* Resolution could not have had any damaging effect on Claimant's rights under Contract 402 because the Resolution was only directed at Contracts 143/158.⁶⁵² As explained in depth in Claimant's Memorial on the Merits⁶⁵³ as well as in paragraphs 260-63 above, Respondent's reliance on this technical legal distinction is not supported by the evidence, which demonstrates beyond peradventure that the *Lesivo* Resolution was perceived by all concerned, including FVG's current and potential customers, investors, suppliers and lenders as an outright repudiation by the Government of FVG's *entire* usufruct, not just the usufruct equipment contracts.⁶⁵⁴ In particular, the evidence shows the *Lesivo* Resolution caused the following substantial damaging effects on Claimant's investment:

- It caused an immediate and dramatic decline in use of the railroad for freight transportation and a critical number of customers to stop using the railway as a means to transport their goods.⁶⁵⁵ This is demonstrated not only by the precipitous reduction in yearly tonnage shipped by the railroad from 2005 to 2006,⁶⁵⁶ but also by the 35% decrease in railway transport revenues experienced in the first seven months in 2007 when compared to the same period in 2006.⁶⁵⁷
- It effectively destroyed FVG's eight years of marketing efforts and its underlying transportation advantage of reliability. After six years of steady traffic increases, FVG lost customers and commodity transportation market share it had steadily

⁶⁵¹ RL-111, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award (30 Aug. 2000) ("*Metalclad* Award"), ¶ 103.

⁶⁵² Counter-Memorial on Merits ¶¶ 320.

⁶⁵³ See Memorial on Merits ¶¶ 87-99, 113-114.

⁶⁵⁴ Cf. RL-136, *Waste Management II* Award, ¶ 160 (tribunal found that there was no indirect expropriation where there had been "no outright repudiation of the transaction in the present case").

⁶⁵⁵ First Statement of H. Posner III ¶ 47; First Statement of J. Senn ¶ 46; Ex. C-34.

⁶⁵⁶ First Statement of H. Posner III ¶ 47; First Statement of J. Senn ¶ 46.

⁶⁵⁷ Third Statement of J. Senn ¶ 84, Annex 2 (showing that FVG railway transport revenues for the period January-July 2007 were Q.3,084,065.91 compared to Q.4,712,986.73 for the same period in 2006).

been reestablishing vis-à-vis the trucking industry, as well as goodwill for its improving safety and delivery performance.⁶⁵⁸

- It 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.⁶⁵⁹ Thus, as a result of the *Lesivo* Resolution, FVG was forced to operate on a "cash-only" basis, which made it impossible to grow or even sustain its ongoing business operations.
- It caused potential customers and tenants to back immediately away from negotiations and discussions with FVG to lease or partner with FVG to develop the right-of-way, rail stations and yards and other large parcels of land controlled by FVG for commercial use.⁶⁶⁰ It also caused potential joint venture partners to back out of projects to rebuild and reopen the South Coast corridor.⁶⁶¹
- Local courts, police and municipalities consistently relied upon the *Lesivo* Resolution as a basis to trespass on, deny protection to, and allow theft and vandalism of FVG's usufruct properties.⁶⁶²

269. Contrary to Respondent's assertion, the fact that FVG continues to earn income from one long-term property lease (COBIGUA/Chiquita) and four right-of-way easements

⁶⁵⁸ First Statement of H. Posner III ¶ 47. In the recent award in *Chemtura Corp. v. Canada*, the NAFTA tribunal rejected Canada's argument that elements of the value of an enterprise, such as goodwill, market share, and customers are not investments within the definition of NAFTA and, hence, could not be expropriated. The tribunal did not decide whether these elements were an investment *per se*, but noted "such elements may be accessory to one of the forms of 'investments' within the meaning of Article 1139. Thus, goodwill or market position may indeed be seen as accessories of an 'enterprise', which is *per se* an investment under Article 1139 of NAFTA." RL-89, *Chemtura Corp. v. Canada, UNCITRAL*, Award (2 Aug. 2010) ("*Chemtura* Award"), ¶ 243. This is directly analogous to the definition of an "enterprise" in CAFTA Article 2.1.

⁶⁵⁹ Statement of M. Cifuentes, Maquinaria Cifuentes (MAQCISA); Second Statement of M. Cifuentes, MAQCISA ¶ 3; First Statement of M. Jiménez, Reinter; Second Statement of M. Jiménez, Reinter ¶¶ 3-4; Statement of A. Carballido, Banco G&T Continental; First Statement of M. Recinos, ALTRACSA; Second Statement of M. Recinos, ALTRACSA ¶ 3; First Statement of H. Posner III ¶ 48; Exs. C-35(a) - 35(g); First Statement of J. Senn ¶ 47.

⁶⁶⁰ First Statement of H. Posner III ¶ 49; First Statement of J. Senn ¶ 48; First Statement of Planos y Puntos/Gesur, cl. 3 (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); Second Statement of Planos y Puntos/Gesur ¶ 3; Statement of A. Arriola, Grupo Unisuper (describing how the *Lesivo* Resolution caused Grupo Unisuper to back out of joint venture with FVG to open supermarkets at several rail stations); First Statement of H. Posner III ¶ 50; Ex. C-36; First Statement of J. Senn ¶ 48.

⁶⁶¹ First Statement of F. Pérez, Expogranel; First Statement of H. Posner III ¶ 50; Ex. C-37(a), 19 Sept. 2006 letter from Expogranel to FVG; Ex. C-37(b), 11 Sept. 2006 email from ITI Development Corporation to FVG.

⁶⁶² First Statement of J. Senn ¶¶ 49-56, First Statement of H. Posner III ¶¶ 51-52; Ex. C-38; Ex. C-46 (compilation of reports of acts of theft, vandalism and squatter invasions after *Lesivo* Resolution submitted by FVG to Public Ministry); Ex. C-48; Ex. C-49(a); Ex. C-49(b); Ex. C-50; Ex. C-51.

(Planos y Puntos/Gesur, Texaco Guatemala, Genor and Zeta Gas de Centroamérica) that it entered into prior to the *Lesivo* Resolution does not demonstrate that Claimant has not been substantially deprived of the expected economic benefits of its investment. Claimant did not invest more than \$15 million in FVG so it could just earn income from these five agreements for the next 42 years. Rather, Claimant invested in FVG for the exclusive right to lease and exploit *all of* the railway real estate that had been granted in usufruct. This right was essential to FVG's overall long-term business plan, because income from real estate activities was necessary to subsidize rail transport activities. The decision of one existing lessee and four easement holders to continue paying FVG for their leasehold or easement rights after the *Lesivo* Resolution made commercial sense for them in that the infrastructure related to these rights (*i.e.*, port facilities, electricity lines, gas lines) already represented a sunk investment cost for them, and they did not want to risk these investments by stopping making lease payments to FVG without a guarantee that the Government would assume or honor their agreements with FVG (which the Government never offered to do).⁶⁶³ This does not obviate the fact that, after the *Lesivo* Resolution, FVG was unable to secure a *single additional lease or easement*, with prospective commercial tenants consistently citing the *Lesivo* Resolution as the reason for their backing out of negotiations or discussions with FVG.⁶⁶⁴ Among the companies that backed out because of the *Lesivo* Resolution was Planos y Puntos/Gesur, which walked away from a preliminary agreement with FVG to add 32 kilometers of electric lines to its existing easement contract at an average rate of \$3,200 per kilometer.⁶⁶⁵ Planos y Puntos/Gesur further states that, had it not been for the *Lesivo* Resolution, it is quite likely that it would have entered into further extensions of its easement beyond the additional 32 kilometers.⁶⁶⁶

⁶⁶³ Third Statement of J. Senn ¶ 86.

⁶⁶⁴ Moreover, if, after the *Lesivo* Resolution, Claimant had not continued to try to collect all easement and lease revenues it could, Respondent undoubtedly would today be arguing that Claimant had not mitigated its damages.

⁶⁶⁵ First Statement of Planos y Puntos/Gesur; Second Statement of Planos y Puntos/Gesur ¶ 3.

⁶⁶⁶ Second Statement of Planos y Puntos/Gesur ¶ 7.

270. Accordingly, in the words of the *Vivendi II* tribunal, the *Lesivo* Resolution had a “devastating effect on the economic viability of the concession”⁶⁶⁷ because it undermined the fundamental economic underpinnings of the entire Usufruct and thereby rendered the critical expected economic benefits of the Usufruct *worthless*. The income FVG continued to earn from its initial leases pre-*lesivo* does not offset the fact that the *Lesivo* Resolution substantially deprived Claimant of virtually all of the expected economic benefits from its investment.

271. Further, as discussed in paragraphs 217-22, *supra*, Respondent has not presented any tangible evidence that Claimant’s post-*lesivo* press release caused or contributed to any of the losses FVG suffered after the *Lesivo* Resolution. Rather, all of the evidence presented shows that it was the actions and public statements of President Berger, Attorney General Gordillo and other high-level Government officials in connection with the publication of the *Lesivo* Resolution which caused FVG’s actual and potential customers, joint venture partners, suppliers and lenders to perceive FVG (correctly) as a “dead man walking.”

5. Respondent Interfered with Claimant’s Distinct, Reasonable, Investment-Backed Expectations

272. The second factor that CAFTA tribunals must consider in a claim of indirect expropriation is the extent to which the government action interferes with an investor’s distinct, reasonable investment-backed expectations.⁶⁶⁸ First and foremost, Claimant’s investment-backed expectations were based on a public bidding process, in which the Government of Guatemala sought desperately needed private sector funding to restore its defunct railroad system. To accomplish its objective, the Government offered a 50-year usufruct to rebuild and operate the Guatemalan rail system, and awarded the bid to FVG, Claimant’s investment vehicle set up specifically for this purpose, based on a staged plan to restore and rebuild the rail system. The Government’s offer shows that, even before the Claimant made its investment, it was always intended and understood that its investment in the rail system would last for a long term, and Claimant took that important fact into account in formulating its business plan to obtain its expected returns on its investment. No investor would have undertaken the risk in investing in

⁶⁶⁷ RL-135, *Compañía de Aguas del Aconquija, S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 Award (20 Aug. 2007) (“*Vivendi II* Award”), ¶ 7.5.26.

⁶⁶⁸ RL-61, CAFTA Annex 10-C, ¶ 4(a)(ii).

the Guatemalan railway without the expectation of a very long term in which to develop both the railroad and real estate business to earn an above average return on its investment.

273. Respondent argues that Claimant could not have had a reasonable expectation that Contracts 143/158 were valid and not “harmful to the interests of the State.” Respondent’s argument rests upon gross misstatements of Guatemalan law and blithely ignores and distorts the several representations it made and actions it took over the course of several years that gave Claimant a distinct, reasonable expectation that Contracts 143/158 were valid under Guatemalan law and that they certainly were not *lesivo* (“harmful to the interests of the State”).

274. To begin with, Claimant had a distinct, reasonable investment-backed expectation that Contracts 143/158 were valid based upon Respondent’s performance and acceptance of FVG’s performance and benefits under the terms of these contracts, including accepting FVG’s canon fee payments without reservation or protest.⁶⁶⁹ Importantly, Guatemalan law expressly provides that a voidable contract can become implicitly validated if the party that created or knew of the alleged defect nonetheless proceeded with the performance of its obligations under the contract.⁶⁷⁰ Unlike the situation with Contract 41, which also was never approved by *Acuerdo Gubernativo*, Respondent never demanded or required that FVG enter into any separate letter agreements to use the FEGUA equipment after FEGUA had obtained legal opinions that concluded Contracts 143/158 required Executive approval. Obviously, if Respondent believed that Contracts 143/158 had no legal effect, it would have either demanded that FVG surrender the equipment or, as it did with Contract 41, it would have required FVG to enter into other legal arrangements that would allow FVG to continue to use the equipment. Instead, at all relevant times, Respondent conducted itself substantially as if the terms of Contracts 143/158 were in

⁶⁶⁹ See Ex. C-108 (FEGUA acknowledging that Contract 143 was in effect and that FVG was using the FEGUA equipment and was up to date on its payment of canon fees pursuant to the terms of this contract).

⁶⁷⁰ CL-37, Civil Code, art. 1304 (“Relative nullity of legal agreements can be cured either by express confirmation or by the deliberate fulfillment of the obligation regardless of the defect that causes avoidance.”); art. 1537 (“The party in default or causing the contract to be invalid is not entitled to claim the resolution of the contract based on such grounds.”).

effect and enforceable,⁶⁷¹ and Claimant relied upon such conduct in continuing to perform under the terms of the Usufruct Contracts.

275. Claimant also had a distinct, reasonable investment-backed expectation that Contracts 143/158 were valid based upon the representations and assurances of FEGUA Overseer Sarceño in presenting this contract to FVG due to the fact that Respondent had not obtained Presidential approval of Contract 41. FVG obviously would not have agreed to terminate and replace Contract 41 if it believed that Contracts 143/158 contained legal defects that rendered them invalid and could subsequently be declared *lesivo* based upon such defects. FVG's reasonable expectation that Contracts 143/158 were valid was further confirmed Respondent's express representation in Contract 143 that "[t]his contract shall be in force as of its endorsement, *without need of subsequent authorization from any other authority.*"⁶⁷² As Professor Reisman observes:

In terms of international law and, for that matter, of common sense, it is difficult to see why Claimant should not have relied on this express assurance of immediate validity of the contract by the person in charge of the issue in the Guatemalan governmental structure. This assurance by a competent governmental official in a recorded document would have reasonably assuaged the anxieties of any prudent foreign investor regarding the missing Presidential signature and the need, or lack thereof, of novel bidding processes.⁶⁷³

276. In any event, contrary to the assertions of Respondent and its expert, Mr. Aguilar, Contracts 143/158 did not require Executive approval or a new public bid to render them valid under Guatemalan law. Pursuant to Decree Law 91-84,⁶⁷⁴ the Overseer of FEGUA could exercise the powers of the extinct FEGUA Board of Directors and, therefore, had the power and authority to enter into this type of contract without Executive approval or ratification.⁶⁷⁵ In

⁶⁷¹ See, e.g., Ex. C-108.

⁶⁷² Ex. C-25, Contract 143, cl. 6.

⁶⁷³ Second Opinion of M. Reisman ¶ 19. Professor Reisman observes further that, in *Metalclad*, the assurances of a less competent official sufficed. Moreover, Claimant notes that at the time Contract 143 was signed no one in the Government of Guatemala (outside of FEGUA) had ever expressed any concern about the lack of Executive approval of Contract 41.

⁶⁷⁴ CL-42, Decree Law 91-84.

⁶⁷⁵ Second Opinion of E. Mayora ¶ 3.4.2; Third Opinion of E. Mayora ¶¶ 88-101. As Dr. Mayora explains, Article 1 of FEGUA's Organic Law (CL-41) establishes it is a decentralized government entity with its own legal

addition, contrary to Respondent's position, a usufruct contract over public assets or goods such as the railroad equipment here does not require the Administration to grant a "concession" subject to Executive approval because such equipment is not a public good of common use.⁶⁷⁶

277. Dr. Mayora further explains that it was not necessary for Contract 143 to have been awarded pursuant to a new public bidding process. Contract 143 was merely the culmination of the same original public bidding process that awarded use of the right-of-way and railway equipment.⁶⁷⁷ The point of any public bidding process is for the Government to get the best possible offer through a competitive mechanism. In the case of Contract 143, this is precisely what happened, as this contract contained more favorable economic terms and conditions for the Government than Contract 41, including a 25% increase in the canon fee and the agreement that these payments would go directly to FEGUA rather than the Trust Fund.⁶⁷⁸ There was absolutely no reason to believe that a new public bid for the FEGUA equipment would have resulted in additional bidders and a better deal for the Government than what was negotiated in Contract 143 because there had been no other bidders for the original award of the equipment, a fact which, of course, made perfect sense given that FVG had already acquired the 50-year usufruct over the right-of-way.⁶⁷⁹ As Dr. Mayora points out, it runs against financial rationality to believe that any third party would have offered to pay the State *more* to use the

existence which has the "full capacity to acquire rights and assume obligations." Article 19 l) of FEGUA's Organic Law gives the Board of Directors the power to approve contracts executed by the FEGUA Manager for amounts in excess of 10,000 quetzales. Decree Law 91-84 (CL-42) provides that the FEGUA Chairman/Overseer "shall undertake all duties and exercise the authority granted to the Board of Directors, the Manager and other executive officer, as applicable, under the Organic Law of the company. The Chairman/Overseer is also the legal representative of the company, both in and out of court. For such purposes, any reference to the Board of Directors and the Management under the terms of the Organizational Law, its Regulations and other legal provisions applicable to the company shall be construed as a reference to the Overseer's administration, while it lasts." Further, in the Privatization Act of 1997 (Act No. 20-97), the Congress of Guatemala amended Articles 91 and 94 of the Public Procurement Act to specifically empower the highest ranking authority ("*autoridad superior*") of State autonomous entities such as the FEGUA Overseer with the power to execute contracts for the disposition of their property and assets, without any further requirement of Executive approval. Third Opinion of E. Mayora ¶¶ 92-101.

⁶⁷⁶ Second Opinion of E. Mayora ¶¶ 3.5.1 - 3.5.7.

⁶⁷⁷ Third Opinion of E. Mayora ¶ 106.

⁶⁷⁸ *Id.* ¶ 103.

⁶⁷⁹ *Id.* ¶ 104.

railway equipment for 50 years than what FVG agreed to pay because, in order to use such equipment, the third party would also have had to pay FVG for use of the right-of-way.⁶⁸⁰

278. In addition, even if Contracts 143/158 contained the legal defects alleged by Respondent, Claimant still had a reasonable expectation that these defects were nonessential legal defects that caused “relative nullity,” not “absolute nullity” (void *ab initio*) to these contracts.⁶⁸¹ The grounds for absolute nullity of a contract are set forth in Article 1301 of the Civil Code and can be the consequence of a contract containing one of the following essential legal defects:

- (i) The contract is contrary to overriding public policy (*el orden público*), contrary to express legal prohibitions;⁶⁸² or
- (ii) The contract lacks one of the following “essential elements of validity”:
 - a. Any of the parties absolutely lacks civil capacity (*i.e.*, is a child, mentally impaired, a criminal sentence has suspended his/her legal capacity)⁶⁸³;
 - b. The subject matter of the contract is illegal⁶⁸⁴; or
 - c. Consent was obtained or procured through violence or intimidation.⁶⁸⁵

Article 1302 of the Civil Code specifically allows the Attorney General to seek on behalf of the State a legal declaration that a contract is absolutely null and void due to one of the essential legal defects set forth in Article 1301.⁶⁸⁶ Respondent never brought any such action here against Contracts 143/158.

279. The grounds for relative nullity of contract are set forth in Article 1303 of the Civil Code and can be the consequence of a contract containing one of the following nonessential legal defects:

⁶⁸⁰

Id.

⁶⁸¹

Third Opinion of E. Mayora ¶¶ 78-86.

⁶⁸²

CL-37, Civil Code, art. 1301.

⁶⁸³

Id., art. 1251.

⁶⁸⁴

Id.

⁶⁸⁵

Id., arts. 1264-65.

⁶⁸⁶

Id., art. 1302.

- (i) Any of the parties lacks capacity relative to the contract (the party required some authorization, approval or directions by some higher body, authority, or principal, etc.)⁶⁸⁷; or
- (ii) There are circumstances that affect the validity of any of the parties consent to the agreement:
 - a. Error (a mistake concerning the substance of the agreement or one of the principal causes for consenting to the agreement; false representations as to things or persons; erroneous calculus)⁶⁸⁸; or
 - b. Deliberate intent to deceive, to induce the other party to enter into the contract through artifices that lead to or keep the other party in error concerning the determinant cause leading to the contract.⁶⁸⁹

The Civil Code also allows an affected party (including the Attorney General on behalf of the State) to seek nullification of a contract within two years of its execution that contains nonessential legal defects.⁶⁹⁰

280. Thus, as Dr. Mayora explains, assuming *arguendo* that a civil law contract such as a usufruct contract, in fact, required Executive approval in order to be “lawful” and such approval was never obtained, this “defect” would only make these contracts *voidable* under Guatemala law, not void *ab initio*.⁶⁹¹ In the instant case, if the Government had properly brought a timely civil court action to challenge the Contracts 143/158 on the ground that the FEGUA Overseer lacked authority to enter into these contracts without further Presidential approval, the court would look to the Organic Law of FEGUA to determine the Overseer’s authority and, when the court did so, it would find that the Overseer properly exercised the power of the extinct FEGUA Board of Directors to enter into the Usufruct Contracts in question without the need for approval by any higher authority.⁶⁹² The Government, however, never exercised its statutory right to bring a civil court action to nullify Contracts 143/158 within two years of their execution. Accordingly, based upon the specific provisions and requirements of Guatemalan

⁶⁸⁷ CL-37, Civil Code, art. 1303.

⁶⁸⁸ *Id.*, arts. 1257-59.

⁶⁸⁹ *Id.*, arts. 1261-63.

⁶⁹⁰ *Id.*, arts. 1312.

⁶⁹¹ Third Opinion of E. Mayora ¶¶ 85-86.

⁶⁹² *Id.* ¶ 85.

law, Claimant always had a reasonable expectation that these contracts were valid and enforceable under Guatemalan law.

281. Moreover, Respondent cannot point to single document prior to the *Lesivo* Resolution where it informed Claimant that it viewed Contracts 143/158 as invalid, illegal or *lesivo*.⁶⁹³ To the contrary, during the entire process leading up to the issuance of the *Lesivo* Resolution, Respondent purposefully kept all of the internal and outside legal opinions and analyses it obtained concerning Contracts 143/158 secret from Claimant. The first time Claimant learned that the declaration of *lesividad* was specifically directed at Contracts 143/158 was at the August 24, 2006 “settlement” meeting on the eve of the *Lesivo* Resolution’s publication, where the Government presented its “take it or leave it” offer⁶⁹⁴ and, as late as May 2007, Claimant still did not have knowledge of the technical and legal causes which allegedly led to the *Lesivo* Resolution.⁶⁹⁵

282. Furthermore, even if Claimant had been made aware of the two alleged “serious legal defects” in Contracts 143/158 – *i.e.*, the lack of a new public bid and Executive approval – Claimant had a reasonable, investment-backed expectation that these defects were entirely within the Government’s control to resolve and that they could easily be resolved without any “negotiation” with Claimant. Indeed, that is precisely what Respondent did with Contract 41. Respondent, however, never once offered or proposed to Claimant, either before or after the *Lesivo* Resolution, to obtain Executive approval of Contracts 143/158 through an *Acuerdo Gubernativo* or to put the equipment contracts out to a new public bid. Instead, the only *Acuerdo Gubernativo* Respondent ever sought and obtained (secretly) was the one which declared Contracts 143/158 *lesivo* and the only actual proposal Respondent ever made to Claimant sought not to fix the alleged defects in Contracts 143/158, but to cause FVG to surrender its key rights under the Usufruct Contracts on terms favorable to the Government.

⁶⁹³ The only legal opinion Respondent ever shared with Claimant concerning Contracts 143/158 prior to the *Lesivo* Resolution was FEGUA Legal Department Opinion 47-2004 dated April 14, 2004 (Ex. R-8). That opinion, however, does not state or even suggest that Contracts 143/158 were invalid, illegal or *lesivo*.

⁶⁹⁴ Second Statement of H. Posner III ¶ 14; Second Statement of J. Senn ¶ 30.

⁶⁹⁵ Ex. R-37; Third Statement of J. Senn ¶ 70; Statement of C. Franco ¶ 10(c).

283. Even assuming *arguendo* that Claimant was actually aware of the alleged technical legal defects in Contracts 143/158 notwithstanding Guatemalan law and Respondent’s representations and actions to the contrary, Claimant certainly had no expectation or understanding that these alleged defects rendered these contracts *lesivo*, *i.e.*, harmful to the interests of the State.

284. There is no legal authority or precedent under Guatemala law which supports Respondent’s assertion that a usufruct contract such as Contracts 143/158 which does not comply with the technical legal requirements of the law is, by definition, *lesivo*. *Lesivo* is not part of the law of contract, but is a procedural law that is part of the Administrative Procedures and Review Act (“APRA”).⁶⁹⁶ No contract can be declared *lesivo* simply because it contains legal defects under contract law.⁶⁹⁷ Article 20 of the APRA requires the existence of some identifiable harm to the interests of the State, as determined by the President and his Cabinet Ministers.⁶⁹⁸ In other words, by definition, a declaration of *lesividad* concerns not the validity of a contract per se, but whether the contract which resulted from the act of a public official or entity is *substantively harmful* to the interests of the State.⁶⁹⁹

285. As discussed above in paragraphs 278-80, the availability to the State of separate and distinct remedies in the civil and administrative courts of Guatemala to declare a contract void *ab initio* or voidable due to various legal defects demonstrates that Guatemalan law draws a clear distinction between the “legality” of a contract and “*lesividad*” of a contract. A declaration of *lesividad* is not an appropriate remedy or vehicle for resolving any of these defects or problems.⁷⁰⁰ Indeed, in their respective legal opinions on Contracts 143/158, both the Attorney General and the Ministry of Finance acknowledged that the alleged legal defects in these

⁶⁹⁶ CL-43, Decree 119-96, Title II, Ch. 1.

⁶⁹⁷ Third Opinion of E. Mayora ¶ 16.

⁶⁹⁸ CL-43, Decree 119-96, Title II, Ch. 1.

⁶⁹⁹ Third Opinion of E. Mayora ¶¶ 18, 23.

⁷⁰⁰ *Id.* ¶¶ 16-17.

contracts could be resolved through means other than a declaration of *lesividad*, such as early termination, annulment or mutual agreement.⁷⁰¹

286. Thus, the lack of any element of validity of a contract –which Claimant does not concede exists here – may or may not cause a situation where the interests of the State suffer any harm or detriment. Conversely, a perfectly lawful contract may still be *lesivo* to the interests of the State.⁷⁰² Put another way, a contract which is *lesivo* and the use of *lesividad* to remedy a contract which is harmful to the interests of the State are *sui generis*, both as to the description of the problem with the contract and as to the remedy for it.

287. Furthermore, at the time FVG was initially awarded the railway usufruct, or even when it entered into Contracts 143/158, there was no law, regulation or legal precedent in Guatemala which would have informed or suggested to anyone, including Claimant, that any contract which contains technical legal defects is, by definition, harmful to the interests of the State.⁷⁰³ There is nothing in the APRA or elsewhere in Guatemalan law which defines what types of Government acts or contracts are “harmful to the interests of the State.”⁷⁰⁴ And, because there has been only one known declaration of *lesividad* that has ever been confirmed by an Administrative Court, there is no legal precedent in Guatemala that would have put Claimant on notice that Contracts 143/158 could be declared *lesivo* based upon their alleged technical legal defects.⁷⁰⁵ To the contrary, as Dr. Mayora demonstrates, Guatemalan law is quite clear that the so-called legal defects in Contracts 143/158 that Respondent has alleged are to be resolved through the less draconian and more direct means available under the Civil Code.⁷⁰⁶

⁷⁰¹ Ex. C-7, PGN (AG) Opinion No. 205-2005, 1 Aug. 2005; Ex. R-24, Ministry of Finance Legal Department, Joint Opinion No. 181-2006-AJ.

⁷⁰² Jurisdiction Hearing Tr. 843(22)-844(10) (Mayora); Third Opinion of E. Mayora ¶ 20.

⁷⁰³ Third Opinion of E. Mayora ¶ 4, n.1.

⁷⁰⁴ *Id.*; Second Opinion of M. Reisman ¶¶ 25, 33.

⁷⁰⁵ Third Opinion of E. Mayora ¶ 4, n.1, Annex 1.

⁷⁰⁶ *Id.* ¶¶ 17, 78-86.

288. Respondent claims it used its *lesividad* power against Claimant for the “ultimate ‘public purpose,’ namely, to uphold the “rule of law” in Guatemala.⁷⁰⁷ There is absolutely no legal basis or evidence to support this assertion. Nowhere does the *Lesivo* Resolution state that it was issued to “uphold the rule of law” and Respondent does not, and cannot, show any Guatemalan legal authority or precedent for declaring an administrative contract *lesivo* to “uphold Guatemalan rule of law.” And even if there were such a precedent, customary international law requires more than just vague and conclusory references to the State’s public interest in upholding its own laws to demonstrate its actions were conducted for a “public purpose.”⁷⁰⁸ Furthermore, Respondent clearly did not use the *lesividad* process in good faith to “uphold the rule of law,” but to force Claimant into surrendering its substantive rights under Contracts 402 and 820 to further benefit Respondent and “other investors” interested in the railway such as Ramón Campollo. If Respondent had been truly interested in “upholding the rule of law in Guatemala,” it would never have embarked on the course of conduct that it did.

289. In any event, “the purpose for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid.”⁷⁰⁹ A host 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.⁷¹⁰

6. The *Lesivo* Resolution was the Basest Kind of Government Action Conducted at the Highest Levels and is Not Entitled to Any Deference

290. The third factor which CAFTA tribunals must consider in claims of indirect expropriation is “the character of the government action.”⁷¹¹ On this point, the record is clear:

⁷⁰⁷ Counter-Memorial on Merits ¶¶ 291-92. Notably, Respondent does not assert that *lesividad* was declared to ensure that Guatemala had a functioning railroad.

⁷⁰⁸ See RL-77, *ADC Award*, ¶ 432 (“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.”); Second Opinion of M. Reisman ¶ 40.

⁷⁰⁹ RL-135, *Vivendi II Award*, ¶ 7.5.21 (quoting CL-154, *Santa Elena Award*, ¶ 71) (internal quotations omitted).

⁷¹⁰ RL-133, *Tecmed Award*, ¶ 120 (citing and quoting James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* 84 (2002)).

⁷¹¹ RL-61, CAFTA Annex 10-C, ¶ 4(a)(iii).

the Declaration of *Lesividad* was an exercise of governmental fiat, conducted in secret and directed by the top echelon of the Government of Guatemala, targeted to repudiate a foreign investment which the Government had induced, and used to coerce Claimant into either substantially giving up its property rights or forcing it to abandon its investment without any compensation. That was the explicit agenda, and the record documents it fully.

291. In a sublime sense of irony, Respondent argues that its use of the *lesividad* process should be accorded deference in this case because it was a proper and legitimate exercise of its “police powers,” and that to accept Claimant’s argument would prevent Guatemala from ever again enforcing its laws in the public interest.⁷¹² This argument hardly merits a serious response.

292. First, Respondent’s claim that any exercise of police power warrants great deference is seriously over-reaching. When it was their intention, CAFTA’s drafters were capable of and, indeed, did express areas of special deference to sovereigns with respect to the investment obligations. The most obvious one is noted by Respondent: consistent with customary international law, Annex 10-C of CAFTA provides that “[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”⁷¹³ But there are other examples as well. Foreign investors in financial institutions, for example, may not access Chapter Ten’s dispute settlement mechanism for claims of breaches of CAFTA Article 10.5 (minimum standard of treatment), but they can for breaches of CAFTA Article 7 (expropriation).⁷¹⁴ Moreover, if a foreign investor in a financial institution does make an expropriation claim, the respondent government can raise a defense that the measure was for prudential reasons and the matter will be deferred to CAFTA’s Financial Services Committee to decide whether and to what extent this is a valid defense.⁷¹⁵ Thus, regulatory areas of special sensitivity are identified and dealt with in CAFTA, and

⁷¹² Counter-Memorial on Merits ¶ 297.

⁷¹³ RL-61, CAFTA Annex 10-C, ¶ 4(b).

⁷¹⁴ RL-61, CAFTA art. 12.2(b).

⁷¹⁵ *Id.*, art. 12.9.

Respondent is left with the rebuke of the tribunal in *Pope & Talbot*, which said “[a] blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.”⁷¹⁶

293. In order to find shelter, Respondent erroneously suggests that the *Lesivo* Resolution was a nondiscriminatory regulation of general application and, therefore, is subject to the deference shown to such public welfare objectives as public health, safety, and the environment.⁷¹⁷ As applied to the facts in this case, the *lesividad* process cannot in any conceivable way fit within this definition of “police powers.” The process was not a “nondiscriminatory regulatory action” that applied to the citizenry of Guatemala as a whole or to a specific industry or group, but was a *sovereign act* by Respondent specifically directed at one and only one private party – FVG. The process was not used by the Government in order to regulate anything, but was an extraordinary discretionary and arbitrary exercise of the Government’s sovereign authority to repudiate a *commercial agreement* on technical legal grounds in furtherance of its agenda to force Claimant to renegotiate the terms of its other commercial agreements with Respondent or terminate the Usufruct. And Respondent does not even attempt to argue – because it cannot – that the *Lesivo* Resolution was issued to protect any public health, safety or environmental objectives. Instead, Respondent cynically argues that the *Lesivo* Resolution was issued in order to “uphold the rule of law,” when, in fact, it laid bare the corruption and cronyism of Guatemala’s political and business elites.⁷¹⁸

294. Accordingly, the Tribunal owes Respondent absolutely no deference in its exercise of the *lesivo* process in this case. Regardless of whether the *lesivo* process has been used or abused by the Government of Guatemala for improper purposes in other instances, there can be no doubt that, *in this particular case*, the *lesivo* process was not used to protect legitimate general public welfare objections such as public health, safety or the environment – or even the rule of law – but, rather, was used by Respondent solely as a “threat instrument” against

⁷¹⁶ CL-126, *Pope & Talbot* Interim Award, ¶ 99. See also RL-140, Ian Brownlie, *Principles of Public International Law* 532 (7th ed. 2008).

⁷¹⁷ Counter-Memorial on Merits ¶¶ 297-98.

⁷¹⁸ Of course, nowhere does the *Lesivo* Resolution state that “upholding the rule of law” was the objective behind the Resolution.

Claimant in order to further Respondent's (and Respondent's favored national investor's) commercial, economic and political interests at Claimant's expense.

7. The *Lesivo* Process Does Not Accord Due Process

295. Respondent argues that the *lesividad* process under Guatemalan law is a “reasonable process” which accords an affected private party a full panoply of due process rights, including a full and fair opportunity to contest the declaration of *lesividad* before the country's *Contencioso Administrativo* court and to appeal any decision by such court.⁷¹⁹ Once again, Respondent's arguments do not comport with the reality of Respondent's deficient legal system or the standards of customary international law.

296. In *ADC*, the tribunal discussed what “due process of law” means in the context of an expropriation claim:

The Tribunal agrees with the Claimants that “due process of law”, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. *Some basic legal mechanisms such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess 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 affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that “the actions are taken under due process of law” rings hollow.*⁷²⁰

297. By no means does the *lesivo* process in Guatemala satisfy this or any other definition of due process; in fact, a comparison of the facts in this case to this standard does not even pass the “red face” test. Under Guatemalan law, the *lesivo* procedure is an expansive and essentially unfettered power that allows the President of the Republic to annul administrative contracts the Government has previously entered into without providing any compensation *or*

⁷¹⁹ Counter-Memorial on Merits ¶ 301.

⁷²⁰ RL-77, *ADC* Award, ¶ 435 (emphasis added). See also CL-148, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 Mar. 2010) (“*Kardassopoulos Award*”), ¶¶ 395-96.

legitimate justification *or* due process to the affected contracting party/investor.⁷²¹ Contrary to the assertion of Respondent’s expert, Mr. Aguilar,⁷²² Guatemalan law does not impose personal responsibility on the President (or, for that matter, any other Government official) if he fails to declare an administrative contract *lesivo* once he becomes aware of that contract’s defects.⁷²³ The President’s power to declare a Government act or contract “harmful to the interests of the State” is a *discretionary* power which is inherently subjective.⁷²⁴ The President, who is responsible to the Guatemalan citizenry as a whole, must make his decision based upon what he perceives to be in the best interests of the entire *country*, which involves balancing the public (national) interest against the potential impact on the private party to the contract and the actions that party may or may not take as a result of a declaration of *lesivo*. Thus, if the President decides to declare a contract *lesivo*, it should *not be* solely because the contract suffers from technical legal defects – which, as discussed above, can be easily remedied through other legal means – but, because, in his judgment, the announced interests of the State upon which the contract is based were capricious or because the terms of the contract were not reasonably related to those announced interests.

298. Guatemalan law does not define or place any limit on what makes a contract or Government act “harmful to the interests of the State.”⁷²⁵ Thus, there does not exist any defined legal criteria or precedent under Guatemalan law that a *Contencioso Administrativo* court can use to perform any meaningful judicial review of the Government’s *lesivo* determination or to reach a

⁷²¹ First Opinion of M. Reisman ¶¶ 33-39; 94-96; First Opinion of E. Mayora ¶¶ 8.2.1 - 8.2.3; 8.3.1 - 8.3.5.

⁷²² Expert Report of J.L. Aguilar ¶¶ 36, 37, 72. The only legal authority Mr. Aguilar cites to support his assertion that the President incurs personal liability if he fails to declare a contract *lesivo* once he has been so advised are Articles 153 and 154 of the Guatemalan Constitution (RL-45). Those Constitutional provisions merely state the unremarkable proposition that Government officials are subject to the law (Article 153) and are subject to personal liability if they infringe it (Article 154). Mr. Aguilar, however, cannot point to any law in Guatemala which provides or even suggests that the President must declare a contract *lesivo* once he has been so advised.

⁷²³ Second Opinion of E. Mayora ¶¶ 4.1 - 4.10. *See also* Second Decision on Jurisdiction ¶ 119 (“The Tribunal remains unconvinced, as argued by Respondent, of the inevitability of the *lesivo* process and the lack of discretion of the President to sign or not to sign a *lesivo* resolution once he has been advised that a contract is *lesivo* and has decided to proceed with the declaration of *lesivo* unless there is a settlement.”).

⁷²⁴ Jurisdiction Hearing Tr. 841(19)-842(18) (Mayora); Third Opinion of E. Mayora ¶¶ 67-68.

⁷²⁵ First Opinion of M. Reisman ¶ 33; First Opinion of E. Mayora ¶ 8.3.5; Third Opinion of E. Mayora ¶ 4.

conclusion different from that of the President.⁷²⁶ 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 or Guatemalan law; (ii) were solely the fault of and within the exclusive control of the Government to resolve; (iii) were intended to force the private contracting party to renegotiate and surrender its rights under other entirely valid administrative contracts in order to favor powerful local political interests; and (iv) do not demonstrate any substantive harm to the interests of the State.

299. Respondent argues that a declaration of *lesividad* can never have any expropriatory effect because the declaration is “devoid of any legal effect” until confirmation by the *Contencioso Administrativo* court. While this may be true from a *de jure* standpoint, it is most certainly not true from a *de facto* standpoint.

300. As a technical legal matter, a *Contencioso Administrativo* court can disagree with an executive determination of *lesividad*. However, there exists no known case where a *Contencioso Administrativo* court has ever disagreed with or denied a Government *lesivo* claim when such claim was made within the requisite three-year time frame. Indeed, a review of the seventeen known claims for the revocation of an act declared *lesivo* made by the State of Guatemala since 1991 shows that *only one claim* has ever been officially adjudicated to a judgment by the *Contencioso Administrativo* court:

Claims for Administrative *Lesion* Declared by the State of Guatemala⁷²⁷

No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
1	140-1991	11/15/1991	State of Guatemala	<i>Fundación para el Ecodesarrollo y Conservación (FUNDAECO)</i> and <i>Instituto Nacional de Transformación Agraria (INTA)</i>	Pending Final Judgment

⁷²⁶ First Opinion of E. Mayora ¶¶ 5.5, 6.4, 8.3.1-8.3.7; Second Opinion of E. Mayora ¶ 2.5.4; First Opinion of M. Reisman ¶¶ 33-34, 95.

⁷²⁷ Third Opinion of E. Mayora, Annex 1; *see also* CL-51 (copies of all obtainable *lesividad* declarations issued since 1991).

No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
2	168-1995	11/07/1995	State of Guatemala	<i>Ferrocarriles de Guatemala (FEGUA) and Poliproductos del Pacifico, S.A.</i>	Judgment for the State Confirmed Administrative Lesion Dec. 17, 2001.
3	186-2000	09/12/2000	State of Guatemala	<i>Empresa Guatemalteca de Telecomunicaciones (GUATEL)</i>	Out-of-Court Settlement
4	271-2000	12/05/2000	State of Guatemala	<i>Instituto de Comercialización Agrícola (INDECA); Silo Central, S.A. and Grupo Thronos, S.A.</i>	Dismissed for Failure to Prosecute
5	206-2002	09/26/2002	State of Guatemala	<i>Mayoreo de Computación, S.A. (MAYCOM)</i>	Out-of-Court Settlement
6	126-2003	05/19/2003	State of Guatemala	<i>Concreto Preesforzado de Centroamérica, S.A. (COPRECA)</i>	Court-approved Settlement
7	194-2003	08/14/2003	State of Guatemala	<i>Instituto Guatemalteco de Seguridad Social (IGSS)</i>	Hearings Pending
8	123-2004	06/01/2004	State of Guatemala	<i>Empresa Portuaria Nacional de Santo Tomas de Castilla (EMPORNAC) and Equipos del Puerto, S.A.</i>	Out-of-Court Settlement
9	50-2005	02/25/2005	State of Guatemala	<i>Crédito Hipotecario Nacional de Guatemala (CHN)</i>	Hearings Pending
10	51-2005	02/25/2005	State of Guatemala	<i>Crédito Hipotecario Nacional de Guatemala (CHN)</i>	Hearings Pending
11	52-2005	02/25/2005	State of Guatemala	<i>Crédito Hipotecario Nacional de Guatemala (CHN)</i>	The case is at the Constitutional Court over an injunction of an overruled defendant objection.
12	360-2006	11/09/2006	State of Guatemala	<i>Bodegas Fiscales de Carga, S.A.</i>	The case is at the Constitutional Court over an injunction of an overruled

No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
					defendant objection.
13	361-2006	11/09/2006	State of Guatemala	<i>Bodegas Fiscales de Carga, S.A.</i>	Hearings Pending
14	389-2006	11/14/2006	State of Guatemala	<i>Ferrocarriles de Guatemala (FEGUA) and Compañía Desarrolladora Ferroviaria, S.A. (COFEDE)</i>	Judgment Pending
15	371-2009	08/18/2009	State of Guatemala	<i>Confederación Deportiva Autónoma de Guatemala (CONFEDE)</i>	Hearings Pending

Claims for Administrative *Lesion* Filed by Other Entities of the State of Guatemala

No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
1	97-2004	05/05/2004	Municipality of Antigua Guatemala, Sacatepequez	<i>Buganbilia, S.A.</i>	Hearing Pending
2	185-2004	08/09/2004	Municipality of Santa Lucia Cotzumalguapa, Escuintla	<i>Soluciones Cartográficas, S.A.</i>	Claim dismissed for failure to comply with legal requirements.

301. The foregoing charts further demonstrate that, with the exception of three cases (Nos. 168-1995, 271-2000 and 185-2004), in all of the other known *lesividad* cases either final judgments remain pending (most for several years, at least one of which has been pending for more than two decades) or the claim of *lesivo* was settled out of court on terms dictated by the State. Thus, Respondent’s assertion that the *Contencioso Administrativo* court “issues its determination regarding *lesividad* based solely on law and fact”⁷²⁸ has no basis in reality. As the

⁷²⁸ Counter-Memorial on Merits ¶ 303.

foregoing record demonstrates, the reality is that, with just one exception, the court *never* issues its determination.

302. This is precisely what has happened in the present case. Well over *four* years have passed since the Government first filed its *lesivo* action in November 2006 in the *Contencioso Administrativo* court and, even though FVG has filed no dilatory motions, the court has *still not issued its ruling* and there is no indication when, if ever, it will rule, despite final submissions in the case having been made almost a year ago and the legal mandate that the Court issue its ruling within 15 days after final submissions.

303. FVG has also not been afforded due process in connection with the administrative process leading up to the publication of the *Lesivo* Resolution or in the *Contencioso Administrativo* proceedings thereafter. In particular, FVG was not allowed an opportunity to contest or respond to the Government's allegations of *lesion* before a neutral decision-maker prior to the issuance of the *Lesivo* Resolution. In fact, Respondent did not know of the pending charges until the day before they were published in the *Diario Oficial*.⁷²⁹ FVG also was not allowed an opportunity to contest the Government's charges within a reasonable time after the Government commenced the *Contencioso Administrativo* proceedings to confirm the *Lesivo* Resolution.⁷³⁰ Indeed, although Respondent filed its *lesivo* action in the *Contencioso Administrativo* court on the last possible day, November 24, 2006, it delayed the filing and service of the official notice of its claim on FVG for six months, until May 15, 2007.⁷³¹ It was only then, almost a year and half after Dr. Gramajo first made his formal request to the President to declare Contracts 143/158 *lesivo*, that Claimant learned for the first time the substantive basis for the Government's *lesivo* charges.⁷³²

304. The subsequent process in the *Contencioso Administrativo* court merely continues the denial of due process. FVG was not allowed an opportunity to contest the Government's charges within a reasonable time after the Government commenced the *Contencioso*

⁷²⁹ Second Statement of J. Senn ¶ 31.

⁷³⁰ First Opinion of M. Reisman ¶ 34; First Opinion of E. Mayora ¶¶ 8.2.1 – 8.2.2.

⁷³¹ Statement of C. Franco ¶ 10(c); First Statement of J. Senn ¶ 43; Ex. C-45.

⁷³² Statement of C. Franco ¶ 10(c); Third Statement of J. Senn ¶ 70.

Administrativo proceedings.⁷³³ The court has failed to meet any of the mandatory procedural deadlines imposed by Guatemalan law.⁷³⁴ As a result, a case that is required under Guatemalan law to be concluded no more than six months after its commencement still remains undecided.

305. Moreover, contrary to Respondent's claim, FVG has not had a full and fair opportunity during the *Contencioso Administrativo* proceedings to cross-examine Government witnesses or otherwise to present its defense. As discussed in paragraphs 223-28, *supra*, the entire focus of the proceedings has been on whether, in connection with the declaration of *lesividad*, the various Government officials complied with the procedural, not substantive, requirements of the law. Thus, there has been no opportunity for FVG to present arguments or evidence to the Administrative Court which challenges the Government's claim that the alleged legal infirmities in the usufruct equipment contracts were substantively harmful to the interests of the State.

306. Furthermore, as discussed in paragraphs 223-24, *supra*, an affected private contracting party does not have the right to assert a counterclaim against the State in a *lesividad* proceeding and the *Contencioso Administrativo* court does not have the legal power to award an affected private contracting party compensation for losses resulting from a *lesividad* declaration.⁷³⁵ And, although the State can settle *lesivo* cases with approval of the Executive Branch as established in Article 2161 of the Guatemala Civil Code,⁷³⁶ there is no record of any settlement of a *lesivo* claim under which the State paid any compensation to the contracting private entity or otherwise sought to resolve the private entity's claims. Instead, settlements have only occurred where the private entity has agreed to pay the State or to do what the State is coercing it to do. The State is also prohibited under Guatemalan law from desisting from a *lesivo*

⁷³³ First Opinion of M. Reisman ¶ 34; First Opinion of E. Mayora ¶¶ 8.2.1 – 8.2.2.

⁷³⁴ See paragraph 225, *supra*.

⁷³⁵ First Opinion of E. Mayora ¶ 8.2.3; First Opinion of M. Reisman ¶¶ 35-39.

⁷³⁶ CL-37, Civil Code, art. 2161.

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.⁷³⁷

307. Moreover, in the five *lesivo* actions which have involved Government contracts with private parties (Nos. 123-2004, 360-2006, 361-2006, 97-2004 and 185-2004), as opposed to contracts between Governmental agencies, regardless of whether the cases have been dismissed on procedural grounds or have languished for years, there exists no known records or indication that the affected private companies are still in business in Guatemala. In other words, the declaration of *lesividad* was, *by itself*, the death knell of these companies. And, FVG, unfortunately, was no exception.

308. Finally, as Professor Reisman emphasizes, Guatemalan law does not provide any legal standards for the *Contencioso Administrativo* court to assess the merits or lawfulness of the Government's *lesivo* declaration.⁷³⁸ The absence of any standards by which to determine whether a contract is substantively harmful to the interests of the State means that the purely internal decision of the President to declare a contract *lesivo* is unreviewable and virtually ensures that it will be ultimately rubber-stamped by the court.⁷³⁹ In Professor Reisman's opinion, the *lesivo* process

violates essential elements of due process, prescribed by CAFTA Article 10.7(d): the decision to invalidate an investment contract is, in substance, made by the President and the Cabinet in a "purely internal", Star-Chamber fashion, and the administrative courts which are called on to make the final decision on nullification of the contract are afforded no legal standards by which to assess the lawfulness of the government's action; the apparent due process guarantees that are supposed to become operative at this juncture, are, thus, illusory and, in practice, prove to be meaningless.⁷⁴⁰

309. Thus, the legal requirement that a *lesivo* declaration must be confirmed by the *Contencioso Administrativo* court for it to be "official" and enforceable is wholly illusory and

⁷³⁷ CL-52, Civil and Mercantile Procedural Code (14 Sept. 1963), art. 584; First Opinion of M. Reisman ¶¶ 34, 95.

⁷³⁸ Second Opinion of M. Reisman ¶¶ 25-26, 33.

⁷³⁹ *Id.*

⁷⁴⁰ *Id.* ¶ 33.

meaningless.⁷⁴¹ For CAFTA purposes, it is the declaration of *lesividad*, not the subsequent *Contencioso Administrativo* proceeding, which is substantively decisive because a *lesividad* declaration has immediate and profound negative consequences on the foreign investment.⁷⁴² These consequences cannot be effectively reversed, even though it is technically possible that the Government's determination may, at some indeterminate point, be reversed by a court. This is precisely why the Attorney General for Guatemala, Mario Gordillo, publicly stated after publication of the *Lesivo* Resolution that "[i]f *lesividad* is declared, the contract is rendered *invalid*. The State has nothing to pay as a result of suspending the contract."⁷⁴³ Viewed in its totality, the *lesivo* process, as applied generally by the Government of Guatemala and specifically here against Claimant, is wholly arbitrary and utterly lacking in due process.

8. The *Shufeldt Claim* is on All Fours With the Present Case

310. The facts and circumstances of the present case are remarkably similar to another expropriation case that was brought against Guatemala more than 80 years ago, the *Shufeldt Claim*,⁷⁴⁴ and, therefore, are worth discussing in some detail. In *Shufeldt*, an American investor had entered into a contract with the Guatemalan Secretary of Agriculture for a ten-year concession to extract and export chicle in the Department of Peten. After six years of performance, a Presidential decree declared the contract to be "harmful to the national interests" (*i.e.*, *lesivo*).⁷⁴⁵ The United States brought an arbitration on behalf of the investor against Guatemala before the Chief Justice of Belize (British Honduras).

311. In response to the claim, Guatemala contended that Shufeldt's concession contract was illegal on various grounds, including (i) that the Minister of Agriculture had no authority to enter into it (just as the Respondent here contends that the FEGUA Overseer had no authority to

⁷⁴¹ *Id.*

⁷⁴² Jurisdiction Hearing Tr. 830(20)-833(6); 847(11)-849(6) (Mayora); First Opinion of E. Mayora ¶ 8.2.1; Second Opinion of E. Mayora ¶ 2.4.7; First Statement of M. Fuentes ¶ 12 ("I clearly understood that [the declaration of *lesividad*] represented the end of all efforts to further develop the railroad project in Guatemala . . ."); Second Opinion of M. Reisman ¶ 26.

⁷⁴³ Ex. C-144, *Prensa Libre*, "Process to Recover FEGUA," 19 Dec. 2006 (emphasis added).

⁷⁴⁴ RL-128, *Percy Shufeldt (US) v. Guatemala*, 2 U.N.R.I.A.A. 1079, Decision (24 July 1930) ("*Shufeldt Decision*")

⁷⁴⁵ *Id.* at 1095.

enter into Contracts 143/158 with FVG); (ii) that the contract had not been approved by the National Assembly (just as the Respondent here contends that Contracts 143/158 were not approved by the President); (iii) that the concession – characterized as a lease of public property – could not be granted without public bidding (just as the Respondent here contends); (iv) and that the payments by Shufeldt pursuant to the concession were inadequate (just as the Respondent here argues that the canon fees were too low).⁷⁴⁶

312. The arbitrator summarily rejected all of Guatemala’s contentions of illegality based upon the fact that, like Respondent here, Guatemala had accepted benefits and performance under the concession contract for several years:

The Government of Guatemala having recognized the validity of the contract for six years and received all the benefits to which they were entitled under the contract and allowed Shufeldt to go on spending money on the concession, is precluded from denying its validity, even if the approval of the Legislature had not been given to it. . . . I have no doubt that this contention of the United States is sound and in keeping with the principles of international law and I so hold.⁷⁴⁷

313. Guatemala further contended that cancellation of the contract was justified because of breaches by Mr. Shufeldt (just as the Respondent here contends that FVG breached the Usufruct Contracts).⁷⁴⁸ The arbitrator dismissed this contention with the following words:

If there was a contravention of the agreement as alleged, it is clear from the evidence that the Government took no steps to cancel the contract and did not refer the matter to arbitration under the terms of . . . the contract, and that the Government continued to recognize the validity of the contract and receive the benefits accruing to it thereunder up to the time of the passing of the decree . . . , thereby in my opinion waiving such breach (if any).⁷⁴⁹

⁷⁴⁶ *Id.* at 1088-91.

⁷⁴⁷ *Id.* at 1094.

⁷⁴⁸ *Id.* at 1096. Interestingly, the turncoat employee who testified that Mr. Shufeldt had breached the contract by using machetes, instead of a “scratcher,” to harvest the chicle was named F. Pérez.

⁷⁴⁹ *Id.*

The arbitrator also considered it important that Guatemala had not justified its declaration of *lesivo* on the ground of the alleged breaches of contract.⁷⁵⁰

314. In addition, Guatemala contended that, having complied with its local law as to the declaration of *lesivo*, which was a sovereign act, it could not be held responsible. The arbitrator dismissed this contention:

The Guatemala Government contend further that the decree of the 22nd May 1928 was the constitutional act of a sovereign State exercised by the National Assembly in due form according to the Constitution of the Republic and that such decree has the form and power of law and is not subject to review by any judicial authority. This may be quite true from a national point of view but not from an international point of view, for ‘it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter’s subject’.”⁷⁵¹

315. As to the effect of the decree of *lesivo*, even though there is no mention that Guatemala physically dispossessed Mr. Shufeldt from the concession area, the arbitrator held that the decree deprived him of all his rights under the contract:

This decree was approved of by the President and published in the *El Guatemalteco* of 7th July 1928. This brought the contract summarily to an end, thus depriving Shufeldt of all his rights under the contract.⁷⁵²

316. Thus, *Shufeldt* holds that the very same measure which Guatemala has taken here against Claimant – the declaration of *lesividad* – constitutes an expropriation, and that the very same arguments Guatemala raises here to defend its expropriatory measure do not justify or excuse its conduct.

⁷⁵⁰ *Id.* (“In any case the Guatemala Government can not set up this alleged breach as the cause of the cancellation in face of the provisions of the decree.”). *See also id.* at 1097 (“If therefore the law had been broken in this way [illegal performance of the contract] the authorities could have proceeded under the law; but the Government never having taken any steps to put a stop to this practice which they must have known existed either under the law or by arbitration under the contract, and never having declared the contract cancelled therefor, and having recognized the contract all through, and thus making themselves *particeps criminis* [in] such breach (if any) of the law, can not in my opinion avail themselves of this contention.”).

⁷⁵¹ *Id.* at 1098.

⁷⁵² *Id.* at 1095.

9. Claimant's Indirect Expropriation Was an Unlawful Expropriation Under CAFTA

317. Finally, Respondent's arguments that its indirect expropriation was a "lawful" expropriation within the terms of CAFTA are unavailing. It has not demonstrated that the *Lesivo* Resolution satisfied *any* of the four necessary conditions for a lawful expropriation set forth in Article 10.7.1, much less *all* of the four conditions.

318. First, as discussed in paragraphs 288-89, *supra*, Respondent has not demonstrated that the *Lesivo* Resolution was issued for a legitimate "public purpose."⁷⁵³ The Resolution was not a nondiscriminatory regulatory action to protect legitimate public welfare objections such as protecting public health, safety or the environment. It was not even intended to ensure that Guatemala had a working railroad. In fact, it ensured the opposite. Respondent's assertion that the *Lesivo* Resolution was issued for the "ultimate public purpose" of "uphold[ing] the rule of law" is not supported by the text of the *Lesivo* Resolution or by any legal authority or precedent. Customary international law requires more than just conclusory references to the State's public interest in upholding its own laws to demonstrate its actions were conducted for a "public purpose."⁷⁵⁴ In any event, Respondent clearly did not use the *lesividad* process to "uphold the rule of law," but as an instrument to bludgeon Claimant into surrendering its substantive rights under Contracts 402 and 820 to further benefit Respondent and "other investors" interested in the railway such as Ramón Campollo.

319. *Second*, the *Lesivo* Resolution was clearly enacted in a discriminatory manner.⁷⁵⁵ On its face, the Resolution was a sovereign, non-regulatory act by Respondent which only targeted Claimant's investment. Respondent cannot point to any specific legal precedent or authority under Guatemalan law which allows the Government to declare an administrative contract "harmful to the interests of the State" based upon alleged technical legal defects that were solely within the Government's control and authority to fix. Furthermore, all of the credible evidence presented shows that the Government issued the *Lesivo* Resolution with a

⁷⁵³ RL-61, CAFTA art. 10.7.1(a).

⁷⁵⁴ See RL-77, ADC Award, ¶ 432.

⁷⁵⁵ RL-61, CAFTA art. 10.7.1(b).

discriminatory intent and for a discriminatory purpose, namely, to force Claimant to surrender its substantive rights under the Usufruct Contracts to benefit the Government and Ramón Campollo.

320. *Third*, Respondent has not paid Claimant “prompt, adequate, and *effective*” compensation for its expropriation.⁷⁵⁶ “Prompt” means “paid without delay.”⁷⁵⁷ Respondent argues that it has satisfied this requirement because Claimant has not requested compensation and the *Contencioso Administrativo* court has not yet ruled on the Government’s request to confirm the *Lesivo* Resolution.⁷⁵⁸ As a factual matter, Claimant has requested compensation from the day it filed its Notice of Intent to Arbitrate and thereby gave Respondent 90 days to pay compensation. And, as discussed above in paragraphs 247-52, there is no merit to Respondent’s “ripeness” argument under the plain text of CAFTA or customary international law. CAFTA and customary international law require *Respondent* to prove that it has paid prompt, adequate and effective compensation for its expropriation; it does not require *Claimant* to show that it has requested compensation from Respondent or to wait futilely until the *Contencioso Administrativo* court gets around to deciding whether the Respondent’s expropriatory measure was enacted in accordance with local law – which, in this case, is truly “waiting for Godot.” Because Respondent has not offered or paid Claimant any compensation, it has not satisfied the third condition for a lawful expropriation under CAFTA.

321. *Fourth* and finally, as discussed extensively in paragraphs 223-28 and 295-309, *supra*, Respondent has not acted in accordance with even a semblance of due process of law.⁷⁵⁹ As applied specifically in this case against Claimant, the *lesividad* process is utterly lacking in the due process protections required under customary international law – including providing Claimant with (i) reasonable notice of what the “law” of *lesividad* is, including what types of Government acts are or are not “harmful to the interests of the State”; (ii) reasonable advance notice of the Government’s claim of *lesion* and the asserted factual and legal grounds for such

⁷⁵⁶ RL-61, CAFTA art. 10.7.1(c).

⁷⁵⁷ RL-61, CAFTA art. 10.7.2(a).

⁷⁵⁸ Counter-Memorial on Merits ¶ 339.

⁷⁵⁹ RL-61, CAFTA art. 10.7.1(d). Article 10.7.1(d) also requires that a lawful expropriation must also satisfy the minimum standard of treatment requirements of Article 10.5. As discussed *infra* and in Claimant’s Memorial on the Merits, the *Lesivo* Resolution breached the minimum standard of treatment requirements as well.

claim; and (iii) a full and fair opportunity to contest and resolve the Government's claims before an unbiased and impartial adjudicator within a *reasonable* time after the claims were first asserted.

322. Accordingly, because Respondent has not satisfied any of the four conditions for a lawful expropriation under CAFTA, its indirect expropriation was an *unlawful* expropriation. As discussed below in Section IV on damages, the result is that the damages owed by Respondent for its expropriation is not limited to the measure of compensation set forth in CAFTA for a lawful expropriation, *viz.*, “the fair market value of the expropriated investment immediately before the expropriation took place”⁷⁶⁰ but, instead, damages are to be measured by the broader customary international law standard originally set forth in *The Factory at Chorzów* case: the “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.”⁷⁶¹

10. Conclusion

323. As demonstrated above and in its Memorial on the Merits, Claimant has established that Respondent's act of issuing the *Lesivo* Resolution and acts in furtherance of the Resolution constituted an indirect expropriation of Claimant's investment under CAFTA and customary international law. Claimant has proven that, as a *de facto* matter, the *Lesivo* Resolution directly interfered with FVG's rights under the entire Usufruct, including its rights under Master Contract 402. Respondent's interference through the *Lesivo* Resolution undermined Claimant's distinct, reasonable investment-backed expectations and was not a nondiscriminatory regulatory action designed to protect legitimate public welfare objectives. The *Lesivo* Resolution had a devastating and irreversible effect on the economic viability of the entire Usufruct (and, hence, FVG) and, as a result, Claimant has been substantially deprived of the expected economic benefits from its investment. Furthermore, Respondent's indirect

⁷⁶⁰ See RL-61, CAFTA art. 10.7.2(b).

⁷⁶¹ RL-90, *Factory at Chorzów*, Judgment No. 13 (Claim for Indemnity - The Merits), Perm. Ct. Int'l Justice, (13 Sept. 1928), at 40.

expropriation was an *unlawful* expropriation under the terms of Article 10.7.1 of CAFTA, rendering it responsible for reparations to Claimant under *The Factory at Chorzów*.

324. Accordingly, Respondent has violated its obligations under CAFTA Article 10.7.

C. Guatemala Failed to Afford Claimant’s Investment Fair and Equitable Treatment in Accordance With CAFTA Article 10.5

325. In CAFTA, the customary international law minimum standard of treatment of aliens is established as the minimum standard of treatment to be afforded to covered investments.⁷⁶² Respondent argues in its Counter-Memorial that Claimant has failed to demonstrate any of the violations that Claimant alleges are part of the customary international law minimum standard of treatment required by CAFTA,⁷⁶³ and questions whether three of them – the duty to refrain from acting arbitrarily, the duty to act transparently, and the duty not to frustrate Claimant’s legitimate expectations – are even encompassed by this standard.⁷⁶⁴ As discussed below, Respondent’s arguments rest upon misstatements and mischaracterizations of what CAFTA and the applicable law require and the actual factual record before this Tribunal. Moreover, Respondent’s bad faith alone is sufficient for the Tribunal to find that Guatemala has failed to provide fair and equitable treatment to Claimant’s investment under CAFTA Article 10.5.

326. At the outset, it is helpful to note that the customary international law minimum standard of treatment of aliens is not a novel standard for tribunals to consider in treaty claims for denial of fair and equitable treatment. NAFTA tribunals have devoted substantial attention to the scope and substantive content of the minimum standard of treatment since July 31, 2001, when the NAFTA Free Trade Commission (FTC) issued its *Notes on Interpretation of Certain Chapter 11 Provisions* (“FTC Notes”).⁷⁶⁵ The FTC Notes clarified and reaffirmed the customary international law minimum standard of treatment as the minimum standard of

⁷⁶² RL-61, CAFTA Arts. 10.5.1, 10.5.2.

⁷⁶³ Counter-Memorial on Merits ¶ 345.

⁷⁶⁴ *Id.* ¶ 349.

⁷⁶⁵ RL-170, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

treatment to be afforded to investments under NAFTA Article 1105(1), and this interpretation became binding on NAFTA Chapter 11 tribunals.⁷⁶⁶

327. To further assist the Tribunal, the following chart compares the relevant minimum standard of treatment provisions of NAFTA (including the FTC Notes) with the CAFTA minimum standard provisions, and makes it abundantly clear that the two agreements use essentially the same language to describe the fair and equitable treatment obligation:

<u>NAFTA</u>	<u>CAFTA</u>
<p>Article 1105: Minimum Standard of Treatment</p> <p>1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.</p> <p><u>NAFTA FTC Notes</u></p> <p>B. Minimum Standard of Treatment in Accordance with International Law</p> <p>1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.</p> <p>2. 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 the customary international law minimum standard of treatment of aliens.</p> <p>3. Any determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).</p>	<p>Article 10.5: Minimum Standard of Treatment¹</p> <p>1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.</p> <p>2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.</p> <p>2. (cont’d.) 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 standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:</p> <p>(a) “fair 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; and</p> <p>(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.</p> <p>3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.</p> <p>¹ Article 10.5 shall be interpreted in accordance with Annex 10-B.</p> <p>Annex 10-B</p> <p>Customary International Law</p> <p>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.</p>

⁷⁶⁶ *Id.* ¶ B.1. NAFTA Article 1131 requires Chapter 11 tribunals to apply governing law, which includes binding interpretations issued by NAFTA’s Free Trade Commission.

328. The fact that NAFTA and CAFTA apply the same standard after July 31, 2001 makes NAFTA arbitral awards after that date particularly relevant to this Tribunal's task of discerning the contemporary content of the customary international law minimum standard as expressed in the fair and equitable treatment obligation of CAFTA Article 10.5.

1. Fair and Equitable Treatment Under CAFTA and NAFTA

329. Respondent's arguments regarding the content of its obligation to provide fair and equitable treatment under CAFTA are confusing, contradictory and of no assistance in determining the standard of treatment required under the customary international law minimum standard. For example, Respondent argues that this Tribunal can rely only on the findings of international tribunals that were similarly bound by customary international law,⁷⁶⁷ but then cites abundantly from arbitral awards that were not so constrained when discussing how the fair and equitable treatment standard under the customary international law minimum standard of treatment has been recognized by other international tribunals.⁷⁶⁸ Respondent next proceeds to "slice and dice" the definition of the standard found in *Waste Management II*, which synthesized NAFTA practice in the aftermath of the FTC Notes and is cited by Claimant in its Memorial. Respondent places half the elements that the *Waste Management II* tribunal found to violate the fair and equitable treatment obligation among the *recognized* customary international law standards (actions that are discriminatory, grossly unfair, unjust or idiosyncratic⁷⁶⁹), but *challenges* other elements (arbitrariness, lack of transparency, the investor's legitimate expectations) without offering any explanation or rationale.⁷⁷⁰ Respondent also cites tidbits from other NAFTA awards while leaving out inconvenient and more important findings, such as

⁷⁶⁷ Counter-Memorial on Merits ¶ 353.

⁷⁶⁸ See Counter-Memorial on Merits, § IV.B.1.c. In this section alone, Respondent cites the following awards that do not rely upon customary international law: RL-95, *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (27 Mar. 2007) ("*Eastern Sugar Award*"); RL-126, *S.D. Myers* First Partial Award; RL-120, *Parkerings-Compagniet A.S. v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 Sept. 2007) ("*Parkerings Award*"); RL-133, *Tecmed Award* (which Respondent criticizes Claimant for citing); RL-86, *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) ("*Biwater Gauff Award*").

⁷⁶⁹ Counter-Memorial on Merits ¶ 366.

⁷⁷⁰ *Id.* ¶ 349.

noting that the *Merrill & Ring* tribunal held that the *Neer* standard still applies to due process,⁷⁷¹ while neglecting to mention the same award declared *reasonableness* to be “today’s minimum standard.”⁷⁷² And Respondent fails to mention the extensive discussion that has taken place among NAFTA tribunals and scholars with respect to the influence of the 2,000+ existing BITs on the content of the fair and equitable treatment standard under customary international law.

330. To provide a more complete and consistent picture, the following chart provides an overview of the ten most prominent NAFTA arbitral awards dealing with the standard for fair and equitable treatment since the FTC Notes were issued.⁷⁷³ The binding nature of the FTC interpretation is immediately apparent in that the two NAFTA decisions that immediately preceded the FTC Notes did not apply the customary international law minimum standard of treatment, while all subsequent NAFTA tribunals have.⁷⁷⁴ The chart also helps to establish some points of agreement among the post-FTC Notes NAFTA tribunals and to identify some limited areas of divergence.

⁷⁷¹ *Id.* ¶ 379

⁷⁷² RL-110, *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL (ICSID Administered Case), Award (31 Mar. 2010) (“*Merrill & Ring Award*”), ¶¶ 210, 213. The tribunal found the exceptions were personal safety, denial of justice, and due process.

⁷⁷³ The information on the following chart was drawn from the following sources: RL-126, *S.D. Myers* First Partial Award, ¶263; RL-123, *Pope & Talbot Inc. v. Government of Canada*, Ad hoc - UNCITRAL Arbitration Rules Award on the Merits of Phase 2 (10 Apr. 2001) (“*Pope & Talbot Award on Merits*”), ¶¶111-18; CL-152, *Pope & Talbot v. Government of Canada*, Tribunal Award in Respect of Damages (31 May 2002) (“*Pope & Talbot Award re Damages*”), ¶¶ 51, 56-68; RL-16, *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/02, Award (11 Oct. 2002) (“*Mondev Award*”), ¶¶ 115-17, 124; RL-78, *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award (9 Jan. 2003) (“*ADF Award*”), ¶¶ 178-84, 190-91; RL-107, *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) (“*Loewen Award*”), ¶¶ 124-34; RL-136, *Waste Management II Award*, ¶¶ 91-98; RL-100, *GAMI Investments, Inc. v. Mexico*, Ad hoc UNCITRAL Arbitration Rules, IIC 109 Award (15 Nov. 2004) (“*GAMI Award*”), ¶¶ 92-97; RL-104, *International Thunderbird Award*, ¶¶ 193-94; RL-102, *Glamis Gold Ltd. v. United States*, Award (8 June 2009) (“*Glamis Gold Award*”), ¶¶ 19-23, 599-616; RL-110, *Merrill & Ring Award*, ¶¶ 190-210; RL-89, *Chemtura Award* ¶¶ 121-23.

⁷⁷⁴ The *S.D. Myers* tribunal found that breach of another NAFTA provision (Article 1102) was sufficient to establish a breach of Article 1105, while the tribunal in *Pope & Talbot* had held that the fair and equitable treatment obligation in NAFTA was additive to the international law standard. These rulings served to prompt at least two of the clarifications in the FTC Notes.

The Standard of Fair and Equitable Treatment in Key NAFTA Arbitral Awards

Year	NAFTA Arbitral Award	Applies CIL?	Rejects <i>Neer</i> ?	Updates Views?	Influence of BITS?	Fair and Equitable Treatment Standard Articulated
2000	<i>S.D. Myers</i>	-	-	-	-	“Such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international level...in the light of the high measure of deference that international law generally extends to [government’s right to regulate within its borders].”
2001	<i>Pope & Talbot</i> (Award on Merits)	N	Y	Y	-	“[F]airness elements under ordinary standards applied in the NAFTA countries, without any threshold limitations that the conduct complained of be ‘egregious,’ ‘outrageous’ or ‘shocking,’ or otherwise extraordinary.”

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2002	<i>Pope & Talbot</i> (Award on Damages)	Y	Y	Y	Y	Previously “additive” fairness elements now viewed as inclusive as customary international law evolves. No “threshold limitations,” but, in any event, tribunal found respondent’s actions did “shock” and “outrage.”
2002	<i>Mondev</i>	Y	Y	Y	Y	“[I]s intended to provide a real measure of protection to investments and...has evolutionary potential. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of a particular case.”
2003	<i>ADF Group</i>	Y	Y	Y	-	“[A]ny general requirement to accord ‘fair and equitable treatment’... and “full protection and security” must be disciplined by being based upon State practice and judicial or arbitral caselaw or other sources of customary or general international law...grossly unfair or inequitable...something more than simple illegality [under domestic law]...flawed by arbitrariness.”
2003	<i>Loewen</i>	Y	-	-	-	“Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.”

The Standard of Fair and Equitable Treatment in Key NAFTA Arbitral Awards (cont'd.)

Year	NAFTA Arbitral Award	Applies CIL?	Reject <i>Neer</i> ?	Update Views?	Influence of BITS?	Fair and Equitable Treatment Standard Articulated
2004	<i>Waste Management II</i>	Y	Y	Y	-	“[A]rbitrary, 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.”
2004	<i>GAMI</i>	Y	Y	Y	-	Uses standard found in <i>Waste Management II</i> and notes four implications.
2006	<i>International Thunderbird</i>	Y	Y	Y	-	“For purposes of the present case, ... acts that ... [when] weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”
2009	<i>Glamis Gold</i>	Y	N	Y	N*	“[S]ufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted minimum standards... The idea of deference is found in the modifiers ‘manifest’ and ‘gross’ ... [and is not additive to that standard].”
2010	<i>Merrill & Ring</i>	Y	Y	Y	Y	“[E]xcept for cases of safety and due process, today’s minimum standard provides for the fair and equitable treatment of aliens within the confines of reasonableness.”
2010	<i>Chemtura</i>	Y	Y	Y	Y	“In line with <i>Mondev</i> , the Tribunal will take account of the evolution of international customary law in ascertaining the content of the international minimum standard ... [Regarding] whether the protection granted ... is lessened by a margin of appreciation ... This is not an abstract assessment ... circumscribed by a legal doctrine about the margin of appreciation of specialized regulatory agencies. It is an assessment that must be <i>conducted in concreto</i> .”

* Unless the BIT is based explicitly on the customary international law minimum standard of treatment.

331. Some of the NAFTA Parties, principally Canada, have argued that the correct customary international law standard is the one laid down by the U.S.-Mexico Claims Commission in the 1926 *Neer* case, *i.e.*, that for there to be a breach of international law, “the treatment of an alien ... should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”⁷⁷⁵ Yet all but two of the post-FTC Notes NAFTA tribunals have explicitly rejected the idea that the current content of the customary international law minimum standard of treatment is found within the elements of *Neer*. The two outliers are the *Loewen* and the *Glamis Gold* awards. The *Loewen* tribunal didn’t reference the *Neer* standard in its decision; it touched only lightly on the issues relating to the evolution of the minimum standard, before settling on how the *Mondev* tribunal had framed a breach for denial of justice.⁷⁷⁶ In contrast, the *Glamis Gold* tribunal explicitly acknowledged that it had departed from a major trend of previous reasoning;⁷⁷⁷ and subsequent NAFTA tribunals (*Merrill & Ring* and *Chemtura*) have rejected its view that the fundamentals of the *Neer* decision still apply, except, perhaps, “within the strict confines of personal safety, denial of justice and due process.”⁷⁷⁸ In other words, contrary to Respondent’s position, the *Glamis Gold* decision is an outlier; this Tribunal need not apply or consider its formulation of the minimum standard of treatment.

332. Second, all of these NAFTA tribunals, including *Glamis Gold*, have held that customary law can evolve over time, and have noted their agreement with the *Mondev* tribunal when it said:

To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.⁷⁷⁹

⁷⁷⁵ RL-116, *U.S.A. (L.F.H. Neer) v. United Mexican States*, Decision of the General Claims Commission, United States-Mexico (15 Oct. 1926), Opinions of Commissioners, 927, p.1.

⁷⁷⁶ RL-107, *Loewen Award*, ¶¶ 133-35.

⁷⁷⁷ RL-102, *Glamis Gold Award*, ¶ 8.

⁷⁷⁸ RL-110, *Merrill & Ring Award*, ¶ 204.

⁷⁷⁹ RL-16, *Mondev Award*, ¶ 116.

The most obvious example of an evolutionary change in the customary international law minimum standard is the one noted immediately above, *i.e.*, all NAFTA tribunals accept that bad faith is no longer required of a State to find a breach of the fair and equitable treatment standard. Another evolutionary change can be found in the plain words of the NAFTA and CAFTA treaties themselves, which make clear that the Parties accept that the obligation to afford fair and equitable treatment to foreign investments is provided for in today's customary minimum standard.⁷⁸⁰

333. In line with this evolutionary potential, beginning with *Pope & Talbot*,⁷⁸¹ there has been a steady line of NAFTA cases that have held that the content of customary international law is shaped by the requirements of fair and equitable treatment included in the 2,000+ bilateral investment treaties that exist today. Roughly half of the post-FTC Notes NAFTA tribunals have espoused this view,⁷⁸² some have not stated a position, and only one – *Glamis Gold* – has rejected it. In this regard, the *Glamis Gold* tribunal has been criticized for “declining to recognize any evolution in the minimum standard of treatment since 1928, despite the fundamental transformations of international law in the post-war era [including] the proliferation of investment treaties (which signal a universal commitment to robust protection of foreign investment).”⁷⁸³

334. The *Mondev* and *Merrill & Ring* tribunals distinguished themselves for the care they took to establish the evolution of the fair and equitable treatment obligation in the

⁷⁸⁰ CL-164, Charles H. Brower II, *Hard Reset vs. Soft Reset: Recalibration of Investment Disciplines under Free Trade Agreements*, available at www.kluwerarbitrationblog.com (posted December 16, 2009). (noting that fundamental transformations in international law include the specific phrasing of NAFTA Article 1105 and similar treaties, which recognize that the international minimum standard positively guarantees “fair and equitable treatment” and thus, represents an improvement over the prohibition against “egregious”, “outrageous” and “shocking” government conduct.)

⁷⁸¹ CL-152, *Pope & Talbot* Award re Damages, ¶ 62 (“Canada’s views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.”).

⁷⁸² See *Id.* at ¶ 62; RL-16, *Mondev* Award, ¶ 117; RL-110, *Merrill & Ring* Award, ¶ 205-207; RL-89, *Chemtura* Award ¶ 121-122.

⁷⁸³ CL-164, Brower “*Hard Reset v. Soft Reset*” (Blog). See also CL-169, Robert Howse, “*Custom in International Investment Law: Glamis Gold and Other Developments*,” Draft Presentation to the NYU Investment Forum, 8 Feb. 2010.

customary minimum standard through State practice and *opinio juris*. *Mondev* highlighted three factors⁷⁸⁴ in its reasoning: (1) the difference in subject matter of the *Neer* case, which concerned the physical security of an alien rather than the treatment of foreign investment;⁷⁸⁵ (2) the considerable development since the 1920s in both the substantive and procedural rights of the individual in international law and the international protection of foreign investment; and (3) the vast and growing network of bilateral and regional investment treaties that almost uniformly provide for fair and equitable treatment of foreign investments. After the *Mondev* tribunal found evidence of *opinio juris* in the statements transmitting NAFTA and BITs to the Canadian Parliament and U.S. Congress respectively,⁷⁸⁶ the tribunal concluded that:

[T]here can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party under NAFTA, the term “customary international law” refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. *In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce.* Those treaties largely and concordantly provide for “fair and equitable” treatment of, and for “full protection and security” for, the foreign investor and his investments. Correspondingly the investments of investors under NAFTA are entitled, under the customary international law which NAFTA Parties interpret Article 1105(1) to comprehend, to fair and equitable treatment and to full protection and security.⁷⁸⁷

⁷⁸⁴ RL-16, *Mondev* Award, ¶¶ 115-24.

⁷⁸⁵ See also RL-78, *ADF* Award, ¶ 181. “There appears no logical necessity and no concordant State practice to support the view that the *Neer* formulation is automatically extendable to the contemporary content of treatment of foreign investors and their investments by a host or recipient State.”

⁷⁸⁶ RL-16, *Mondev* Award, ¶¶ 111-13.

⁷⁸⁷ *Id.* ¶ 125 (emphasis added).

335. The *Merrill & Ring* tribunal covered further ground in documenting the increasing “obsolescence”⁷⁸⁸ of the approach taken by the *Neer* Commission and, turning to the applicable standard in the context of “business, trade and investment” cases, stated:

The parties have extensively discussed whether the customary law standard might have converged with the fair and equitable treatment standard, but convergence is not really the issue. The situation is rather one in which the customary law standard has led to and resulted in establishing the fair and equitable treatment standard as different stages of the same evolutionary process.⁷⁸⁹

336. After analyzing the relevant state practice and *opinio juris*, the *Merrill & Ring* tribunal found that “[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment...has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.”⁷⁹⁰ With regard to the content of this standard, the tribunal held that “the standard protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.”⁷⁹¹ As further demonstration of *opinio juris*, the tribunal noted that this standard was followed by the NAFTA states in respect of the conduct of other countries affecting the business, trade or investment interests of their own citizens abroad.⁷⁹²

337. Any lack of precision in the definition of what constitutes fair and equitable treatment is taken into account of in a final point of agreement among NAFTA tribunals, that is, that the judgment of what is fair, equitable and reasonable can only be discerned when applied to the facts of each case. As the tribunal in *Mondev* pointed out, “[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.”⁷⁹³

⁷⁸⁸ RL-110, *Merrill & Ring* Award, ¶ 202.

⁷⁸⁹ *Id.* ¶ 209.

⁷⁹⁰ *Id.* ¶ 202.

⁷⁹¹ *Id.* ¶ 210.

⁷⁹² *Id.* ¶ 212.

⁷⁹³ RL-16, *Mondev* Award, ¶ 118.

Similarly, the tribunal in *Waste Management II* stated “the standard is to an extent a flexible one which must be adapted to the circumstances of each case.”⁷⁹⁴

338. Based on the foregoing, Claimant will proceed to present the facts of its fair and equitable treatment claim. In so doing, Claimant will rely on arbitral awards that involved an examination of customary international law “to serve as illustrations of customary international law.”⁷⁹⁵ Further, in light of the preponderant view of NAFTA tribunals – analyzing State practice and establishing *opinio juris* – that the current content of customary international law is shaped by the thousands of bilateral and regional investment treaties that require host States to afford “fair and equitable treatment” to foreign investments, Claimant will also rely upon other arbitral awards that present a similar fact situation or hold, as so many ICSID tribunals have, that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law, especially when applied to the facts in a particular case.⁷⁹⁶ In *Vivendi II*, for example, the parties found common ground on the standard of treatment, even though they had disagreed on whether that standard was limited to the minimum standard of treatment under international law. Both parties accepted the proposition that, in assessing whether the standard had been transgressed, a tribunal must determine whether

⁷⁹⁴ RL-136, *Waste Management II* Award, ¶ 99. See also RL-104, *International Thunderbird* Award, ¶ 194 (“when weighed against the given factual context”); RL-110, *Merrill & Ring* Award, ¶ 210; RL-89, *Chemtura* Award, ¶¶ 122-23.

⁷⁹⁵ RL-102, *Glamis Gold* Award, ¶ 605.

⁷⁹⁶ CL-177, Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation*, Hart Publishing, Oxford and Portland, Oregon (2009), pp. 312-15 (stating upon detailed analysis that “[M]ost arbitral tribunals have lately arrived at the conclusion that the FET standard, whether or not it is “autonomous,” does not go *de facto* beyond IMS [the International Minimum Standard under customary international law].”). For individual tribunals, see also RL-78, *ADF* Award, ¶ 184 (stating the general requirement to accord ‘fair and equitable treatment’ must be disciplined by being based upon state practice and judicial or arbitral case law or other sources of customary or general international law); RL-85, *Azurix* Award, ¶ 361; RL-125, *Saluka Investments BV v. The Czech Republic*, PCA-UNCITRAL, Arbitration Rules Partial Award (17 Mar. 2006) (“*Saluka* Award”), ¶ 291 (stating that the difference “when applied to the specific facts of a case, may well be more apparent than real.”);

CL-153, *Rumeli Telekom* Award, ¶ 611; RL-92, *CMS Gas v. Argentine Republic*, ICSID Case No. ARB/01/8 Award (12 May 2005) (“*CMS Gas* Award”), ¶ 284 (with respect to “required stability and predictability of the business environment, founded on solemn legal and contractual commitments”); RL-118, *Occidental Exploration & Production Company v. Ecuador*, LCIA Case No. UN3467 Award (1 July 2004) (“*Occidental* Award”), ¶ 190 (with respect to “both the stability and predictability of the legal and business framework of the investment”).

“in all of the circumstances of the particular case, the conduct properly attributable to the state has been fair and equitable, or unfair and inequitable.”⁷⁹⁷

2. The Relevant Period for Assessing Respondent’s Conduct

339. Before examining Respondent’s specific conduct, it is also useful to address the relevant period for analysis. In particular, it is entirely permissible under ICSID jurisprudence for Claimant to refer to the conduct of Respondent prior to CAFTA’s entry into force in support of its claims. The *Mondev* tribunal was explicit that Article 28 of the Vienna Convention on the Law of Treaties (VCLT) (and, hence, CAFTA Article 10.1.3 on scope and coverage) does not imply that events prior to the entry into force of an agreement may not be relevant to the question of whether a Party to that agreement is in breach of its obligations by conduct of that Party *after* the agreement’s entry into force. Specifically, the *Mondev* tribunal determined that

events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it still must be possible to point to conduct of the State after that date which is itself a breach.⁷⁹⁸

340. Similarly, the *Tecmed* tribunal confirmed that if there is a breach after a treaty’s entry into force, acts or omissions by the Respondent occurring before that date may be relevant:

[C]onduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal’s jurisdiction. This is so, provided such conduct or acts, upon consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement, and particularly if the conduct, acts or omissions prior to [date of EIF] could not reasonably have been fully assessed by the Claimant in their significance and effects when they took place....⁷⁹⁹

⁷⁹⁷ RL-135, *Vivendi II* Award, ¶ 7.4.12.

⁷⁹⁸ RL-16, *Mondev* Award, ¶ 70.

⁷⁹⁹ RL-133, *Tecmed* Award, ¶¶ 68-70 (citing in particular Article 18 of the Vienna Convention: “A State shall refrain from acts that defeat the object and purpose of a treaty when: a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty....”)

341. International law puts no limit on how far back in time Claimant can refer, but as the *Tecmed* tribunal rightly points out, Guatemala *had an obligation* to refrain from acts that would defeat the object and purpose of CAFTA (importantly including the broad protection of foreign investors and their investments) *from the date of CAFTA's signing on May 28, 2004*.⁸⁰⁰ Far from being a trap sprung by Claimant on Respondent as Respondent has posited,⁸⁰¹ CAFTA was a top priority for President Berger's Administration from the day of his inauguration in January 2004, as demonstrated by President Berger's personal participation in an unprecedented six-city U.S. tour with the other Central American Presidents to lobby for U.S. Congressional passage of CAFTA.⁸⁰² Virtually the entire chronicle of Respondent's efforts to undermine and destroy Claimant's investment occurred *after* CAFTA's signing by Respondent, and the deplorable conduct of Respondent should be harshly viewed in this light.

3. Guatemala Acted in Bad Faith Under Customary International Law

342. It is now well-established in NAFTA and by other arbitral tribunals dealing with the protection of foreign investments that bad faith is no longer required for a violation of the fair and equitable treatment standard.⁸⁰³ On the other hand, it is equally well-established that the fair and equitable treatment standard "encompasses *inter alia* the concrete principle that the State is obliged to act in good faith."⁸⁰⁴ Reflecting this principle, several NAFTA tribunals have stated that a failure to act in good faith is proof of a breach of the fair and equitable treatment standard under customary international law. Even the *Glamis Gold* tribunal, which held to the *Neer*

⁸⁰⁰ Ex. C-162, USTR Press Release, "United States and Central America Sign Historic Free Trade Agreement," 28 May 2004. To be clear, Claimant is not claiming that a breach of a separate international agreement (the Vienna Convention) establishes a breach of CAFTA Article 10.5. Doing so would contravene CAFTA Article 10.5.3. The breach complained of remains the *Lesivo* Resolution and subsequent conduct of Respondent in furtherance of the Resolution. The principle expressed by Article 18 of the Vienna Convention merely provides an appropriate lens for viewing Respondent's conduct in the period between CAFTA's signing and entry into force, consistent with customary international law.

⁸⁰¹ Counter-Memorial on Merits ¶¶ 6-8.

⁸⁰² Ex. C-163, *Congressional Record* - House, Vol. 151, pt. 8, p. 10393 (19 May 2005) ("Those six presidents, five from Central America and one from the Dominican Republic, flew around the United States hoping to sell CAFTA...[T]hese six presidents traveled to Albuquerque, New York, Los Angeles, Miami, Cincinnati.")

⁸⁰³ RL-16, *Mondev Award*, ¶¶ 115-16; RL-107, *Loewen Award*, ¶ 132; RL-136, *Waste Management II Award*, ¶ 93; RL-92, *CMS Gas Award*, ¶ 280.

⁸⁰⁴ CL-153, *Rumeli Telekom Award*, ¶ 609. See also RL-133, *Tecmed Award*, ¶ 153; RL-125, *Saluka Award*, ¶ 307.

standard, stated that bad faith would meet the violative standard of *International Thunderbird* [“a gross denial of justice or manifest arbitrariness falling below acceptable international standards”]⁸⁰⁵ and is “conclusive evidence” of a breach of the fair and equitable treatment obligation under the customary international law minimum standard of treatment.⁸⁰⁶ Notably, Respondent does not refute this point.

343. Arbitral panels have identified several examples of violations of good faith in the investment context.⁸⁰⁷ Among them are (i) situations of coercion and harassment directed at the investor;⁸⁰⁸ (ii) a deliberate conspiracy to defeat the investment;⁸⁰⁹ (iii) use of threats of rescission to bring a concessionaire to the re-negotiation table;⁸¹⁰ and (iv) termination of an investment for reasons other than the one put forth by the government, all of which exist in the present case.⁸¹¹ Recent awards of particular relevance are the *Vivendi II* tribunal’s finding that “arm-twisting aimed at compelling Claimants to agree to new terms to the Concession Agreement which were acceptable to the new Government”⁸¹² breached the fair and equitable treatment obligation, as well as the *Bayindir* tribunal’s finding that “unfair motives” are capable of breaching the fair and equitable treatment standard.⁸¹³

344. Respondent contends that “Guatemala has acted in good faith *at all times* vis-à-vis Claimant and its investment, in accordance with its obligations under CAFTA and international law.”⁸¹⁴ Nothing could be further from the truth. The record in this case demonstrates beyond

⁸⁰⁵ RL-104, *International Thunderbird* Award, ¶ 194.

⁸⁰⁶ RL-102, *Glamis Gold* Award, ¶¶ 560, 616.

⁸⁰⁷ See CL-182, Christoph Schreuer, *Fair and Equitable Treatment*, included in *Protection of Foreign Investments Through Modern Treaty Arbitration - Diversity Harmonization*, (A.K. Hoffman ed.) (2010), at p. 129 (citing cases).

⁸⁰⁸ RL-133, *Tecmed* Award, ¶ 169; RL-123, *Pope & Talbot* Award on Merits, ¶¶ 156-81.

⁸⁰⁹ RL-136, *Waste Management II* Award, ¶ 138.

⁸¹⁰ RL-135, *Vivendi II* Award, ¶ 7.4.37.

⁸¹¹ CL-1, *Bayindir Insaat Turizm Ticaret VE Sanayi A. S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005) (“*Bayindir* Decision on Jurisdiction”), ¶ 250.

⁸¹² RL-135, *Vivendi II* Award, ¶ 7.4.37.

⁸¹³ *Bayindir* Decision on Jurisdiction, ¶ 250.

⁸¹⁴ Counter-Memorial on Merits ¶ 367.

peradventure that the *Lesivo* Resolution – *i.e.*, the unlawful measure – was a bad faith exercise and abuse of Guatemala’s sovereign powers.⁸¹⁵

345. As Dr. Mayora has explained, the alleged legal defects in Contracts 143/158 are not supportable under Guatemalan law and there was no requirement that the contracts had to be approved by Executive Resolution or subject to a new public bidding process.⁸¹⁶ Moreover, even if there were such requirements, neither of these “defects” caused any substantive harm to the interests of the State and, therefore, use of a declaration of *lesividad* was not the appropriate legal means to seek nullification of such contracts.⁸¹⁷ What is more, as the Tribunal has already noted, the alleged defects in Contracts 143/158 were entirely within the Government’s control to fix and therefore could have been easily addressed and rectified by the Government without having to declare the contracts *lesivo*.

346. Respondent, however, never once made an offer or effort to fix the alleged legal deficiencies in Contracts 143/158 because it was never concerned about these “defects” in the first place. At the same time it was secretly proceeding with the *lesivo* process, Respondent internally acknowledged that Contracts 143/158 were “in effect” and it continued to allow FVG’s use of the equipment and accepted FVG’s canon payments under the contracts.⁸¹⁸ The record evidence overwhelmingly demonstrates that Respondent utilized the alleged legal defects in Contracts 143/158 as a flimsy excuse to issue the *Lesivo* Resolution, so it could then be used by Respondent as a threat instrument to, *inter alia*, (i) force FVG to put up a \$50 million investment to re-open the entire South Coast corridor or surrender its rights to Ramón Campollo; (ii) get out of its contractual obligations to remove squatters and make payments to the Railway Trust Fund; (iii) force FVG to drop its local breach of contract arbitrations against FEGUA; (v) increase the canon fee percentages under Contracts 402 and 143; and (iv) force FVG to surrender certain railway equipment that had been granted in usufruct. Indeed, President Berger and

⁸¹⁵ See CL-158, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010) (“*Suez* Decision on Liability”), ¶ 153 (“It is the use by the State of its sovereign powers that gives rise to treaty breaches....”).

⁸¹⁶ Third Opinion of E. Mayora ¶¶ 88-102, 103-06.

⁸¹⁷ *Id.* ¶¶ 76-86.

⁸¹⁸ Ex. C-108, 18 July 2005 letter from Dr. Gramajo to Attorney General’s Office, Consultancy Division, attaching 15 July 2005 opinion from FEGUA Legal Department.

Respondent's other witnesses have *conceded* that this was the bad faith motivation behind the *Lesivo* Resolution, and the Government's "take it or leave it" settlement negotiation demands both before and after the publication of the *Lesivo* Resolution bear this out.

347. Respondent's bad faith *lesivo* strategy was first developed in the Options Paper prepared by Dr. Gramajo for the Legal Coordinator of the Ministry of Communications in April 2005.⁸¹⁹ The Options Paper laid out, *inter alia*, a potential strategy of seeking the "non-amicable termination" of Contract 143 and suggests using the lack of Executive approval of this contract as a basis for renegotiating the terms of the Contracts 402 and 820 to relieve FEGUA of its outstanding \$2 million debt to the Railway Trust Fund, its obligation to make further contributions to the Trust Fund and its obligation to remove squatters. Notably missing from the Options Paper was the "good faith option" of simply securing Executive approval for Contract 143.

348. Rather than attempting to cure or fix the alleged legal infirmities that had been identified in Contracts 143/158, on June 22, 2005 – approximately one week after FVG initiated local arbitration against FEGUA for its failure to pay into the Trust Fund – Dr. Gramajo requested a legal opinion from the Attorney General of Guatemala regarding the legality of Contracts 143/158, arguing that "they fail[ed] to comply with the terms of the bidding conditions."⁸²⁰ On August 1, 2005, the Attorney General's office issued its opinion in response to FEGUA's request. Although the Attorney General's opinion concluded that Contracts 143/158 were *lesivo* to State interests, it stated that this infirmity could be resolved through means other than a declaration of *lesividad*, including early termination, annulment or mutual agreement.⁸²¹ Dr. Gramajo, however, chose to ignore these other, less draconian options and, instead, on January 13, 2006, sent a letter asking President Berger to declare Contracts 143/158 *lesivo*;⁸²² the letter cited numerous alleged irregularities which, as this Tribunal has noted, "had

⁸¹⁹ Ex. C-104, Annex No. 7.

⁸²⁰ Ex. C-106, 22 June 2005 letter from A Gramajo to Attorney General of the Republic, Consultancy Division.

⁸²¹ Ex. C-7, PGN (AG) Opinion No. 205-2005, 1 Aug. 2005.

⁸²² Ex. C-6, FEGUA Opinion No. 05-2006.

been copied from Contract 41 and which the Government had attested to be in accordance with Guatemalan law.”⁸²³

349. The High-Level Railroad Commission launched by President Berger in March 2006 was an exercise in bad faith on several fronts. At the same time the High-Level Commission was purportedly engaging in good faith discussions to resolve the issues between the Government and FVG, behind the scenes the Government continued to work behind the scenes to undermine FVG’s position by concocting the Finance Ministry’s *lesivo* opinion, the General Secretariat’s *lesivo* opinion and a draft *Lesivo* Resolution. When rumor of the Government’s stealth actions was leaked to FVG, the Government’s principal negotiators on the High-Level Commission disclaimed any knowledge of the ongoing *lesivo* process while Dr. Gramajo silently stood by. Rather than showing good faith by “suspending” the *lesivo* process to create “space” for ongoing negotiations as Respondent contends, the Government cancelled future meetings of the High-Level Commission and there was a three-month hiatus with no discussions between the parties while the Government agencies internally debated how best to use the *Lesivo* Resolution to maximize the benefits for Respondent.

350. President Berger signed the *Lesivo* Resolution on August 11, 2006, before any talks resumed. Respondent then waited until the week of August 21 to tell FVG *for the first time* that, unless it could agree to changes in the Usufruct Contracts that were satisfactory to the Government, a declaration of *lesividad* would be issued.⁸²⁴ On August 24, 2006, the last possible day to reach a deal and avoid publication of the *Lesivo* Resolution, Respondent presented FVG with a “take it or leave it” settlement offer that would have fundamentally altered the economic terms of FVG’s concession to its detriment and caused it to surrender unrestored portions of the railroad to “other [interested] investors,” *i.e.*, Mr. Campollo. The only mention of the equipment contracts in the Government’s proposal was a minor, non-specific reference to modifying the contracts “in order to rectify the terms which are deemed to cause *lesion* to the interests of the State of Guatemala.”⁸²⁵ It was at this meeting that FVG learned *for the first time*

⁸²³ Second Decision on Jurisdiction, n.95.

⁸²⁴ Memorial on Merits ¶ 69.

⁸²⁵ Ex. C-44.

that the *Lesivo* Resolution was specifically directed at the usufruct equipment contracts.⁸²⁶ When FVG rejected Respondent’s offer, Respondent issued the *Lesivo* Resolution, as threatened, the next day. The tribunal in *Vivendi III* found a similar bad faith renegotiation process – structured in such a way as to severely limit or indeed curtail the contractual freedom of the claimant in order to arrive at a predetermined result desired by respondent – to be in breach of fair and equitable treatment.⁸²⁷

351. Respondent tries to absolve itself from any responsibility for its bad faith by arguing the inevitability of the *lesivo* process and the lack of discretion of the President. The Tribunal has stated it remains unconvinced on this point,⁸²⁸ and there is no support for Respondent’s position under Guatemalan law. Claimant further notes that, as a factual matter, the legal opinions upon which Respondent relies to justify the *Lesivo* Resolution acknowledged that a *lesivo* contract could be aside “through formal acknowledgement of its condition as *lesivo* to State interests, *early termination, annulment or mutual agreement.*”⁸²⁹ Further, since the grounds for *lesividad* were conditions entirely within the Government’s control, even after talks failed on August 24, the Government still remained capable of fixing the alleged defects in Contracts 143/158 without any further negotiation with or action by Claimant. The Government, however, never did so.

352. As is evident from the above, the *Lesivo* Resolution had nothing to do with fixing the legal defects in Contract 143/158 “that were injurious to the State.” The only alleged substantive harm to the State’s interests set forth in any of the Government’s legal opinions was that the Government of Guatemala was denied the benefit of other potential bidders for the

⁸²⁶ Second Statement of H. Posner III ¶ 14; Second Statement of J. Senn ¶ 30.

⁸²⁷ CL-159, *Vivendi III* Award, ¶¶ 242-43. The tribunal questioned “whether in reality the process thus established constituted a ‘renegotiation’ in reality or whether it was actually an effort to compel changes in the Concession under that label.”

⁸²⁸ Second Decision on Objections to Jurisdiction ¶ 119.

⁸²⁹ Ex. C-7, PGN (AG) Opinion No. 205-2005, 1 Aug. 2005; Ex. R-24, Ministry of Finance Legal Department, Joint Opinion No. 181-2006-AJ (emphasis added). *See also* Ex. R-25, General Secretariat Opinion No. 236-2006, 26 Apr. 2006 (providing draft Government Resolution of *lesion* for “the *consideration* and signature” of the President) (emphasis added).

FEGUA railway equipment who might have offered a higher price⁸³⁰ – a ludicrous proposition on its face given that FVG owned the fifty-year exclusive right to the only narrow gauge railway in Guatemala and that, under the same circumstances in 1997, FVG had been the only bidder for the railroad equipment. More importantly, nowhere did any of the Government’s legal opinions define the State interest that was harmed in this case as “the common good of [Guatemala’s] citizens, through the development and rehabilitation of the country’s railway transport and use of rail equipment,”⁸³¹ as contended by Respondent’s expert, Mr. Aguilar, or to “uphold Guatemalan rule of law,”⁸³² as contended by Respondent. There was simply no effort to establish a declaration of State interest on the basis of anything other than the pretextual technical violations of Government Contract Law.

353. The Tribunal captured Respondent’s hypocrisy when it observed that “[t]he reasons for declaring the Equipment Usufruct Contracts *lesivo* as stated in the “*Exposición de Motivos*” of the *Lesivo* Resolution are substantially the same as those that prevented Contract 41 becoming effective (lack of approval by *Acuerdo Gubernativo* and by Congress) or relate to the need to follow the procedures for public contracting that, notwithstanding the fact that they had already been followed by FVG and FEGUA in respect of the same equipment in the case of Contract 41, had been to no avail to secure the approvals entirely under the Government’s control.”⁸³³ Moreover, as the Tribunal has already concluded, the grounds for the *Lesivo* Resolution, “even if they had been cured by FVG, would not have satisfied the conditions of the settlement proposed on August 24, 2006.”⁸³⁴ This conclusion has been confirmed by the statements of Commissioner Aitkenhead and Legal Counsel Zosel in this proceeding.⁸³⁵ The

⁸³⁰ Ex. R-24, Ministry of Finance Legal Department, Joint Opinion No. 181-2006-AJ (“For the reasons above ... the right of other bidders – who may have submitted bids more favorable to the State – to participate in the process has been curtailed.”).

⁸³¹ Expert Report of J.L. Aguilar ¶ 14.

⁸³² Counter-Memorial on Merits ¶ 291.

⁸³³ Second Decision on Jurisdiction ¶ 144.

⁸³⁴ Second Decision on Jurisdiction ¶ 134.

⁸³⁵ Statement of R. Aitkenhead ¶ 11 (stating “[h]ad the parties reached an agreement that would have provided for the cure of the legal defects of the equipment contracts *and for a plan that would ensure the rehabilitation and functioning of the railroad*”) (emphasis added); Statement of A. Zosel ¶ 17 (stating the Government “was prepared to rectify the legal defects ... provided that the parties settled their disputes....”).

Tribunal has also found the lack of relationship between the grounds for the *Lesivo* Resolution and the “take it or leave it” agreement confirmed, “as argued by Claimant, the use of the *lesividad* process as an element of pressure” to force the renegotiation of the Usufruct contracts.⁸³⁶

354. Following the publication of the *Lesivo* Resolution, the Government continued to use the *lesivo* process in bad faith to exert pressure in its negotiations to extract significant concessions from FVG. Reflective of the Government’s bad faith motivations and negotiating posture, President Berger stated that he issued the *Lesivo* Resolution not because of the alleged legal defects in Contracts 143/158, but because FVG had failed to rebuild and re-open the South Coast corridor. He stated that FVG had 90 days (*i.e.*, the statutory deadline for the Government to file its *lesivo* action in the *Contencioso Administrativo* court) to guarantee a \$50 million investment to rebuild the South Coast corridor and, if FVG failed to do so, he would take away the railway concession from FVG and call for a new bidding process.⁸³⁷ Further, secret Government minutes from the “discussion tables” between FVG and the Government held in September and October 2006 show that the Government continued to withhold from FVG the asserted grounds which motivated the declaration “as a strategy,” and that the Attorney General used the timing of the initiation of the *lesivo* action in the *Contencioso Administrativo* court to “increase pressure to advance the negotiations.”⁸³⁸ Negotiations between FVG and the Government ended not because FVG was unwilling to enter into a new usufruct equipment contract – the Government never made such a stand-alone offer – but because FVG was unwilling to accede to the Government’s extortionate demands to surrender its fundamental rights under the Usufruct Contracts.

355. Based on the foregoing, Respondent’s contention that it acted in good faith at all times and that its sole intent and motivation in issuing the *Lesivo* Resolution was nothing more than the consistent and diligent application of its laws, cannot be taken seriously. The tribunal in *Waste Management II* held that the State has a basic obligation to act in good faith and form, and

⁸³⁶ Second Decision on Jurisdiction ¶ 135.

⁸³⁷ See paragraph 220, *supra*.

⁸³⁸ Ex. R-36.

that deliberately setting out to destroy or frustrate the investment by improper means, as Respondent has done here, is a breach of the minimum standard of treatment under customary international law.⁸³⁹ Further, the *Merrill & Ring* tribunal held that today’s minimum standard under customary international law “protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness.”⁸⁴⁰ Thomas Wälde has suggested that “equitable” is “a reference to *the abuse of formality of law*, e.g. related to the English law principle of estoppel, the international law and civil law concepts of ‘good faith’, ‘*Treu und Glauben*’, *abus de droit* and ‘*venire contra factum proprium*’.”⁸⁴¹ Such abuse is manifest in Respondent’s use of the *lesivo* process against Claimant, in clear violation of its obligation to provide fair and equitable treatment to Claimant’s investment.

4. Guatemala Denied Claimant Due Process of Law

356. The CAFTA parties agree that the minimum standard of treatment under customary international law encompasses principles of procedural fairness or denial of justice. CAFTA Article 10.5.2.(a) states that the obligation to provide fair 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.”⁸⁴²

357. CAFTA’s transmittal papers to the U.S. Congress explained the standard that is contemplated by this obligation:

Under the Agreement, the Central American countries and the Dominican Republic will provide U.S. investors *due process rights*, and recourse in the event of expropriations, *that are consistent with U.S. legal principles and practice*... While the Agreement commits the United States to continue to

⁸³⁹ RL-136, *Waste Management II* Award, ¶ 138.

⁸⁴⁰ RL-110, *Merrill & Ring* Award, ¶ 210.

⁸⁴¹ CL-186, Thomas Wälde, “*Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues*” in *Transnat’l Dispute Mgmt.*, Vol. 1, No. 2 (May 2004), n.11 (emphasis added).

⁸⁴² RL-61, CAFTA art. 10.5.2(a).

provide Central American and Dominican Republic investors *a high level of protection and due process....*”⁸⁴³

Thus, as an evolving standard,⁸⁴⁴ the transmittal supports the view that the contemporary customary international law standard of protection regarding due process – “as embraced by the United States and other major legal systems of the world”⁸⁴⁵ – is a high one.

358. At a minimum, Guatemala should not “seriously depart from a fundamental rule of procedure,” a standard which ICSID tribunals have routinely examined in the context of grounds for annulment of an arbitral award.⁸⁴⁶ As for what rules are fundamental, “the drafters of the Convention refrained from attempting to enumerate them, but the consensus seems to be that only rules of natural justice⁸⁴⁷ – rules concerned with the essential fairness of the proceeding – are fundamental.”⁸⁴⁸ In this regard, ICSID annulment tribunals have pointed approvingly to the following passage from the *Wena Hotels* annulment decision:

[Article 52(1)(d)] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the *right to be heard* before an independent and *impartial tribunal*. This includes the right to state its claim or its defence and to *produce all arguments and evidence* in support of it. This fundamental

⁸⁴³ CL-173, Letter of President Bush Transmitting Implementing Bill for CAFTA-DR to U.S. Congress, June 23, 2005, Tab 4, Statement of How the Dominican Republic-Central America-United States Agreement Makes Progress in Achieving U.S. Purposes, Policies, Objectives and Priorities (“Transmittal Statement”), at 6-7 (emphasis added).

⁸⁴⁴ CL-153, *Rumeli Telekom* Award, ¶¶ 609-11. The tribunal in *Rumeli Telekom* shared “the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law” and found that standard encompassed, *inter alia*, the concrete principle that the State must respect procedural propriety and due process.

⁸⁴⁵ CL-173, Transmittal Statement at 7.

⁸⁴⁶ Article 52(1)(d) of the ICSID Convention states: “(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: ... (d) that there has been *a serious departure from a fundamental rule of procedure;....*” (emphasis added).

⁸⁴⁷ It goes without saying that rules of natural justice are reflected in customary international law.

⁸⁴⁸ CL-139, Decision of the *ad hoc* Committee on the Application for Annulment of *CDC Group v. the Republic of the Seychelles*, ICSID Case No. ARB/02/14, Annulment Proceeding (29 June 2005) (“*CDC Group* Annulment Proceeding”), ¶ 49.

right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other....⁸⁴⁹

In his review of three generations of ICSID annulment proceedings, Professor Schreuer identified the three italicized phrases as representing fundamental rules of procedure that have been invoked by ICSID tribunals, along with one more – meaningful deliberations by the tribunal.⁸⁵⁰

359. The tribunal in *Waste Management II* equated denial of due process with a “manifest failure of natural justice in judicial proceedings” or with “a complete lack of transparency and candour in an administrative process,”⁸⁵¹ while the tribunal in *ADC v. Hungary* observed that due process requires that “the legal procedure must be of a nature to grant an affected investor a *reasonable* chance within a *reasonable* time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that ‘the actions are taken under due process of law’ rings hollow.”⁸⁵²

360. Astonishingly, Respondent does not argue that the *lesividad* process affords due process as currently embodied in the principal legal systems in the world or that it provides for the fundamental rules of natural justice or that it grants an affected investor a reasonable chance within a reasonable time to claim its rights and have its claims heard. Instead, understanding that its *lesividad* process does not even marginally meet the above standard, Respondent argues only that this process is not “manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety.)”⁸⁵³ Respondent’s due process standard is fundamentally incorrect.

⁸⁴⁹ CL-160, *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision of the ad hoc Committee on the Application for Annulment (5 Feb. 2002) (“*Wena Hotels Decision on Annulment*”), ¶ 57 (emphasis added).

⁸⁵⁰ CL-181, Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, p. 29-33 (E. Gaillard, Y. Banifatemi eds., 2004).

⁸⁵¹ RL-136, *Waste Management II Award*, ¶ 98.

⁸⁵² RL-77, *ADC Award*, ¶ 435 (emphasis added). The applicable law provision in the relevant BIT referred to “the *universally acknowledged* rules and principles of international law,” and claimant argued its case based on customary international law.

⁸⁵³ Counter-Memorial on Merits ¶ 380.

361. After setting forth a flawed standard for due process, Respondent proceeds to raise three complaints about Claimant and three defenses of the *lesivo* process to argue its case, none of which withstand even minimal scrutiny. First, Respondent accuses Claimant of asking this Tribunal to “second-guess the decisions of the Constitutional Court of Guatemala that has found the *lesividad* process to be lawful under Guatemalan law, both as such and as applied in this case.”⁸⁵⁴ This argument is nothing more than a red herring. Respondent knows full well that the question is not whether the *lesividad* process is constitutional under Guatemalan law – a matter outside the purview of this Tribunal – but, rather, whether the *lesividad* process accords with the due process requirements of *international law*. It has long been settled under international law that “[a]n international tribunal is not bound to follow the result of a national court.”⁸⁵⁵ Thus, the fact that the Constitutional Court of Guatemala has upheld the validity of the *lesivo* process “only confirms that no legal succor is to be expected from the highest judicial instance of the country.”⁸⁵⁶

362. Second, Respondent complains that Claimant is asking this Tribunal to find a violation of due process “when all that Guatemala did was faithfully apply the pre-existing laws that establish and regulate the *lesividad* process; a process that is fair on its face.”⁸⁵⁷ The unfairness and bad faith that Respondent directed at Claimant’s investment is well documented in the previous section. Suffice it to note here that, when tribunals review the character of administrative decision-making, “at the more egregious end of the spectrum are cases of *coercion* and harassment by State officials; *bad faith*; and discrimination. These latter factors *are sufficient*, but not necessary *elements of breach* of the standard.”⁸⁵⁸

363. Third, Respondent complains that Claimant is asking this Tribunal to condemn the *lesividad* process for not according due process before that process has been given an

⁸⁵⁴ *Id.* ¶ 388.

⁸⁵⁵ CL-39, *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case ARB/81/1, 24 I.L.M. 1022, 1026 at ¶177, Award (20 Nov. 1984) (“*Amco Award*”).

⁸⁵⁶ Second Opinion of M. Reisman ¶ 33.

⁸⁵⁷ Counter-Memorial on Merits ¶ 388.

⁸⁵⁸ RL-155, Campbell McLachlan *et al.*, *International Investment Arbitration* (Oxford University Press, 2007), ¶ 7.99 (emphasis added).

opportunity to provide due process through a decision on the merits by the *Contencioso Administrativo* court.⁸⁵⁹ To the contrary, there does not exist any defined legal criteria or precedent under Guatemalan law that the *Contencioso Administrativo* court can use to perform any meaningful judicial review of the President’s *lesivo* determination or reach a conclusion different from that of the President. As Professor Reisman points out, “[t]o be effective, due process has to be granted at the place and time where the *de facto* final substantive decision is made; to decide otherwise would unduly elevate form over substance.”⁸⁶⁰ For this reason, as well as the “pattern of chronic delay, even lack of resolution, in the cases on *lesivo* declarations in the Respondent’s administrative courts,”⁸⁶¹ Respondent’s argument embodies the “fourth kind of denial of justice” identified by the tribunal in *Azinian v. United Mexican States*,¹⁶ which “overlaps with the notion of ‘pretence of form’ to mask a violation of international law.”⁸⁶²

364. As previously noted, the *Contencioso Administrativo* proceeding to confirm the *Lesivo* Resolution has been pending for well over four years despite the fact that Guatemalan law requires that the court’s judgment should be completed within six months from the commencement of the action.⁸⁶³ The *Glamis Gold* tribunal held that an administrative claim is ripe for review when the Claimant determines the damage has been done, noting that “international and domestic courts do not require futile attempts that will merely waste claimant’s resources and fail to change an inevitable final decision.”⁸⁶⁴

365. Further, the annulment tribunal in *Helnan* held that the decision of a Government Minister, taken at the end of an administrative process, “is one for which the State is undoubtedly responsible at international law” even if there is a provision for subsequent judicial review.⁸⁶⁵

⁸⁵⁹ Counter-Memorial on Merits ¶ 388.

⁸⁶⁰ Second Opinion M. Reisman ¶ 33.

⁸⁶¹ *Id.* ¶ 47.

⁸⁶² CL-136, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 Nov. 1999) (“*Azinian Award*”), ¶ 103.

⁸⁶³ Statement of C. Franco ¶¶ 8, 16.

⁸⁶⁴ RL-102, *Glamis Gold Award*, ¶ 333.

⁸⁶⁵ CL-145, *Helnan Annulment Decision*, ¶ 51.

The tribunal reasoned that to do otherwise would

leave the investor only with a complaint of unfair treatment based upon denial of justice in the event that the process of judicial review of the Ministerial decision was itself unfair. Such a consequence would be contrary to the express provisions of [ICSID] Article 26, incorporated into the parties' compromise, since it would have the effect of substituting another remedy for that provided under the BIT and the ICSID Convention."⁸⁶⁶

The *Lesivo* Resolution constitutes such a definitive administration action, as it is “embodied in an executive resolution (the *Acuerdo Gubernativo*) approved by the President, his Cabinet Ministers and his Secretary General” and published in Guatemala’s Official Gazette.⁸⁶⁷ The provision for standardless and never-ending judicial review in the *Contencioso Administrativo* court does not resurrect the denial of due process embodied in a declaration of *lesividad*.

366. Fourth, Respondent asserts that the *Lesivo* Resolution is merely the initiation of a court process and does not have any immediate practical or legal effects on Claimant’s investment.⁸⁶⁸ As discussed throughout this Reply, the factual record in this case demonstrates quite the opposite. Professor Reisman accurately summarizes the situation Claimant experienced:

Effectively, the damage was done the moment the President and all the members of his Cabinet published the *Lesivo* Declaration and made known to the markets, and particularly to FVG customers, suppliers and possible investors and financiers who would have followed the events especially closely, that the Government opposed the railroad activities of RDC to the point of initiating a legal process to invalidate a contract granting the right to use the railroad equipment

Although the Attorney General still has to seek the formal enforcement of that declaration in the administrative court, the court proceeding, in which due process rights are formally guaranteed (but apparently rarely followed), is actually irrelevant because the court adjudicating the *Lesivo* Declaration has no standards by which to review the Government’s declaration of harmfulness. Moreover, this court’s decision can typically take years and typically is never rendered; it has not been rendered at the case at bar, more than four years since

⁸⁶⁶ *Id.* ¶ 53.

⁸⁶⁷ Counter-Memorial on Merits, ¶ 28.

⁸⁶⁸ *Id.* ¶ 383.

the case was initiated. In the meanwhile, the economic injury has already been wrought by the *Lesivo* Declaration of the Government, wholly apart from the formal question of whether the declaration has legally binding effect.⁸⁶⁹

367. Fifth, Respondent contends it is *reasonable* that the Government make an initial decision in a “purely internal deliberation within the Government to which private parties have no rights to participate or be heard.”⁸⁷⁰ This argument is patently absurd. The *Lesivo* Resolution was a *public* declaration by the President of the Republic and his Cabinet, published in the *Diario Oficial*, the Official Gazette of Guatemala, and constituted a direction for the Attorney General to commence a court action against Claimant with drastic consequences. According to Dr. Mayora, it is precisely for this reason that Spain provides due process guarantees *before* a final declaration of *lesivo* is issued by the Executive Branch.⁸⁷¹ Moreover, Professor Reisman rightly observes that Respondent’s “assembly of national practices misses the point. The issue is not a common practice among states but the concordance of *Guatemala’s* internal legal practices with the obligations it has assumed as a party to CAFTA.”⁸⁷²

368. Finally, Respondent contends that “as applied to the facts,” Claimant was afforded “both notice and opportunity to be heard.”⁸⁷³ This is an outrageous statement. First, Respondent cannot point to a single document prior to the *Lesivo* Resolution where it informed Claimant that it viewed Contracts 143/158 as invalid, illegal or *lesivo*. To the contrary, during the entire process leading up to the issuance of the *Lesivo* Resolution, Respondent purposefully kept all of the internal and outside legal opinions and analyses it obtained concerning Contracts 143/158 secret from Claimant. The first time Claimant learned that the declaration of *lesividad* was specifically directed at Contracts 143/158 was at the August 24, 2006 “settlement” meeting on the eve of the *Lesivo* Resolution’s publication.⁸⁷⁴ And Claimant was not notified of the

⁸⁶⁹ Second Opinion of M. Reisman ¶¶ 10-11.

⁸⁷⁰ Counter-Memorial on Merits ¶¶ 28, 383.

⁸⁷¹ First Opinion of E. Mayora ¶ 5.3

⁸⁷² Second Opinion of M. Reisman ¶ 32.

⁸⁷³ Counter-Memorial on Merits ¶ 391.

⁸⁷⁴ Other breaches of due process include the Government’s refusal to inform FVG for several months thereafter about the technical and legal reasons for the *lesivo* decree and the delay in filing and serving the official notice of its claim on FVG for six months, until May 15, 2007 (coincidentally, about the date by which, under Guatemalan law, the court should have issued its ruling).

alleged technical and legal grounds for the *Lesivo* Resolution until May 15, 2007, six months after Respondent had commenced its action in the *Contencioso Administrativo* court.⁸⁷⁵

369. Respondent imperturbably responds that the *Contencioso Administrativo* court provides an opportunity to be heard, an opportunity to overturn the President's decision, and opportunities to obtain recourse if the declaration was issued improperly and indemnity in case the contract is declared null and void.⁸⁷⁶ The latter two purported remedies are just flat out wrong, while the first two are mere formalisms. The governing law has *no* provision for declaratory relief of damages in the event of an improper declaration of *lesividad*. As Claimant has experienced, the entire focus of the proceedings in the *Contencioso Administrativo* court has been on whether the various Government agencies complied with the *procedural* requirements of the law because there are no *substantive* requirements with which to comply or for the court to assess. Professor Reisman describes this judicial charade:

The rubber stamping function assigned to a court as the apparent legal precondition for the *Lesivo* Declaration to become binding is revealed to be an empty formalism. In substance, the essentially unreviewable decision by the Cabinet seals the foreign investor's economic fate: in the absence of clear standards of review, as both the Counter-Memorial and the Respondent's expert acknowledge, the foreign investor has little, if any chance of securing a change of the outcome of the *Lesivo* Declaration in court.⁸⁷⁷

In fact, a reversal of a declaration of *lesividad* in favor of the investor *has never occurred* in a Guatemalan court when such claim was made within the requisite three-year time frame for filing a *lesivo* claim.⁸⁷⁸

370. In light of the foregoing, Claimant has been repeatedly and affirmatively due process, *i.e.*, “a *reasonable* chance within a *reasonable* time” to claim its legitimate rights and have its claims heard and decided before a neutral-decision maker. “In the context of fair and equitable treatment, it is critical that the Claimant was not provided with notice of any changes regarding the harmfulness of its contract and had no chance to defend itself before the *Lesivo*

⁸⁷⁵ Statement of C. Franco ¶ 10(c).

⁸⁷⁶ Counter-Memorial on Merits ¶ 391.

⁸⁷⁷ Second Opinion of M. Reisman ¶ 26.

⁸⁷⁸ See paragraph 301, *supra*.

Declaration was issued. This denies [Claimant] justice under the rules of the principal legal systems of the world and thus violates the standard of fair and equitable treatment as it is defined in CAFTA Article 10.5.2(a).”⁸⁷⁹

5. Guatemala’s Lesivo Resolution and Subsequent Actions Were Arbitrary and Discriminatory

371. It is really quite astonishing that Respondent actually questions “that the obligation to refrain from acting arbitrarily is an element of the minimum standard of treatment under customary international law.”⁸⁸⁰ Over 60 years ago, the International Court of Justice in the *Asylum* case⁸⁸¹ spoke of “arbitrary action” being “substituted for the rule of law,” prompting the famous quote from the *ELSI* tribunal that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to *the* rule of law.”⁸⁸²

372. A long line of NAFTA tribunals have dealt with arbitrary treatment in close conjunction with the fair and equitable treatment standard.⁸⁸³ Professor Schreuer opines that this may be explained in part by the fact that NAFTA does not contain a separate provision on arbitrary treatment.⁸⁸⁴ The same is true of CAFTA; in addition, CAFTA Annex 10-B makes it clear that the customary international law minimum standard of treatment in CAFTA Article 10.5 is an umbrella provision that “refers to all customary international law principles that protect the economic rights and interests of aliens.”⁸⁸⁵

⁸⁷⁹ Second Opinion of M. Reisman ¶ 49.

⁸⁸⁰ Counter-Memorial on Merits ¶ 394.

⁸⁸¹ RL-83, *Asylum case (Colombia v. Peru)*, International Court of Justice Judgment (20 Nov. 1950) (“*Asylum case*”) at 277.

⁸⁸² RL-97, *Elettronica Sicula S.p.A. (ELSI) v. Italy* (United States of America v. Italy), ICJ Judgment (20 July 1989) (“*ELSI Award*”), ¶ 128 (emphasis added).

⁸⁸³ CL-136, *Azinian Award*, ¶ 103; RL-99, *Marvin Feldman Karp v. Mexico*, ICSID Case No. ARB(AF)/99/1 Award (16 Dec. 2002) (“*Feldman Award*”); RL-126, *S.D. Myers First Partial Award*, ¶ 263; CL-152, *Pope & Talbot Award re Damages*, ¶¶ 63-64; RL-16, *Mondev Award*, ¶ 127; RL-78, *ADF Award*, ¶ 188; RL-107, *Loewen Award*, ¶ 131; RL-136, *Waste Management II Award*, ¶ 98; RL-100, *GAMI Award*, ¶ 95; RL-104, *International Thunderbird Award*, ¶ 194; RL-102, *Glamis Gold Award*, ¶ 625; RL-110, *Merrill & Ring Award*, ¶ 156; RL-89, *Chemtura Award*, ¶ 121-22.

⁸⁸⁴ CL-182, Schreuer, *Fair and Equitable Treatment*, at p. 132

⁸⁸⁵ RL-61, CAFTA Annex 10-B.

373. Respondent suggests that Claimant must conduct a vast amount of research into pertinent state practice and *opinio juris* to confirm the emergence of “arbitrariness” as a new norm of customary international law.⁸⁸⁶ Professor Reisman disagrees, stating that the burden Respondent attempts to impose on Claimant is not the correct one.⁸⁸⁷ While CAFTA Annex 10-B defines the customary international law minimum standard of treatment in CAFTA Article 10.5 as “the general and consistent practice of states that they follow from a sense of legal obligation,”⁸⁸⁸ Professor Reisman points out that under Article 38(1)(d) of the Statute of the International Court of Justice, Claimant is entitled to rely on the evidence of customary international law norms provided by pertinent decisions of tribunals and the teachings of the most highly qualified publicists.⁸⁸⁹ Nothing in CAFTA suggests otherwise. Given that at least ten NAFTA tribunals have reviewed a State’s conduct for arbitrariness or otherwise acknowledged that arbitrary actions are prohibited by the obligation to provide fair and equitable treatment under the customary international law minimum standard of treatment,⁸⁹⁰ Claimant maintains that it has more than met its burden. Further, the *Glamis Gold* tribunal rejected the U.S. contention, referenced by Respondent, that the claimant in that case had failed to demonstrate that customary international law places a general obligation upon States to refrain from acting arbitrarily.⁸⁹¹

374. Thus, the question is not whether the obligation to refrain from arbitrary actions exists in customary international law, but what is the standard to be applied. The most widely-cited standard continues to be that articulated in *Waste Management II*, which singled out

⁸⁸⁶ Counter-Memorial on Merits ¶ 352-54.

⁸⁸⁷ Second Opinion of M. Reisman ¶ 54.

⁸⁸⁸ RL-61, CAFTA Annex 10-B.

⁸⁸⁹ Second Opinion of M. Reisman ¶ 54.

⁸⁹⁰ See CL-152, *Pope & Talbot* Award re Damages, ¶¶ 63-64; RL-16, *Mondev* Award, ¶ 127; RL-78, *ADF* Award, ¶ 188; RL-107, *Loewen* Award, ¶ 131; RL-136, *Waste Management II* Award, ¶ 98; RL-100, *GAMI* Award, ¶ 95; RL-104, *International Thunderbird* Award, ¶ 194; RL-102, *Glamis Gold* Award, ¶ 625; RL-110, *Merrill & Ring* Award, ¶ 156; RL-89, *Chemtura* Award, ¶ 121-22.

⁸⁹¹ RL-102, *Glamis Gold* Award, ¶ 625 (stating that claimant had established that a certain level of arbitrariness would violate the State’s obligation to accord fair and equitable treatment.) See also RL-16, *Mondev* Award, ¶ 107 for a similar allegation and response.

conduct “arbitrary, grossly unfair, unjust or idiosyncratic.”⁸⁹² While “mere” arbitrariness may not be sufficient, few NAFTA tribunals have required the “*manifest* arbitrariness” that Respondent seeks to require in this proceeding.⁸⁹³ A better definition is contained in the Restatement (Third) of Foreign Relations Law: an arbitrary act is one that is “unfair and *unreasonable* and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation.”⁸⁹⁴ In fact, the “unreasonableness” standard was employed by the *Saluka* tribunal which Respondent refers to approvingly – except that the *Saluka* tribunal characterized *unreasonable* as “unrelated to some rational policy,”⁸⁹⁵ not as “only when there is no reasonable relationship whatsoever to a rational policy” as Respondent represents.⁸⁹⁶ Nonetheless, given that the ordinary meaning of “manifest” is “‘plain’, ‘clear’, ‘obvious’, ‘evident’, *i.e.* easily understood or recognized by the mind,”⁸⁹⁷ Claimant has no objection to the standard of “manifest arbitrariness,” because it is not difficult to divine such arbitrariness in Respondent’s conduct.

375. Respondent’s repeated protestations that “Guatemala acted both reasonably and rationally in applying [the *lesivo*] procedure to Claimant’s investment”⁸⁹⁸ can be reduced to four key defenses.⁸⁹⁹ First, Respondent maintains that the *lesivo* process was not arbitrary because it was based on legal standards, not on discretion, prejudice or personal preference.⁹⁰⁰ Respondent

⁸⁹² RL-136, *Waste Management II* Award, ¶ 98. The standard in *Waste Management II* was an attempt by the tribunal to synthesize NAFTA experience up to that point. Subsequent tribunals (*GAMI*, *International Thunderbird*, *Glamis Gold*, *Merrill & Ring*) have all made positive reference to it, with *Glamis Gold* characterizing *Waste Management II*’s definition as “probably the most comprehensive review.” RL-102, *Glamis Gold* Award, ¶ 559.

⁸⁹³ Counter-Memorial on Merits ¶ 396 (citing *International Thunderbird* Award and *Glamis Gold* Award).

⁸⁹⁴ CL-73, *Restatement (Third) of Foreign Relations Law*, § 712 (1987), n.11 (emphasis added).

⁸⁹⁵ RL-125, *Saluka* Award, ¶ 309.

⁸⁹⁶ Counter-Memorial on Merits ¶ 396.

⁸⁹⁷ CL-157, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment (29 June 2010) (“*Sempra Energy* Annulment Decision”), ¶ 211.

⁸⁹⁸ Counter-Memorial on Merits ¶ 399.

⁸⁹⁹ Two ancillary defenses cited by Respondent – that the *Lesivo* Resolution had no harmful effect on Claimant and that the *lesividad* process is constitutional under Guatemalan law (Counter-Memorial on Merits ¶ 402) – have already been disposed of by Claimant. See paragraphs 260-63, 361, *supra*. Claimant also directs the Tribunal to its discussion of Guatemala’s bad faith in Section II.C.3. for additional examples of manifestly arbitrary actions taken by the Government with respect to the *Lesivo* Resolution.

⁹⁰⁰ Counter-Memorial on Merits ¶ 398.

contends that “[f]or any administrative act to be deemed *lesivo*, there must be sufficient grounds showing that the agreement is injurious to the interest of the State.”⁹⁰¹ Yet Respondent and its legal expert do not dispute that the concept of *lesividad* found in Article 20 of the *Ley de Contencioso Administrativo* has no objective legal standards. Respondent is untroubled that the President of Guatemala and his Cabinet have unfettered discretion in determining whether a contract is harmful to the interests of the State, claiming that the *lesivo* process somehow protects the investor from the Executive Branch arbitrarily nullifying its contract by requiring its submission to the *Contencioso Administrativo* court, which makes the ultimate decision.⁹⁰²

376. Professor Reisman points to the fundamental flaw in this arrangement:

[N]either the local expert nor the Counter-Memorial define what would constitute sufficient legal grounds to declare a contract *lesivo* or, put differently, what would constitute *insufficient* grounds that might lead the administrative court to disagree with the conclusion of the President and his Cabinet and leave the contract intact. Lacking legal standards to be applied, the role of the court in this constellation is reduced to that of a rubber stamp of the Executive Branch: whatever the Claimant may say in that process cannot upset the standardless decision of the Cabinet. It is, moreover, taken *in camera* and, thus, decides, with ultimate authority, whether or not a contract harms the interest of the State. It is under no legal obligation to indicate how or why.”⁹⁰³

Discretionary decisions such as these are manifestly arbitrary and result in a violation of the fair and equitable treatment standard.

377. Second, Respondent maintains the *lesivo* process was not arbitrary because the damage inflicted on Claimant served a legitimate public purpose. Respondent contends this public purpose was “to uphold the rule of law” in Guatemala.⁹⁰⁴ As previously discussed, this assertion finds no support in the text of the *Lesivo* Resolution, any of the Resolution’s supporting legal opinions or in any legal authority or precedent. Customary international law requires more than vague invocations of the State’s public interest in upholding its own laws to demonstrate its actions were conducted for a “public purpose”:

⁹⁰¹ *Id.* ¶ 29.

⁹⁰² *Id.* ¶ 399.

⁹⁰³ Second Opinion of M. Reisman ¶ 25.

⁹⁰⁴ Counter-Memorial on Merits ¶ 399.

[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.⁹⁰⁵

Lacking a statement of legitimate public interest to support the *lesivo* process and *Lesivo* Resolution, the Government of Guatemala’s actions against Claimant’s investment were arbitrary and in violation of its obligation to accord Claimant’s investment fair and equitable treatment under CAFTA Article 10.5.

378. Third, Respondent maintains that the *Lesivo* Resolution was not arbitrary because the Government’s motive in declaring Contracts 143/158 *lesivo* was always to correct the legal defects found upon a routine review and confirmed by four legal opinions. That, of course, is simply not the case. Claimant has demonstrated that Government’s motive behind the *Lesivo* Resolution to force Claimant to renegotiate and surrender substantial rights under the Usufruct Contracts to benefit the Government and the mutual economic interests of Ramón Campollo and President Berger’s family. Indeed, President Berger and Respondent’s other witnesses have *conceded* that this was the Government’s motivation, and the Tribunal has already concluded there was no relationship between the grounds for the *Lesivo* Resolution and the Government’s “take it or leave it” settlement proposal, noting that “even if [the legal defects] had been cured by FVG, [it] would not have satisfied the conditions of the settlement proposed on August 24, 2006.”⁹⁰⁶

379. Other tribunals have found that a measure is arbitrary if it is taken for reasons that are different from those put forward by the decision-makers, especially if the public purpose is merely a pretext for a different motive.⁹⁰⁷ For example, the tribunal in *CME v. Czech Republic* found that “[o]n the face of it, the Media Council’s actions and inactions in 1996 and 1999 were

⁹⁰⁵ RL-77, *ADC Award*, ¶ 432.

⁹⁰⁶ Second Decision on Jurisdiction ¶ 134.

⁹⁰⁷ CL-182, Schreuer, *Fair and Equitable Treatment*, p. 132. See also RL-80, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 Award (6 Feb. 2007) (“*Siemens Award*”), ¶ 319 (citing respondent’s failure to explain why an authorization was never given after the investment was made and had started to operate, and respondent’s failure to submit evidence that an error could not be corrected, as demonstrations that the measure was “not based on reason.”); RL-85, *Azurix Award*, ¶ 393 (finding respondent’s denial of access to the documentation explaining the basis upon which claimant was sanctioned an arbitrary action.).

unreasonable as the clear intention of the 1996 actions was to deprive the foreign investor of the exclusive use of the Licence under the MOA and the clear intention of the 1999 actions and inactions was [to] collude with the foreign investor's Czech business partner to deprive the foreign investor of its investment."⁹⁰⁸ The Tribunal should reach a similar conclusion in the instant case.

380. Fourth, Respondent maintains that the *lesivo* process was not arbitrary because "the President – or any other Government official – is civilly liable for improper declarations of *lesividad*" and therefore was compelled to act. Even if this statement were correct, which it is not,⁹⁰⁹ it would not excuse Respondent under customary international law. The commentary to Article 3 of the ILC Draft Articles on the Responsibility of States for Wrongful Acts specifically states:

An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law – *even if, under that law, the State was bound to act that way.*⁹¹⁰

381. In conclusion, the *Lesivo* Resolution as applied in this case was arbitrary and violated the fair and equitable treatment obligation in CAFTA Article 10.5 because it was not based on any defined legal standards, but on the Executive's personal whim and discretion; it did not serve any legitimate public purpose; and it was taken for reasons other than those put forward by the Government. Professor Reisman sums it up succinctly: "One would have to look far for a legal arrangement that ensures, with more efficiency, an arbitrary decision."⁹¹¹

382. Respondent also denies that its conduct violated the fair and equitable treatment standard by discriminating against Claimant and its investment.⁹¹² Claimant's reply to these

⁹⁰⁸ RL-91, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Partial Award, (13 Sep. 2004) ("*CME* Partial Award"), ¶ 612.

⁹⁰⁹ See paragraph 297, *supra* (rebutting Respondent's contention that the President faces personal liability if he fails to declare a contract *lesivo*).

⁹¹⁰ RL-29, International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) ("ILC Draft Articles"), art. 3, ¶ 1 (emphasis added).

⁹¹¹ Second Opinion of M. Reisman ¶ 26.

⁹¹² Counter-Memorial on Merits ¶¶ 403-06.

arguments is addressed below in Section III.E in the context of Claimant’s discussion of its national treatment claim under CAFTA Article 10.3.

6. Guatemala Frustrated Claimant’s Legitimate Expectations and Failed to Provide Transparency and Stability to Claimant’s Investment

383. Respondent contends Claimant has failed to meet its burden of proof that investor’s legitimate expectations are an element of fair and equitable treatment under the customary international law minimum standard of treatment. Respondent cites four arguments to support its contention. First, Respondent states that Claimant’s reliance upon *Sempra*, *Tecmed*, and *Waste Management II* is unavailing, as none of these cases address “the more narrow contours of the minimum standard of treatment under customary international law.”⁹¹³ Respondent apparently missed the point that the tribunal in *Waste Management II* was putting forward a standard of review for fair and equitable treatment under the customary minimum standard, having first conducted a comprehensive review of other NAFTA cases that had applied this standard:

The search here is for the Article 1105 standard of review [under the customary international law minimum standard of treatment], and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the *minimum standard of treatment of fair and equitable treatment* is infringed by conduct attributable to the State and harmful to the claimant if⁹¹⁴

The tribunal went on to note that “the standard is to some extent a flexible one which must be adapted to the circumstances of each case,”⁹¹⁵ and held that “[i]n 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,” thereby confirming that an investor’s legitimate expectations are an important component of fair and equitable treatment under the minimum

⁹¹³ Counter-Memorial on Merits ¶ 422.

⁹¹⁴ RL-136, *Waste Management II* Award, ¶ 98 (emphasis added).

⁹¹⁵ *Id.* ¶ 99.

standard. With respect to *Sempra* and *Tecmed*, Respondent’s attempt to dismiss these cases is based upon its over-interpretation of *Glamis Gold*, as previously discussed.⁹¹⁶

384. Second, Respondent refers to the Separate Opinion of Arbitrator Nikken in the *Suez* case.⁹¹⁷ Besides the fact that separate opinions by their very nature represent the minority view, Claimant believes that Mr. Nikken misunderstood the respected *Suez* tribunal to be saying that the investor’s expectations gave rise to the obligation that formed the breach, rather than that legitimate expectations generated as a result of the investor’s dealing with the competent authorities of the host State may be relevant to the application of the guarantees contained in an investment treaty. In discussing his own views as to what would constitute a breach of the fair and equitable treatment standard, Mr. Nikken said it would be reasonable to assume that States offered to commit themselves to “what the canons of **good governance** would require” with the propriety of the government “*of a reasonably well-organized modern State.*”⁹¹⁸ Such a good faith offer certainly formed the general basis for Claimant’s legitimate expectations concerning the treatment Guatemala would accord its investment, although Respondent denies such an offer is relevant.⁹¹⁹

385. Third, Respondent implies that Claimant is relying on its expectations as the source of Guatemala’s treaty obligations,⁹²⁰ a situation which the annulment committee for the *MTD* Award indicated could result in a manifest excess of powers.⁹²¹ But the annulment committee did not find that the *MTD* tribunal had exceeded its powers, much less manifestly so, noting that the tribunal’s formulation of the fair and equitable treatment standard cited “treatment

⁹¹⁶ Second Opinion of M. Reisman, ¶¶ 52-56.

⁹¹⁷ Counter-Memorial on Merits ¶¶ 422-24.

⁹¹⁸ RL-132, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales de Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Separate Opinion of Arbitrator Pedro Nikken (30 July 2010), ¶ 20 (emphases in original).

⁹¹⁹ Counter-Memorial on Merits ¶ 435 (stating that “based on the law existing at the time Claimant invested in Guatemala, its prior experience with government concessions, and the specific representations made by State officials, Claimant could not reasonably expect that Guatemala would not enforce its laws (including through the *Lesivo* Declaration)”).

⁹²⁰ Counter-Memorial on Merits ¶ 425.

⁹²¹ RL-114, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7 Decision on Annulment (21 Mar. 2007), ¶ 67.

in an even-handed and just manner”⁹²² and the relevant case law, in particular *Waste Management II*.⁹²³ These are exactly the same legal references Claimant uses in its Memorial to define the fair and equitable treatment standard.⁹²⁴ Further, the annulment committee noted the *MTD* tribunal cited the *Tecmed* dicta “in support of this standard, not in substitution of it,”⁹²⁵ which is precisely how Claimant uses the *Tecmed* dicta in its Memorial.⁹²⁶

386. Fourth, Respondent proclaims that “[t]he *Glamis Gold* tribunal concluded that ‘merely not living up to expectations *cannot be sufficient to find a breach of Article 1105* [the fair and equitable treatment provision] *of the NAFTA*.’”⁹²⁷ However, Respondent fails to mention that in the very next sentence the *Glamis Gold* tribunal went on: “Instead, Article 1105(1) *requires* the evaluation of whether the State made *any specific assurance* or commitment to the investor *so as to induce its expectations*.”⁹²⁸

387. With respect to Respondent’s general contention that Claimant has not done enough to establish arbitrariness, transparency and investor’s legitimate expectations as elements of the fair and equitable standard of treatment under the customary international law minimum standard, Claimant has never argued that these were “stand-alone” obligations. Professor Schreuer notes that “[t]ransparency, stability, and the protection of the investor’s legitimate expectations are closely related.” and provides definitions for, and describes the relationship among, all three of the principles that Respondent questions and describes their relationship:

Transparency means that the legal framework for the investor’s operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework. *Stability* means that the investor’s legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host State will be protected. The *legitimate expectations* of the investor will rest primarily on the legal order of the host state

⁹²² *Id.* ¶¶ 70-71.

⁹²³ *Id.* ¶ 69, n.79.

⁹²⁴ Memorial on Merits ¶ 140.

⁹²⁵ *Id.* ¶ 70.

⁹²⁶ Memorial on Merits ¶ 141.

⁹²⁷ Counter-Memorial on Merits ¶ 426 (emphasis added by Respondent).

⁹²⁸ RL-102, *Glamis Gold* Award, ¶ 620 (emphasis added).

as it stood at the time when the investor acquired the investment. The investor may rely on that legal framework as well as on representations and undertakings made by the host State in legislation, treaties, decrees licenses and contracts. An *arbitrary* reversal of such undertakings will constitute a violation of FET.⁹²⁹

Thus, in this paradigm, express assurances or contractual commitments made to induce foreign investment provide the basis for a breach of the minimum standard of treatment *when an arbitrary action* (i.e., something beyond mere breach of contract such as a repudiation of the contract using sovereign powers) frustrates the investor's legitimate expectations. "While the host State is entitled to determine its legal and economic order, the investor has a legitimate expectation in the system's stability to facilitate rational planning and decision making."⁹³⁰

388. In *Glamis Gold*, respondent (the United States) recognized the following autonomous BIT cases as examples falling within this constellation of violations of the fair and equitable treatment standard under customary international law:

- Both the *CMS* and *Enron* tribunals found a breach of the fair and equitable treatment obligations when Argentina *abandoned the energy privatization incentives* (in the form of inflation-adjusted tariffs that could be calculated in U.S. dollars and converted to pesos) it had agreed to in the *Gas Law of 1992*.
- In *Azurix* and *Siemens*, the tribunals found that Argentina breached its fair and equitable treatment obligations when it *forced renegotiation* of rate adjustments provisions contained in the respective investors' *concession contracts*.
- The *Tecmed* tribunal found such a breach based on Mexico *withholding permit renewals* despite a *quasi contract between the investor and various government agencies* that had earmarked the concession for this exclusive public use purpose.⁹³¹

389. Similarly, relying specifically on customary international law, the NAFTA tribunal in *Glamis Gold* emphasized the "creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations,"⁹³² while the tribunal in *International Thunderbird* formulated its own NAFTA dicta:

⁹²⁹ CL-182, Schreuer, *Fair and Equitable Treatment*, p. 126 (emphasis added).

⁹³⁰ *Id.* p. 126.

⁹³¹ RL-102, *Glamis Gold Award*, ¶ 576.

⁹³² *Id.* ¶ 22 (emphasis in original).

Having considered recent investment case law and the good faith principle of international customary law, *the concept of “legitimate expectations” relates, within the context of a NAFTA framework, to a situation where a contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honor those expectations could cause the investor (or investment) to suffer damages.*⁹³³

390. In contrast, the NAFTA tribunal in *Merrill & Ring* applied its evolving *reasonableness* standard to arrive at a less definitive relationship between specific assurances and a breach of the minimum standard: “any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy purposes.”⁹³⁴ In doing so, *Merrill & Ring* is more in line with the *Saluka* tribunal’s conclusion that investor’s legitimate expectations include host State observance of “well-established fundamental standards”⁹³⁵ or the “do no harm” standard articulated in *Vivendi II*.⁹³⁶

391. It is not surprising, then, that several ICSID tribunals have explicitly stated that a stable legal and business environment is an essential element of fair and equitable treatment under both the so-called Treaty standard and the customary international law minimum standard of treatment.⁹³⁷ For example, the *CMS Gas* tribunal opined:

[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”⁹³⁸

⁹³³ RL-104, *International Thunderbird Award*, ¶ 148 (emphasis added).

⁹³⁴ RL-110, *Merrill & Ring Award*, ¶ 233.

⁹³⁵ RL-125, *Saluka Award*, ¶ 303 (“[t]he expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.”).

⁹³⁶ RL-135, *Vivendi II Award*, ¶ 7.4.39 (“[u]nder the fair and equitable treatment standard, there is no doubt about a government’s obligation not to disparage or undercut a concession (a ‘do no harm’ standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force a renegotiation.”)

⁹³⁷ See CL-153, *Rumeli Telekom Award*, ¶¶ 609-11; RL-118, *Occidental Award*, ¶ 190.

⁹³⁸ RL-92, *CMS Gas Award*, ¶ 284.

This is precisely the situation under CAFTA. First, just as the *CMS Gas* tribunal highlighted the subject BIT's preamble to give meaning to the "somewhat vague" fair and equitable treatment standard, so too CAFTA's Preamble includes among its principal objectives to "ENSURE a predictable commercial framework for business planning and investment."⁹³⁹ Second, this same principle is included in the legislation that the Congress of Guatemala passed to ratify CAFTA. Decree No. 31-2005, passed on March 10, 2005, explicitly noted that one of the overall objectives of the Treaty was "to create a stable legal framework to promote and develop investment" (as well as to "create effective procedures for the resolution of disputes").⁹⁴⁰ Finally, the *Merrill & Ring* tribunal found that "[s]tate practice and jurisprudence have consistently supported such a requirement in order to avoid sudden and arbitrary alterations of the legal framework governing the investment."⁹⁴¹

392. Claimant's legitimate expectations and Respondent's frustration of the same have previously been fully laid out in its Memorial and this Reply,⁹⁴² so Claimant will touch briefly on only a few additional points raised by Respondent.

393. First, Respondent contends that it was only applying its law consistently and that if Claimant had done its due diligence then it would have known, or should have known, Contract 143/158 was *lesivo*.⁹⁴³ Professor Reisman deals with Respondent's underlying contention succinctly:

The purported reason [Claimant's expectations regarding its intended investment were not reasonable or legitimate] is that it could not reasonably expect that it would not be subject to government procurement laws. While such an argument is generally correct, the converse is equally true: The Government knew of the purpose of the investment and negotiated every detail of the contested contracts through its agent FEGUA, only to impede the project by means of the denial of a

⁹³⁹ CL-29, CAFTA Preamble. Note this language is identical to NAFTA.

⁹⁴⁰ CL-166, The Congress of the Republic of Guatemala, Decree No. 31-2005 (5 Aug. 2004) ("CONSIDERANDO: Que los objetivos generales del Tratado son ... crear un marco jurídico estable para promover y desarrollar las inversiones ... CONSIDERANDO: Que el Tratado también tiende ... crear procedimientos eficaces ... para la solución de controversias...").

⁹⁴¹ RL-110, *Merrill & Ring* Award, ¶ 89.

⁹⁴² See Memorial on Merits ¶¶ 115-21, 130-34, 142, 153, 181; see also Section III.C.6., *supra*.

⁹⁴³ Counter-Memorial on Merits ¶¶ 427-28.

final signature by the President of the essential railroad equipment usufruct contract. Under the circumstances of this case, the expectation that the President would sign the contracts in question, if it was even legally necessary, was legitimate.”⁹⁴⁴

394. Next, Respondent repeats its ridiculous assertion that Claimant’s failure to anticipate that the *lesivo* law would be applied to its investment was a failure to perceive a known, or knowable, investment risk.⁹⁴⁵ In an analogous situation, the *Vivendi II* tribunal found respondent directly undermined claimant’s legitimate expectations and breached its fair and equitable treatment standard under the subject BIT.⁹⁴⁶ According to the tribunal:

[I]t was not reasonable for claimants to expect that they would achieve the recovery rates or internal rates of return upon which they modeled their investment. Investments always carry risk and returns are seldom guaranteed. However, they had every reason to expect that their privatization partner, the Province, would not mount an illegitimate campaign to force them, on threat of rescission, to renegotiate a lower tariff.”⁹⁴⁷

Likewise, in the instant case, Claimant had every reason to expect that Guatemala would not use the *lesivo* process as a strategy and means to force Claimant to renegotiate and surrender substantial rights under the Usufruct Contracts to benefit the Government and the mutual economic interests of Ramón Campollo and President Berger’s family. Moreover, the *Vivendi II* tribunal found that respondent’s many acts and omissions cumulatively constituted an “international delinquency” even under the obsolete *Neer* standard.⁹⁴⁸ Similarly, the cumulative effect of Respondent’s many acts and omissions, based on facts similar to those in the *Vivendi II* case, constitutes a breach of the minimum standard of treatment even under the most demanding standard.⁹⁴⁹

⁹⁴⁴ Second Opinion of M. Reisman ¶ 60.

⁹⁴⁵ Counter-Memorial on Merits ¶ 429.

⁹⁴⁶ RL-135, *Vivendi II* Award ¶ 7.4.42.

⁹⁴⁷ *Id.* n.355.

⁹⁴⁸ *Id.* ¶ 7.4.46.

⁹⁴⁹ While the legislature also engaged in “a vindictive exercise of sovereign power” in the *Vivendi II* case, an aspect missing from the present case, the *Vivendi II* tribunal had already found the basic breach of the fair and equitable treatment standard on executive trespasses similar to those here. *Id.* ¶¶ 7.4.42, 7.4.45.

395. Once more, this time in the discussion of Claimant’s legitimate expectations, Respondent asserts that it somehow provided notice and an opportunity to be heard before the *Lesivo* Resolution issued.⁹⁵⁰ Besides the outrageousness of this contention, Claimant remains baffled by Respondent’s repeated reference to *Tecmed* as supporting Respondent’s use of *lesividad* “in conformity with its normal function.”⁹⁵¹ In relevant part, the *Tecmed* tribunal describes a process very much like that experienced by Claimant with respect to the *lesivo* process:

During the term immediately preceding the Resolution, INE did not enter into any form of dialogue through which Cytrar or Tecmed would become aware of INE’s position with regard to the possible non-renewal of the Permit and the deficiencies attributed to Cytrar’s behavior—including those attributed in the process of relocation of operations—which would be the grounds for such a drastic measure and, thus, Cytrar or Tecmed *did not have the opportunity, prior to the Resolution, to inform of, in turn, their position or provide an explanation with respect to such deficiencies, or the way to solve such deficiencies* to avoid the denial of renewal and, ultimately, the deprivation of the Claimant’s investment. Despite Cytrar’s good faith expectation that the Permit’s total or partial renewal would be granted to maintain Cytrar’s operation of the Landfill effective until the relocation to a new site had been completed, INE did not consider Cytrar’s proposals in that regard and not only did it deny the renewal of the Permit although the relocation had not yet taken place, but it also did so in the understanding that this would lead Cytrar to relocate.⁹⁵²

Far from confirming “conformity with its normal function,” the *Tecmed* tribunal found such behavior to frustrate “Cytrar’s fair expectations upon which Cytrar’s actions were based and upon the basis of which the Claimant’s investment was made” and, therefore, the respondent violated its duty to accord fair and equitable treatment to the claimant’s investment, effective on the date of issuance of the resolution.⁹⁵³ Respondent’s conduct during the *lesivo* process is directly analogous to the *Tecmed* situation, and, accordingly, constitutes a similar violation of CAFTA’s fair and equitable treatment obligation.

⁹⁵⁰ Counter-Memorial on Merits ¶¶ 434-37.

⁹⁵¹ *Id.* ¶¶ 292, 369, 400, 402 (citing to RL-133, *Tecmed* Award, ¶ 173).

⁹⁵² RL-133, *Tecmed* Award, ¶ 173 (emphasis added).

⁹⁵³ *Id.* ¶¶ 173-74.

396. Respondent's contention that Claimant's legitimate expectations regarding Contracts 143/158 have not been frustrated because Claimant technically remains in possession of the railway equipment until the *Contencioso Administrativo* court rules⁹⁵⁴ is, once again, nothing more than form over substance. By itself, the *Lesivo* Resolution rendered Claimant's possession of such equipment *worthless* because it destroyed FVG's railroad business.

397. A final word is warranted on the element of transparency. In contrast to NAFTA, CAFTA's preamble includes an explicit objective to "*PROMOTE transparency ... in international trade and investment.*"⁹⁵⁵ In this respect, (i) the lack of any objective standards for a declaration of *lesividad* in Article 20 of the *Ley De Contencioso Administrativo*; (ii) Respondent's deliberate withholding of its intention to declare Contracts 143/158 *lesivo* until the day before the deadline to publish the declaration; and (iii) Respondent's deliberate withholding from Claimant of the asserted legal grounds for declaring Contracts 143/158 *lesivo* until months after its action was formally filed in the *Contencioso Administrativo* court all demonstrate a fundamental lack of transparency and clearly impeded Claimant's ability to perceive fully and act on Guatemala's legal framework, thus undermining Claimant's legitimate expectations.

7. Conclusion

398. As demonstrated above and in its Memorial on the Merits, Claimant has established that Respondent's act of issuing the *Lesivo* Resolution and acts in furtherance of the Resolution constituted multiple breaches of its obligation under CAFTA Article 10.5 to accord Claimant's investment fair and equitable treatment under the customary international law minimum standard of treatment. Claimant has proven that the *Lesivo* Resolution – *i.e.*, the unlawful measure – was a bad faith exercise and abuse of Guatemala's sovereign powers. On the face of it, the *Lesivo* Resolution was unreasonable because its clear intent was not to resolve any alleged legal defects in Contracts 143/158, but to force Claimant to renegotiate and surrender substantial rights under the Usufruct Contracts to benefit the Government and the mutual economic interests of Ramón Campollo and President Berger's family. The lack of relationship

⁹⁵⁴ Counter-Memorial on Merits ¶ 438.

⁹⁵⁵ CL-29, CAFTA Preamble (emphasis added). NAFTA had no specific transparency objective in its Preamble, but, rather, mentions transparency generally as one its guiding principles and rules under the Article on Objectives (a feature which it shares in common with CAFTA).

between the purported grounds for the *Lesivo* Resolution and the Government’s “take it or leave it” settlement negotiation demands (both before and after the publication of the *Lesivo* Resolution) confirm the arbitrary nature of the *lesividad* process and its bad faith use. President Berger confirmed his Government’s bad faith in several public statements when he stated he had issued the *Lesivo* Resolution not because of alleged legal defects in Contract 143/158, but because FVG had failed to rebuild and re-open the South Coast corridor, which he was prepared to re-bid unless FVG could guarantee a \$50 million investment. Respondent’s actions in connection with the *Lesivo* Resolution denied Claimant transparency and the required stability and predictability of the business environment, as expressed in CAFTA’s Preamble, thereby frustrating the legitimate expectations upon which Claimant had made its investment. Furthermore, Claimant was not notified of any of Respondent’s *lesion* allegations against Contracts 143/158 and had no chance to defend itself against such allegations before the *Lesivo* Resolution was issued or even shortly thereafter, denying Claimant the principle of due process embodied in the principal legal systems of the world and thus violating the standard of fair and equitable treatment as it is defined in CAFTA Article 10.5.2(a). Other tribunals, including *ADC*, *Azurix*, *Pope & Talbot*, *Saluka*, *Siemens*, *Tecmed*, *Vivendi II* and *Vivendi III*, cited herein, have found these same or similar elements to violate fair and equitable treatment.

D. Guatemala Breached Its Obligation to Provide Full Protection and Security to Claimant’s Investment

399. Respondent contends that it complied with its obligation under Article 10.5 of CAFTA to provide full protection and security to Claimant’s investment in accordance with customary international law.⁹⁵⁶ In particular, Respondent argues that, after the *Lesivo* Resolution, it acted with due diligence and took reasonable measures to protect FVG’s Usufruct properties and assets.⁹⁵⁷ Respondent’s arguments are unavailing. When they are stripped of their volume and repetition and the actual underlying evidence is examined, it reveals that the

⁹⁵⁶ Respondent’s argument that Claimant “seemingly attempts to base its full protection and security claim on the alleged breach of FEGUA’s duties under Contract 402,” (Counter-Memorial on Merits ¶ 493) is a strawman argument. Nowhere in its Memorial on the Merits does Claimant argue or even suggest that Respondent’s breach of its full protection and security obligation should be measured or determined by FEGUA’s breach of its contractual duty to protect the right-of-way from squatters.

⁹⁵⁷ Counter-Memorial on Merits ¶¶ 482-97.

measures Respondent undertook to protect FVG’s property and assets after the *Lesivo* Resolution were wholly insufficient and certainly not reasonable.

400. Respondent contends that customary international law standard for full protection and security requires that a host State exercise “due diligence” in the protection of a foreign investment, which means that a host State must take “reasonable measures” to protect the investment under the given circumstances.⁹⁵⁸ Claimant notes that this may be the correct standard with respect to protection from third parties, but not with respect to the actions of Respondent. As the Commentary to Article 4 of the “*Draft articles on Responsibility of States for Internationally Wrongful Acts*” makes clear: “According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule ... is of a customary character.”⁹⁵⁹ The Commentary goes on to say that “Mixed Commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors, and police officers, and consistently treated the acts of such persons as attributable to the State.”⁹⁶⁰ There is no doubt that the municipal officials, district attorney and police described below were acting in their official capacities when they violated FVG’s property rights under the Usufruct Contracts or that such actions are directly attributable to Respondent.

401. Further, with respect to third parties, Claimant disagrees that Respondent’s actions (or lack thereof) demonstrate that it exercised the requisite due diligence to protect Claimant’s investment. In terms of what constitutes sufficient due diligence, the duty of full protection and security obligates a host State “to take *active* measures to protect a foreign investment from adverse effects.”⁹⁶¹ This means that the host State must undertake reasonable measures to *prevent* actions by third parties which interfere with or damage the foreign investor’s property or assets.⁹⁶² In other words, the State’s due diligence obligation is not satisfied by the

⁹⁵⁸ *Id.* ¶¶ 469-73.

⁹⁵⁹ RL-29, ILC Draft Articles, art. 4 Commentary, ¶6.

⁹⁶⁰ *Id.* Article 4 Commentary, ¶ 7.

⁹⁶¹ CL-183, Christoph Schreuer, *Full Protection and Security*, 1 J. of Int’l Dispute Settlement 353 (2010).

⁹⁶² *Id.* at 353, 357 (“The host State’s duty is not restricted to preventing damaging acts by private actors. The State’s responsibility extends to actions perpetrated by its organs.”); RL-95, *Eastern Sugar Award*, ¶ 203 (“Thus,

State merely undertaking *passive* and *reactive* measures in connection with protecting a foreign investment.

402. As discussed in Claimant’s Memorial on the Merits, after the *Lesivo* Resolution was published, Claimant experienced a dramatic increase in public interference, theft and vandalism within the right-of-way.⁹⁶³ The dramatic increase was specifically acknowledged by the FEGUA Overseer,⁹⁶⁴ and is documented by the more than one hundred reports FVG submitted to the Government regarding incidents occurring after the *Lesivo* Resolution.⁹⁶⁵

403. Despite this evidence, Respondent nevertheless argues that it took reasonable measures to protect FVG’s Usufruct rights after the *Lesivo* Resolution. In particular, Respondent identifies four types of actions which it claims demonstrate that it complied with its full protection and security obligation: (i) supervising the right-of-way to identify portions which had been invaded by third parties; (ii) filing reports regarding the state of the right-of-way and any discovered interference; (iii) responding to Claimant’s request to dislodge squatters; and (iv) initiating judicial proceedings relating to the theft of rails and to the removal of squatters.⁹⁶⁶ However, none of this evidence demonstrates that Respondent undertook the reasonable, *active* measures to *prevent* harm to Claimant’s investment that it was required to take under customary international law.

404. Regarding points (i) and (ii) above, the fact that Respondent may have identified portions of the right-of-way which had been interfered with by third parties and filed reports regarding such interferences did nothing to provide protection and security to Claimant’s investment. Respondent’s passive act of identifying and documenting third party interference with FVG’s rights *after it had already occurred* – and then not doing anything to eliminate or

where a host state fails to grant full protection and security, it fails to act to *prevent* actions by third parties that it is required to prevent.”) (emphasis in original).

⁹⁶³ Memorial on Merits ¶¶ 92, 156.

⁹⁶⁴ See 3 July 2008 letter from FEGUA Overseer E. Martinez to J. Senn (“I am concerned about the increasing reports of railroad deprecation and FEGUA’s real property occupation.”).

⁹⁶⁵ See Ex. C-46, Compilation of post-*lesivo* reports FVG submitted to the Public Ministry; Ex. C-47, 16 Oct. 2008 letter from FVG to FEGUA enclosing copies of complaints regarding crimes on the railway property since declaration of *lesividad*.

⁹⁶⁶ Counter-Memorial on Merits ¶ 486.

prevent such interference from occurring – does not demonstrate due diligence in protecting Claimant’s investment.

405. Regarding point (iii), Respondent’s claim that it responded to Claimant’s post-*lesivo* requests to dislodge squatters is wholly lacking in proof. The only specific evidence Respondent points to in support of this claim is *one eviction* of squatters from a segment of the right-of-way in Amatitlán that took place in *January 2010* – almost three and a half years after the *Lesivo* Resolution was published, almost two and a half years after FVG shut down its railway operations, and more than six months after Claimant submitted its Memorial on the Merits in this action.⁹⁶⁷ This eviction action was just another after-the-fact attempt by Respondent to bolster its full protection and security credentials for the purposes of this arbitration.

406. Finally, regarding point (iv), Respondent’s efforts to evict squatters from the right-of-way and to prosecute rail thefts after the *Lesivo* Resolution were woefully inadequate and far from “reasonable.” Regarding the over 50 actions Respondent claims it commenced in relation to theft of rails after the *Lesivo* Resolution, only *five* of those actions (of 45, not 50) were commenced from the time Respondent published the *Lesivo* Resolution in late August 2006 until FVG shut down its commercial railway operations in September 2007.⁹⁶⁸ The remaining 40 actions were commenced after the irreparable damage to Claimant’s investment had been done and Claimant had commenced this arbitration. Similarly, Respondent’s own summary chart shows that, from late August 2006 through September 2007, Respondent commenced only *two* actions to evict squatters from the right-of-way, and these actions were both brought in August 2007.⁹⁶⁹ In fact, Respondent commenced only *five legal actions* against squatters during the entire period FVG operated the entire railway, in contrast to the 52 actions brought by Respondent after ICSID registered this claim.⁹⁷⁰ This record either confirms the substantial increase in squatter activity complained of by Claimant, or demonstrates that the only thing that Respondent was

⁹⁶⁷ See Counter-Memorial on Merits ¶ 486, n.1191 (citing Exs. R-154, R-155 and R-156).

⁹⁶⁸ See Ex. R-184, Excel Chart of Criminal Proceedings For Theft/Rail Removal.

⁹⁶⁹ See Ex. R-182, Excel Chart of Criminal Proceedings For Removal of Squatters.

⁹⁷⁰ *Id.*

“diligent and proactive” about after the *Lesivo* Resolution was in manufacturing a post-litigation evidentiary record in an attempt to bolster its full protection and security credentials.

407. The full protection and security standard also requires the host State not to encourage, foster or contribute to actions which physically damage or harm a foreign investment.⁹⁷¹ Here, Respondent not only failed to take sufficient proactive measures to prevent harm to Claimant’s investment, it *actively encouraged such harm* with its numerous public statements in the wake of the *Lesivo* Resolution, which informed the citizenry of Guatemala in no uncertain terms that the Government viewed FVG’s Usufruct Contracts as invalid and “harmful to the interests of the State,” and that the Government was going to take the railroad away from FVG and award it to someone else.⁹⁷² At no point did the Government retract or modify these unequivocal statements. Thus, the message the Government consistently conveyed after the *Lesivo* Resolution was that FVG’s property rights were no longer entitled to or worthy of legal protection. The public environment created and fostered by the Government was one which encouraged and fostered public interference, theft and vandalism within the right-of-way, rather than discouraging such actions.

408. Nor is Respondent’s assertion that Guatemalan authorities consistently respected FVG’s property and assets supported by the record. Respondent argues that the Guatemalan Army’s occupation of the Palin station is outside the jurisdiction of the Tribunal because its occupation commenced in 2006 before CAFTA went into effect.⁹⁷³ However, what is important is that the Army’s occupation of Palin station is attributable to the State and *continues to this day*, long after the purported local crime emergency which motivated the initial occupation had subsided.⁹⁷⁴ Respondent dismisses the paving over and conversion of the railroad tracks into a public street and green spaces in the Municipality of Puerto Barrios by emphasizing that the local court ultimately dismissed the claim against the Mayor of Puerto Barrios for authorizing these actions and that FEGUA initiated a criminal investigation against a private party for paving over

⁹⁷¹ RL-133, *Tecmed* Award, ¶ 176.

⁹⁷² See paragraphs 218-20, *supra*.

⁹⁷³ Counter-Memorial on Merits ¶¶ 499-500.

⁹⁷⁴ See Ex. C-119 (photographs of Palin station dated January 20, 2011 showing continued occupation of station by Guatemalan Army).

the right-of-way.⁹⁷⁵ Respondent's argument glosses over the fact that, when FVG initially protested these actions to the Mayor of Puerto Barrios, he told FVG in his official capacity that he did not care about the Municipality's lack of authorization – thereby admitting the Municipality's involvement in these expropriatory actions – and challenged FVG to file a claim in the local courts.⁹⁷⁶ This action is directly attributable to Respondent. Respondent's argument also overlooks the fact that it was FVG – not FEGUA – which initially filed a claim against the Mayor in April 2008.⁹⁷⁷ Respondent also does not explain why it has never taken any affirmative action to reclaim the portions of the right-of-way that were paved over in Puerto Barrios.

409. Another incident of Government trespass on FVG property which occurred as a result of the *Lesivo* Resolution was when the Municipality of San Antonio La Paz chose to install a water pipeline on the right-of-way without FVG's authorization because the Municipal Council determined that FVG was not able to grant such authorization *as a result of the Lesivo Resolution*.⁹⁷⁸ This action, which Respondent did nothing to stop, also is directly attributable to Respondent.

410. A District Attorney also told a local criminal court that, because of the *Lesivo* Resolution, FVG no longer had rights under its Usufruct Contracts in a case FVG had brought against the industrial squatter, EEGSA.⁹⁷⁹ This action is also directly attributable to Respondent. Although Respondent notes that court rejected this argument, the court did not reject the substance of the argument that the *Lesivo* Resolution, by itself, stripped FVG of its legal rights; it merely noted the technical discrepancy that the case before it involved Contract 402, whereas the

⁹⁷⁵ Counter-Memorial on Merits ¶¶ 501-03.

⁹⁷⁶ Statement of J. Senn ¶ 52.

⁹⁷⁷ Ex. C-49(a).

⁹⁷⁸ *See* Ex. C-50.

⁹⁷⁹ Memorial on Merits ¶ 96; Ex. C-51.

Lesivo Resolution was technically directed at Contracts 143/158.⁹⁸⁰ Hence, there was no defense from the bench of FVG’s legal rights under the *lesivo* process.

411. Finally, Respondent further attempts to explain away its failure to take affirmative action to protect Claimant’s investment by arguing that Claimant encouraged and caused the dramatic increase in squatters after the *Lesivo* Resolution by charging rents to certain “squatters.”⁹⁸¹ As discussed in Section II.V., *supra*, Respondent’s theory is preposterous. No rational person could have possibly been incentivized to squat illegally on the right-of-way after the *Lesivo* Resolution because FVG was enforcing its property rights by collecting rent from its tenants. Moreover, the vast majority of persons and families to whom FVG charged rent were not “squatters,” but individuals who were long-term tenants of the existing houses, shacks and rooms in the railroad station yards.⁹⁸² These persons and families were not occupying the railway tracks or living on or along the tracks and thereby impeding or potentially impeding the operation and safety of the railroad.⁹⁸³ Respondent was well aware that FVG was charging rent to these individuals and never once complained or asserted that such actions were “emboldening squatters” or preventing Respondent from protecting and securing FVG’s property rights.

412. Thus, the influx of squatters and rail thefts which occurred after the *Lesivo* Resolution had nothing to do with the presence of the station yard tenants from whom FVG had been collecting rent. In contrast to the station yard tenants, these persons were directly occupying and interfering with the right-of-way. FVG did not charge or attempt to collect rent from these individuals, but instead consistently demanded that the Government take immediate action to remove them, which demands the Government ignored.

⁹⁸⁰ See Ex. R-200, p. 3 (“It is indeed true, as argued by the District Attorney’s Office, ... *Acuerdo Gubernativo* number 433-2006 ... FINDS the Railway Equipment Onerous Usufruct to be *LESIVO*. Yet it is also true that the *lesividad* under discussion relates to public deed number [143] and its modification contained in public deed number [158], and not to public deed number four hundred and two of November twenty-fifth, nineteen hundred and ninety-seven.”).

⁹⁸¹ Counter-Memorial on Merits ¶¶ 495-496.

⁹⁸² Third Statement of J. Senn ¶ 71. See also Ex. R-229.

⁹⁸³ Third Statement of J. Senn ¶ 72.

E. Guatemala Has Breached Its National Treatment Obligation Under CAFTA Article 10.3

1. Claimant and Campollo Were Investors in “Like Circumstances” at the Time of the *Lesivo* Resolution.

413. Respondent asserts that Claimant’s national treatment claim must fail because Claimant and Ramón Campollo were not investors in “like circumstances.” Specifically, Respondent asserts that Mr. Campollo did not compete with Claimant “either directly or indirectly, and did not even operate in similar industries.”⁹⁸⁴ Respondent makes this assertion based upon the witness statement of Mr. Campollo, who claims that he does not have, nor has he ever had, an interest or the experience in operating a railroad.⁹⁸⁵ Respondent’s blind reliance upon the word of Mr. Campollo is seriously misplaced, as Mr. Campollo has not told the Tribunal the entire truth regarding his business interests and experience in railroads. As discussed in Section II.L., *supra*, Mr. Campollo and Claimant were very much competitors in the railroad business at the time Mr. Campollo was discussing with FVG his potential investment in the Guatemalan railway. Mr. Campollo owned and operated a 44 kilometer, narrow gauge railroad in the Dominican Republic which he used to transport sugar cane to his mill located there.⁹⁸⁶ Claimant was well aware of Mr. Campollo’s ongoing railroad operations because, at Mr. Campollo’s request, Claimant provided Mr. Campollo with assistance and input on how best to improve and upgrade the operational efficiency of his railroad.⁹⁸⁷

414. Respondent’s argument that Claimant and Mr. Campollo were not in “like circumstances” also ignores the fact that the Mr. Campollo and Claimant were also competitors in the most significant and potentially profitable aspect of the Usufruct – its real estate rights. As an extensive landowner and real estate developer in Guatemala, Mr. Campollo had both the experience and a direct economic interest in obtaining and exploiting the real estate leasing and development rights that had been granted in usufruct to FVG, particularly with regard to the railway properties located in close proximity to South Coast properties owned by Mr. Campollo,

⁹⁸⁴ Counter-Memorial on Merits ¶ 514.

⁹⁸⁵ Statement of R. Campollo ¶ 18; Counter-Memorial on Merits ¶ 525.

⁹⁸⁶ Ex. C-78; Third Statement of B. Duggan ¶ 6.

⁹⁸⁷ See paragraphs 80-85, *supra*.

such as his planned Ciudad del Sur development. Indeed, Mr. Campollo admits that his interest in the railway was based in principal part on the benefits it would bring to the Ciudad del Sur project.⁹⁸⁸

415. Mr. Campollo’s direct competition with Claimant in the railroad and real estate sectors is further clearly demonstrated by the “Desarrollos G” proposal his representative and intermediary, Héctor Pinto, made to FVG in March 2005. Government records show that Desarrollos G was incorporated on March 3, 2005, with the company’s stated purpose to “[c]arry out railway activities, in general, including but not limited to planning, developing and executing projects related to said activities” and to “purchase, sell, exchange, assign, rent or lease or sublease, or use under any other title all kinds of rights and property, such as personal property, *real estate* or real rights.”⁹⁸⁹ The proposal itself included granting Mr. Campollo a first option “to initiate and develop businesses or projects related to property and rights” granted to FVG by the Usufruct Contracts.⁹⁹⁰

416. Mr. Campollo’s attempts to disclaim any economic interest in investing in the railway and controlling FVG’s usufruct rights are not credible. The “feasibility study” of Roberto Morales that Mr. Campollo claims he relied upon in deciding that it would not be profitable for sugar mills to invest in the railway *never existed*.⁹⁹¹ In any event, Campollo’s primary interest in the South Coast railway was not how it could be used by his sugar mill, but how it could be built – at no cost to him – to develop and serve his planned Ciudad del Sur real estate development project and how he could benefit from leasing the South Coast real estate parcels and corridors that had been granted in usufruct to FVG.⁹⁹²

417. Likewise, Mr. Campollo’s assertion that he never authorized Mr. Pinto to make proposals and threats to FVG on his behalf is contrary to the testimony and clear impression of other witnesses, including Mr. Juan Esteban Berger, who states that it was his understanding that

⁹⁸⁸ Statement of R. Campollo ¶ 12.

⁹⁸⁹ Ex. C-98.

⁹⁹⁰ Ex. C-41.

⁹⁹¹ See paragraphs 90-94, *supra*.

⁹⁹² Statement of R. Campollo ¶ 12.

“Mr. Campollo, *by means of Mr. Héctor Pinto* . . . had a series of meetings with Ferrovías staff, in order to reach an agreement to *exploit the right to the railway* with a view to support his Ciudad del Sur Project.”⁹⁹³ Mr. Campollo’s attempt to disassociate himself from Mr. Pinto’s actions is further undermined by the fact that he never informed anyone from FVG that Mr. Pinto had never been authorized by Mr. Campollo to have any discussions or negotiations with FVG.⁹⁹⁴ To the contrary, notwithstanding Mr. Campollo’s stated withdrawal of interest in the South Coast railway project in April 2005 and purported clear directive to Mr. Pinto to no longer communicate with Claimant, Mr. Pinto continued to have regular communications with Claimant up to and after the *Lesivo* Resolution wherein Mr. Pinto expressed – obviously on behalf of Mr. Campollo – continued interest in the South Coast railway in furtherance of Mr. Campollo’s Ciudad del Sur project and sugar interests and made threats of harm to FVG if it did not accede to Mr. Campollo’s demands.⁹⁹⁵

418. Accordingly, there is ample evidence that Mr. Campollo was an experienced direct competitor of Claimant in both the railroad and real estate sectors and, therefore, was a domestic investor in “like circumstances” to Claimant at the time the *Lesivo* Resolution issued.

2. Claimant Received Less Favorable Treatment Than Domestic Investors in Like Circumstances

419. Respondent argues further that Claimant has failed to demonstrate the second prong of the national treatment test, which requires that the foreign investor show that it has been accorded “less favorable treatment,” than the domestic investor in “like circumstances.” In particular, Respondent argues that Claimant has not demonstrated that, in issuing the *Lesivo* Resolution, (i) Respondent had a discriminatory purpose and intent; (ii) its discriminatory treatment had an adverse effect on Claimant’s investment; and (iii) the discriminatory treatment was unreasonable.⁹⁹⁶ None of these arguments are correct.

⁹⁹³ Statement of J.E. Berger ¶ 13 (emphasis added).

⁹⁹⁴ Third Statement of J. Senn ¶ 62.

⁹⁹⁵ See paragraphs 130, 145, 155-56, *supra*.

⁹⁹⁶ Counter-Memorial on Merits ¶ 522.

420. The events and actions that led up to the publication of the *Lesivo* Resolution on August 25, 2006 demonstrate beyond a doubt that it was issued in substantial part to facilitate Ramón Campollo’s takeover of FVG’s Usufruct rights and assets. As discussed above, Mr. Campollo’s denial of any interest in the railway or its real estate assets after April 2005 is contradicted by the several actions and statements of his disclosed representative and intermediary, Mr. Pinto. Mr. Campollo now attempts to distance himself from Mr. Pinto, but the notion that Mr. Pinto was a “rogue employee” acting in the name of Mr. Campollo’s companies and economic interests without Mr. Campollo’s authorization and contrary to his instruction is not supported by anything but Mr. Campollo’s convenient, *post hoc* denials.

421. There is also strong direct and circumstantial evidence that Mr. Campollo was working closely with the Government to accomplish their mutual objectives. His representative, Mr. Pinto, sat on the Government’s Squatter Commission at the invitation of the Government.⁹⁹⁷ When Mr. Pinto made his “Desarrollos G” proposal in March 2005, he told FVG that all of FVG’s problems with the Government would be “resolved” once FVG signed an agreement with Mr. Campollo.⁹⁹⁸ At a March 15, 2005 meeting with Claimant’s representatives, Mr. Pinto outlined how the Campollo Group viewed the railway as the key to the development of the Ciudad del Sur project and diversifying the South Coast economy⁹⁹⁹ Mr. Pinto stressed the reasons why the Campollo Group had the necessary Government connections and capacity to develop everything contained in FVG’s Usufruct: (1) he sat on the Government’s Squatter Commission; (2) he sat on the FEGUA reform commission; (3) the Campollo Group had direct contact with President Berger; (4) he had new investors interested in the South Coast; and (5) the Campollo Group had the financial capacity and credibility to pull the project together.¹⁰⁰⁰ Mr. Pinto, however, also stressed that, if FVG chose not to “cooperate with Mr. Campollo’s companies on joint ventures” for both potential FVG lines of business on the South Coast, *i.e.*,

⁹⁹⁷ Statement of H. Valenzuela ¶ 5; Third Statement of J. Senn ¶ 50.

⁹⁹⁸ First Statement of J. Senn ¶ 25.

⁹⁹⁹ Third Statement of H. Posner III ¶ 17; Ex. C-99, Contemporaneous notes of H. Posner III of March 15, 2005 meeting with Héctor Pinto.

¹⁰⁰⁰ *Id.*

rail operations and real estate development, in accordance with the “option” Mr. Pinto had just sent, Mr. Campollo would “take” the business with or without FVG.¹⁰⁰¹

422. A few weeks later, on April 5, 2005, Mr. Pinto asserted to Mr. Senn 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. . . .”¹⁰⁰² The only plausible way Mr. Pinto could have been made aware of any alleged “illegalities” in FVG’s Usufruct Contracts was from a source in the Government, most likely Dr. Gramajo, who sat on the Squatter Commission with Mr. Pinto and was at this time working on a lengthy submission to the Legal Department of the Ministry of Communications which, among other things, described alleged legal infirmities with Contracts 143/158.¹⁰⁰³ That submission was formally delivered to the Ministry of Communications Legal Department on April 12, 2005.¹⁰⁰⁴ After Claimant balked at Mr. Campollo’s one-sided “Desarrollos G” proposal and Mr. Pinto’s threats, Mr. Pinto informed the Government on April 13, 2005 that negotiations between Mr. Campollo and FVG had concluded without success and therefore requested that he be excused from further meetings of the Squatter Commission.¹⁰⁰⁵ Mr. Pinto included with his April 13 letter a very compromising handwritten request addressed to Héctor Valenzuela, the Government official who had been chairing the Squatter Commission meetings, on the top of the letter which stated “*Please destroy [this letter] along with our previous communications, if any.*”¹⁰⁰⁶ Mr. Campollo followed Mr. Pinto’s letter with an April 15, 2005 letter to Claimant, where he informed Claimant that he had decided not to participate in the railway project that had been proposed to him due to his participation in other businesses that

¹⁰⁰¹ First Statement of H. Posner III ¶ 32; First Statement of B. Duggan ¶ 10; First Statement of J. Senn ¶ 27; Ex. C-99.

¹⁰⁰² First Statement of J. Senn ¶ 28; Ex. C-100.

¹⁰⁰³ Ex. R-13, 12 Apr. 2005 FEGUA Official Letter No. 140-2005 from A. Gramajo to G. Zachrisson; Ex. C-104, Annexes No. 1-7 to 12 Apr. 2005 FEGUA Official Letter No. 140-2005 from A. Gramajo to G. Zachrisson.

¹⁰⁰⁴ Ex. R-13, 12 Apr. 2005 FEGUA Official Letter No. 140-2005 from A. Gramajo to G. Zachrisson.

¹⁰⁰⁵ Ex. R-189.

¹⁰⁰⁶ Ex. R-189 (emphasis added).

would require most of his time.¹⁰⁰⁷ Thus, Mr. Campollo withdrew from further negotiations and discussions with Claimant after Mr. Pinto was made aware of the alleged “illegalities” with FVG’s Usufruct Contracts and the Government’s plan to proceed with invalidating such contracts, which would thereby enable Mr. Campollo to obtain FVG’s Usufruct rights without having to pay Claimant anything for them.

423. Further demonstrating the mutual economic interests and connections between the Government and Mr. Campollo during this time is the close relationship between Mr. Campollo and the family of President Berger. At Mr. Campollo’s invitation, President Berger’s son, Juan Esteban Berger, attended Mr. Campollo’s December 2004 meeting in Miami with Claimant in an obvious demonstration that Mr. Campollo had close personal connections to and influence with President Berger.¹⁰⁰⁸ The reason for Mr. Berger’s presence at the Miami meeting and his interest in the railway was that Mr. Berger and his family stood to obtain substantial financial gains from Mr. Campollo controlling the railway on the South Coast. The family of Mr. Berger’s mother (and President Berger’s wife), the Widmanns, not only own their own sugar mills in Guatemala – and therefore stood to benefit financially from an operating South Coast railway – they are also *shareholders in Mr. Campollo’s sugar mill, Ingenio Madre Tierra*.¹⁰⁰⁹ Thus, regardless of whether Mr. Berger was ever promised a fee or other direct remuneration from Mr. Campollo for assisting him in connection with the South Coast railroad project, Mr. Berger (as well as President Berger) still had a direct financial stake in and stood to gain personally from Mr. Campollo obtaining control of the railway.

424. Further demonstrating the mutual economic interests of the Berger family and Mr. Campollo in connection with the railway, Mr. Pinto copied Juan Esteban Berger on his “Desarrollos G” proposal of March 9, 2005.¹⁰¹⁰ Mr. Berger later reviewed and apparently commented on a subsequent draft of this proposal.¹⁰¹¹ Mr. Pinto also affirmed Mr. Campollo’s

¹⁰⁰⁷ First Statement of J. Senn ¶ 31; Ex. C-43.

¹⁰⁰⁸ Statement of R. Campollo ¶ 13.

¹⁰⁰⁹ See Ex. C-83, at 11, Table 3.

¹⁰¹⁰ See Ex. C-41.

¹⁰¹¹ Ex. C-101.

close connections with President Berger at his March 15, 2005 meeting with Claimant.¹⁰¹² Mr. Campollo's continued interest in the railway was confirmed one year later at the March 7, 2006 meeting with President Berger, where Dr. Gramajo spoke of the substantial interest of "other private sector parties" in the development of the South Coast route and Mr. Campollo's Ciudad del Sur project.¹⁰¹³ Around this same time, Héctor Pinto reemerged by sending Claimant's representatives an email on Ciudad del Sur letterhead expressing interest in having a meeting with FVG to discuss using the railway to connect the Ciudad del Sur industrial park development in Santa Lucia with Puerto Quetzal.¹⁰¹⁴ Mr. Pinto then followed up with a written request on behalf of Ciudad del Sur for railway service and connection with Puerto Quetzal, and stated that Ciudad del Sur wanted to be the party, rather than FVG, which would manage the railport and coordinate and render transportation contracts with other potential customers and users of the South Coast railway (*i.e.*, other sugar mills).¹⁰¹⁵ In closing, Mr. Pinto wrote "I believe that we are still in time to rescue the Railway Project Puerto – Ciudad del Sur."¹⁰¹⁶

425. 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 Ferrovías" and award the railway assets to a business consortium managed by him and on behalf of Mr. Campollo.¹⁰¹⁷ On July 26, 2006, at the same time the Government was proceeding with its plan to issue the *Lesivo* Resolution unless FVG agreed to the Government's negotiation demands, which included "surrender[ing] certain railway sections in which other investors may be interested,"¹⁰¹⁸ Héctor Pinto sent an email to Henry Posner III, wherein he requested an opportunity to speak with FVG regarding restoring railroad service from Puerto Quetzal to Ciudad del Sur in Santa Lucia.¹⁰¹⁹

¹⁰¹² Third Statement of H. Posner III ¶ 17; Ex. C-99.

¹⁰¹³ Second Statement of H. Posner III ¶ 32; Ex. C-57.

¹⁰¹⁴ Ex. C-109.

¹⁰¹⁵ Ex. C-111.

¹⁰¹⁶ *Id.*

¹⁰¹⁷ Statement of I. Iten, Maya Quetzal; Second Statement of I. Iten, Maya Quetzal ¶ 5.

¹⁰¹⁸ Ex. C-112.

¹⁰¹⁹ Ex. C-113.

On that same day, Mr. Pinto called Jorge Senn to demand a meeting and threatened that “the rules would change by the end of the month.”¹⁰²⁰

426. Mr. Pinto’s threat proved to be true. On August 24, 2006, the Government presented FVG with its “take it or leave it” offer, under the threat that it would publish the *Lesivo* Resolution the next day unless Claimant accepted the offer without modification.¹⁰²¹ The Government’s “take it or leave it” offer demanded, *inter alia*, that FVG surrender “railway sections yet to be restored in which other investors may be interested,” which was a clear reference to domestic investors in Guatemala and, more specifically, to Mr. Campollo. Respondent’s contention that this demand had nothing to do with handing over portions of the railway to Mr. Campollo, but, instead, merely reflected Respondent exercising its right under Contract 402 to reclaim the lands on which FVG had not restored the railway is not supported by the facts or the terms of Contract 402. Respondent did not have a legal right to reclaim any portion of the railway because FVG had fully complied with its restoration obligations, which Respondent had previously acknowledged to Claimant by official letter.¹⁰²² And if Respondent had truly believed at the time that it had the contractual right to reclaim any unrestored portions of the railway from FVG and give it to other interested domestic investors, there certainly would have been no need for it to “negotiate” this issue with Claimant under the threat of declaring Contracts 143/158 *lesivo*. Respondent has not presented any contemporaneous evidence which suggests its attempt to force Claimant to hand over Claimant’s investment to other interested domestic investors was based upon its contractual rights.

427. Finally, the Government’s discriminatory intent and purpose behind the *Lesivo* Resolution was further confirmed by the public statements of President Berger after the Resolution was published. President Berger made clear in these statements that the Resolution was not issued in order to “uphold the rule of law” as Respondent contends, but to force Claimant to put up \$50 million within 90 days to re-open the South Coast corridor and otherwise modify the Usufruct Contracts in Respondent’s favor, or Respondent would take the railway

¹⁰²⁰ First Statement of J. Senn ¶ 35; First Statement of B. Duggan ¶ 20.

¹⁰²¹ Ex. C-44; First Statement of J. Senn ¶ 40; Second Statement of J. Senn ¶ 32; Statement of J.P. Carrasco ¶ 13.

¹⁰²² See Section II.C., *supra*; Ex. C-61; Ex. C-62.

usufruct away and award it to other domestic investors.¹⁰²³ In sum, the totality of the evidence – both direct and circumstantial – demonstrates beyond a doubt that one of the Government’s principal motivations in issuing the *Lesivo* Resolution was to discriminate and harm Claimant’s investment in favor of a domestic investor in “like circumstances,” Mr. Campollo.

428. Respondent’s argument that its discriminatory measure, the *Lesivo* Resolution, did not cause any adverse effects to Claimant’s investment is meritless. As discussed in Section III.B.3, *supra*, Claimant has demonstrated that the *Lesivo* Resolution and actions taken in furtherance of the Resolution substantially deprived it of its expected economic benefits under the Usufruct and, in particular, under Contract 402, the Master Usufruct Contract. Respondent’s argument that the *Lesivo* Resolution could not have had any damaging effect on Claimant’s rights under Contract 402 because the Resolution was only directed at Contracts 143/158 and has not yet been confirmed by the *Contencioso Administrativo* court is not supported by the evidence, which demonstrates that the *Lesivo* Resolution was perceived by all concerned, including FVG’s current and potential customers, investors, suppliers and lenders as an outright repudiation by the Government of FVG’s *entire* Usufruct, not just the usufruct equipment contracts. As a result, regardless of the *legal* effect of the *Lesivo* Resolution, the Government’s discriminatory measure had a devastating *economic* effect on Claimant’s investment because it rendered the fundamental expected economic benefits of the Usufruct *worthless*.

429. Finally, the discriminatory effect of the *Lesivo* Resolution clearly did not have a reasonable nexus to a legitimate government policy.¹⁰²⁴ Respondent did not use the *lesividad* process in good faith to “enforce the rule of law.” If, in fact, Respondent had been legitimately interested in enforcing its laws, it would have offered to fix the alleged defects in Contracts 143/158 – which it *never once did* – rather than use the *lesividad* process in bad faith to extort changes to other contracts that did not contain any alleged defects.

430. Accordingly, Respondent has breached its national treatment obligation under Article 10.3 of CAFTA. The *Lesivo* Resolution did not further any legitimate governmental

¹⁰²³ See paragraph 220, *supra*.

¹⁰²⁴ RL-123, *Pope & Talbot* Award on Merits, ¶ 78; RL-100, *GAMI* Award, ¶ 114.

purpose, but was intended to discriminate against Claimant in favor of a domestic investor in like circumstances, Mr. Campollo, and it achieved its intended discriminatory effect by substantially depriving Claimant of its expected economic benefits under the Usufruct.

IV. REPLY ON DAMAGES AND COSTS

A. Introduction and Summary of Arguments

431. Consistent with Respondent’s approach throughout this arbitration - raise every objection; deny everything; obfuscate or contort the facts; ignore or miscite the law; secure experts who will advance any proposition, however unfounded – it is no surprise that Guatemala’s damages expert, Dr. Pablo Spiller, comes to the conclusion that, Claimant should recover *no damages* as a result of Respondent’s illegal Declaration of *Lesivo*.¹⁰²⁵

432. In order to get to his “no damages” conclusion, Dr. Spiller has to posit that Guatemala’s expropriation was legal, so that he can apply an incorrect legal standard; he has to ignore interest, depreciation and amortization *and* rents owable under the Trust Fund,¹⁰²⁶ so that he can contend that FVG has been historically unprofitable and, then, compare irrelevant accounting profits/losses to discounted lost cash flow;¹⁰²⁷ he has to ignore evidence of strong demand for right-of-way easements and leases of Usufruct properties at the time of the *Lesivo* Declaration in order to contend that RDC’s real estate projections are speculative; and he has to concoct an unreasonable and unrealistic discount rate in order to reduce the value of highly

¹⁰²⁵ Counter-Memorial on Merits ¶ 539; Pablo T. Spiller, “Comments to RDC’s Damages Assessment In the Matter of Railroad Development Corporation v. Republic of Guatemala” (“Expert Report of P. Spiller”) ¶¶ 10, 104.

¹⁰²⁶ Because Respondent has raised the issue of FVG’s profitability prior to *Lesivo*, such rents, which FEGUA contractually owed to FVG but did not pay, must be considered to determine what FVG’s cash flow would have been if FEGUA had complied with its obligations; otherwise, Respondent would gain advantage from its own wrong, which it is legally not entitled to do. *See* paragraphs 488-93, *infra*. Honoring its waiver, however, Claimant does NOT include such rents in any of its damage calculations.

¹⁰²⁷ As discussed in further detail below, the discounted cash flow (DCF) analysis is, as its name indicates, based on cash flow (usually described as earnings before interest, taxes, depreciation and amortization – EBITDA), *not accounting profits*. Even Dr. Spiller concedes that a potential buyer of a business makes his decision as to value based upon such future cash flows, and that a weighted average cost of capital (WACC) computation is based upon EBITDA. *See* Expert Report of P. Spiller ¶¶ 24, 136 n.139. As a result, the analysis as to the likelihood of those future cash flows based upon past performance should be made by comparing past cash flows, not past accounting profits or losses. Thus, interest, taxes (if any), depreciation and amortization are added back to net historical profits, in order to compare EBITDA (past) with EBITDA (future).

probable future cash flows. He even has to ignore well-established precedent that Claimant should, at a minimum, be allowed to recover its sunk investment costs.

433. To being with, in Section IV.B, Claimant demonstrates that Respondent’s entire discussion of damages is infected (and, thus, discredited) by the application of the incorrect legal standard. In particular, the appropriate damages measure for all of Respondent’s treaty breaches – including its unlawful expropriation – is not the CAFTA “lawful expropriation” standard of “compensation” based upon the “fair market value” of Claimant’s investment but, rather, the measure is the customary international law standard of “full reparations.” In this regard, “full reparations” demand a subjective evaluation of Claimant’s actual loss and entitle it to be put back into the position it would have been absent Respondent’s breaches. A long line of international investment arbitration precedent and authoritative scholarly writings properly determine that such “full reparations” include recovery of *both* the amount invested or sunk costs (*damnum emergens*) and lost future cash flow/profits (*lucrum cessans*). Further, any academic concern over “double counting” by an award that consists of both amounts invested and future cash flow is decisively eliminated, as Claimant has done here, by amortizing the award of amounts invested over the remaining years of the Usufruct for which lost future cash flow is computed. Both the jurisprudence and Claimant’s expert, Dr. Shannon Pratt, agree that such amortization correctly measures damages by accurately and appropriately matching expenses to income, from both an accounting and economic point of view.

434. Having established the proper legal framework, Claimant demonstrates in Section IV.C.3-4 that Respondent and its expert, Dr. Spiller, are in error when they argue that, in the absence of a history of accounting profits, Claimant cannot recover lost future cash flow. Indeed, accounting profits are not even the proper inquiry because, as its name indicates, the Discounted Cash Flow (DCF) method of measuring future economic performance – which Dr. Spiller concedes is the “gold standard” methodology for measuring lost future cash flows/profits – is based on EBITDA “cash flow” (earnings before interest, taxes, depreciation and amortization), not accounting profits. In the case of FVG, properly determined past cash flows demonstrate that it enjoyed a steady climb to profitability and had attained positive cash flow by 2004 and, therefore, its record strongly supports Claimant’s contention that FVG would have enjoyed its projected future cash flows absent the *Lesivo* Resolution. Further supporting

Claimant's claim for lost future cash flows is its record in achieving profitable operations in its other railroad ventures in other developing countries.

435. Claimant demonstrates in Section IV.C that its revised projections of lost future cash flows from both its real estate and railway operations are not speculative and that Dr. Spiller's assumptions and criticisms of Claimant's projections are unreasonable or irrelevant. Claimant shows that the easement agreements and leases which FVG had concluded at the time of the *Lesivo* Resolution, plus the projected income from its Tecún Umán operations, by themselves had a projected DCF value of \$17.2 million, thereby making Mr. MacSwain's projection of additional easements and leases with a DCF value of \$29.8 million both reasonable and conservative. Claimant also demonstrates that there is more than sufficient evidence of demand for additional right-of-way easements and commercial real estate leases to support Mr. MacSwain's real estate valuations and that Dr. Spiller's contention that Claimant would not have been able to lease *any additional* real estate over the remaining 42 years of the Usufruct is wholly unreasonable.

436. In Section IV.C.7(a), Claimant demonstrates that Dr. Spiller's calculated weighted average cost of capital ("WACC") of 18.7% is flawed and unreasonable. In particular, in order to present an inflated WACC, Dr. Spiller makes the absurd assumption that RDC would have abandoned its U.S. borrowing interest rate of 7.08% in order to borrow in Guatemala at a 18.67% interest rate; he adopts an erroneous size premium based upon an improper statistical base; and, he erroneously weighs the computed WACCs for real estate vs. railroad operations on a 50-50 ratio, when the projected future cash flows call for a 92-8 ratio. As Dr. Pratt demonstrates, a more accurate and proper WACC is 12.9%, not Dr. Spiller's highly inflated 18.7%.

437. Thus, Claimant's revised lost future cash flows/profits claim is properly computed at \$22,188,540, after amortizing the entirety of Claimant's sunk costs/lost investment claim.

438. In Section IV.D, Claimant sets forth its revised lost investment claim. These sunk costs properly include both RDC's investment expenditures and the investments of the minority shareholders in FVG and have been revised and recalculated to include some expenditures and overheads that were erroneously omitted in Claimant's previous calculation. When interest is

added (at Dr. Pratt's rate of 12.9%) in order to bring the investment up to the present value at the time of *Lesivo* Resolution in 2006, this yields a value of \$42,943,533. When 2007 business termination and wind down costs of \$1,350,429 are included, Claimant's revised lost investment claim totals \$44,293,982. After deductions of \$2,704,310 in mitigation income are made, this results in a revised net total damages claim of \$63,778,212.

439. Claimant next demonstrates in Section IV.H that, Respondent's argument that Claimant cannot recover its sunk costs or lost investment even in the unlikely event that the Tribunal determines that an award of lost cash flow/profits is not warranted and is fundamentally flawed.¹⁰²⁸

440. Finally, Claimant shows that Respondent's causation defense – that, somehow, Claimant's press release protesting Respondent's illegal, arbitrary and bad faith *Lesivo* Resolution, or its imaginary failure to rehabilitate or maintain the railroad, caused its damages – is utterly feckless. There is simply no evidence that anyone – customer, supplier, financier or potential lessee – stopped doing or refused to do business with FVG because of this single press release or because FVG did a poor job rehabilitating or maintaining the railway. In contrast, the record is replete with multiple statements of Guatemalan officials, from the President of the Republic on down, which made it painfully clear that the Government had targeted FVG for extinction so that it could take FVG's Usufruct and give it to “other [interested] investors,” *i.e.*, Ramón Campollo.

441. In sum, the task for the Tribunal is to separate consistent authority and sound legal theory from unsupported contentions and out-of-context snippets, record evidence and testimony from imagination and fancy, and logical projections and calculations from improper comparisons and concocted numbers.

B. Respondent's Damages Analysis is Based Upon the Incorrect Legal Standard

1. The CAFTA “Fair Market Value” Measure of Compensation for Expropriation Only Applies to “Lawful” Expropriations; Unlawful

¹⁰²⁸ See the discussion of the customary international law standards reflected in scholarly writing and the findings of numerous arbitral tribunals dealing with cases of illegal expropriations, discussed in Section IV.B.3, *infra*.

Expropriations are Governed by the Customary International Law Principle of “Full Reparation”

442. Both Respondent and its expert, Dr. Spiller, assert that the measure of damages set forth in CAFTA Article 10.7.2 – “compensation” equivalent to the “fair market value of the expropriated investment” – is applicable to both lawful *and* unlawful expropriations and that, even if that were not the case, the Declaration of *Lesivo*, if it was an expropriation, was a lawful expropriation under CAFTA and, therefore, Respondent is only liable to pay the fair market value of Claimant’s investment as compensation.¹⁰²⁹ Respondent and Dr. Spiller are both wrong.

443. On its very face, the “fair market value” standard for compensation for expropriation under CAFTA 10.7.2 applies only to “lawful” expropriations, *i.e.*, expropriations which comply with the terms of Article 10.7.2. As discussed in Section III, *supra*, Respondent’s indirect expropriation here did not satisfy *any* of the requisite elements for a lawful expropriation under CAFTA, *viz.*, it was not done (i) for a public purpose, (ii) in a non-discriminatory manner, (iii) in accordance with due process of law and the Article 10.5 minimum standard of treatment, and (iv) there has not been payment of prompt, adequate, and effective compensation.

444. CAFTA Annex 10-B directs that Article 10.7 be interpreted in accordance with customary international law. And, as Respondent acknowledges in its Counter-Memorial,¹⁰³⁰ in cases of an unlawful expropriation and/or other measures which violate CAFTA, the measure for compensatory damages owed to the claimant is the customary international law standard of “reparation” as originally set forth in *The Factory at Chorzów* decision:

The essential principle contained in the actual notion of an illegal act - a principal 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.¹⁰³¹

¹⁰²⁹ Counter-Memorial on Merits ¶¶ 541-46; Expert Report of P. Spiller ¶ 17. Even its own argument, which is legally erroneous, Respondent is not consistent. For example, Respondent confuses the occasions for the application of the concepts of “compensation” and “reparation” (“With respect to [lawful] expropriation, Article 10.7 of CAFTA sets forth the standard for reparation.”). Counter-Memorial on Merits ¶ 543.

¹⁰³⁰ Counter-Memorial on Merits ¶¶ 540-41.

¹⁰³¹ RL-90, *Factory at Chorzów*, Judgment No. 13 (Claim for Indemnity - The Merits), Perm. Ct. Int’l Justice, p.40 (13 Sept. 1928).

445. Despite its acknowledgement that the *Factory at Chorzów* reparation standard is the proper measure for damages for violations of CAFTA’s substantive provisions – including violations of its expropriation provision – Respondent nevertheless proceeds to argue nonsensically that the CAFTA Article 10.7.2 “fair market value” compensation standard for lawful expropriations is also the proper “reparation” standard for an unlawful expropriation.¹⁰³² In support of this (mis)interpretation, Respondent argues that the term “compensation” in Article 10.7 does not recognize any distinction between lawful and unlawful expropriations.¹⁰³³ Respondent, however, does not, and cannot, cite any support for its illogical interpretation of the treaty. Indeed, given the fact that Respondent devotes a significant portion of its Counter-Memorial to arguing that its alleged expropriation was “lawful,”¹⁰³⁴ it is highly questionable that Respondent itself truly believes that CAFTA does not recognize any compensatory distinction between lawful and unlawful expropriations. In any event, NAFTA tribunals have made clear that NAFTA’s almost identical expropriation provision, Article 1110, envisions a fair market value measure for compensation *only* for expropriations that are “lawful” under NAFTA by taking place in accordance with the requirements of Article 1110.¹⁰³⁵ These NAFTA tribunals all note that, in cases of violation of the expropriation standards of Article 1110 or any other substantive provision of Chapter 11, the *Factory at Chorzów* reparation standard governs.

446. As a result, it is generally accepted that the amount which is due from a State to an investor whose property has been lawfully expropriated is referred to as “compensation,” whereas, the amount due on account of a violation of an investment treaty or international law is referred to as “damages” or “reparation.”¹⁰³⁶

¹⁰³² Counter-Memorial on Merits ¶ 543.

¹⁰³³ Counter-Memorial on Merits ¶ 546.

¹⁰³⁴ See Counter-Memorial on Merits ¶¶ 332-43.

¹⁰³⁵ See RL-126, *S.D. Myers* First Partial Award, ¶¶ 305-09; RL-111, *Metalclad* Award ¶¶ 112-22.

¹⁰³⁶ See, e.g., CL-161, C.F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 Int’l. & Comp. L.Q. 22, 37-8 (1992) (“It is important in all cases to distinguish between unlawful takings of property and lawful takings. In the former what is due is damages. In the latter the alien must be compensated. There is clearly a distinction between the two cases, damages being naturally usually heavier than compensation.”); CL-163, Derek Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 Catholic U. L. Rev. 929, 938 (1985) (“[I]t may be best to refer to compensation as the remedy for a *lawful* taking or termination of contract and damages as the remedy for an *unlawful* taking or termination.”); CL-16, *Southern Pacific* Award, ¶ 183 (“Thus, the claimants are seeking ‘compensation’ for a lawful

447. Importantly, Respondent concedes that CAFTA does not establish a standard of compensation for State breaches of other obligations of the treaty.¹⁰³⁷ Accordingly, there is no dispute between the parties that the customary international law principle of full reparation applies to Respondent’s breaches of the minimum standard of treatment and national treatment obligation.¹⁰³⁸ In the absence of a clearly expressed intention in CAFTA to depart from the principles of, on the one hand, compensation for lawful expropriations and, on the other hand, full reparation for unlawful expropriations and other violations of treaty or international law, the treaty should be interpreted consonantly with unchallenged authorities stretching back for nearly a hundred years. Thus, all violations of CAFTA result in damages measured by “full reparation.”

2. An Investor Who Suffers an Unlawful Expropriation is Entitled to “Full Reparation,” a Subjective Evaluation of the Actual Loss to the Investor, Measured by the Amount Necessary to Put the Investor Back in the Position in which He was Immediately Prior to the Host Country’s Wrongful Act

448. The next issue, of course, is the consequence of this clear legal distinction between compensation for a legal expropriation versus reparation for an illegal expropriation. As Professor Imgard Marboe explains, in the case of lawful expropriations, international law has recognized “objective valuations,” *i.e.*, valuations from the perspective of an independent third party, for whom the market is a proxy:

It is, therefore, not surprising that the fair market value has prevailed as the most widespread standard of compensation upon [lawful] expropriation. Not only is it

expropriation, and not ‘reparation’ for an injury caused by an illegal act . . . [T]he Claimants are entitled to receive fair compensation for what was expropriated rather than damages for breach of contract.”); RL-2, *Amoco Int’l Finance v. Iran*, 15 Iran-US CTR (1987), ¶ 189 (“*Amoco* Partial Award”) (rejecting the concept that compensation for a lawful expropriation and damages for an unlawful one are the same); and RL-77, *ADC Award*, ¶ 481 (“The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation of a lawful expropriation with damages for an unlawful expropriation”).

¹⁰³⁷ Counter-Memorial on Merits ¶ 547.

¹⁰³⁸ Respondent’s concession underscores the illogic of its underlying argument that CAFTA Article 10.7(2) refers to both lawful and unlawful expropriations. Is it inconceivable that the CAFTA framers intended that there would be one standard of damages for one kind of treaty violation (an illegal expropriation) but a different standard of damages for other treaty violations (*e.g.*, deprivation of fair and equitable treatment, full protection and security and national treatment).

contained in many international treaties and other legal texts, but also numerous international investment tribunals have referred to it in the context of [lawful] expropriations.¹⁰³⁹

449. On the other hand,

[f]or the calculation of the amount to be paid after an unlawful act, it is important to assess the financial situation the injured person would be in if the unlawful act had not been committed The starting point of the analysis is, therefore, restitution in kind [or the financial equivalent thereof] In addition, there might be damage or loss sustained which would not be covered by reparation in kind or payment in place of it. The important question then is what kind of damage or loss can be successfully claimed in addition to the restitution value It is necessary to create a hypothesis as to how the financial situation of the individual ‘in all probability’ would be in the absence of the unlawful act. Then this hypothetical situation must be compared with his or her actual situation [known as the “differential method”] This concrete calculation is capable of implementing the principle of full reparation in the most adequate way. The reason for considering all these additional aspects is that the illegal act has caused a financial loss to the injured party. The principle of full reparation means that the injured party does not have to bear the financial consequences of this illegal act, not even in part. If taken seriously, the damage caused must be repaired in its entirety. This is necessary for special and general preventive reasons.¹⁰⁴⁰

450. Nor is this “differential method” at odds with the *Factory at Chorzów* formulation, upon which Professor Marboe relies for her “starting point” quoted above. Indeed, this method of assessing damages for illegal acts is completely consistent with the ILC Draft Articles on State Responsibility:

The ILC Articles on State Responsibility refer to the importance of the concrete damage incurred even more clearly than the abovementioned formula of the PCIJ in *Factory at Chorzów*. While the obligation of restitution remains intact, the claim for compensation according to Article 36(1) refers to the damage caused by the act, “insofar as this damage is not made good by restitution.” Paragraph (2) adds that this also includes “loss of profits insofar as it is established”.¹⁰⁴¹

¹⁰³⁹ CL-175, Ingard Marboe, *Calculation of Compensation and Damages in International Investment Law* ¶ 2.98 (2009) (“*Calculation of Compensation and Damages*”).

¹⁰⁴⁰ *Id.* ¶¶ 2.101 – 2.106.

¹⁰⁴¹ *Id.* ¶ 2.109.

451. Furthermore, Professor Crawford's Commentary to Article 36 states that, in addition to fair market value being awarded in the context of internationally wrongful acts by states, lost profits and other damage are also taken into account:

The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value, (ii) compensation for loss of profits and (iii) incidental expenses.¹⁰⁴²

Accordingly, Claimant's damage claim here is for compensation for capital value, compensation for loss of profits and incidental expenses.

452. Thus, there can be no serious question that the standard for a claimant's recovery in the case of a wrongful expropriation is reparation, not compensation, and it is similarly well established that reparation is "heavier" than the "fair market value" compensation awarded for lawful expropriations; otherwise, there would be no incentive or reason for a State to refrain from wrongful expropriations.

3. Under the *Factory at Chorzów* and the ILC Draft Articles of State Responsibility "Full Reparations" Standard, both the Amount Invested or Sunk Costs (*Damnum Emergens*) and Lost Profits (*Lucrum Cessans*) are Recoverable

453. The starting point for any discussion of the relationship between *damnum emergens* and *lucrum cessans* is the meaning of the terms themselves. According to Black's Law Dictionary, *damnum emergens* is "an actual realized loss," and *lucrum cessans* is "a loss of anticipated profit."¹⁰⁴³ Obviously, each is a distinct concept and does not overlap the other. Indeed, as Petros C. Mavroidis states, "the ILC codification gives only one guideline to the person entrusted with the quantification exercise: the damages awarded cannot be higher than the addition of *damnum emergens* and *lucrum cessans*."¹⁰⁴⁴ Thus, it is impossible to conclude that

¹⁰⁴² CL-165, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 225 (2002) ("Commentaries").

¹⁰⁴³ CL-162, Black's Law Dictionary (9th ed. 2009).

¹⁰⁴⁴ CL-176, Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 *Eur. J. Int'l. L.* 763, 769 (2000).

this recognized cumulation of both *damnum emergens* and *lucrum cessans* can, by itself, be either legally unsupported or, in and of itself, double counting.

454. Nor is the support for Claimant’s position in this regard limited, as Respondent contends, to “the decision of the PCIJ in the *Chorzów Factory* case and the award of the tribunal in *Siemens*.”¹⁰⁴⁵ But, first, we demonstrate that *Factory at Chorzów* and the *Siemens* cases squarely support Claimant’s damage methodology.

(a) *Factory at Chorzów*

455. *Factory at Chorzów* requires 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.” Thus, the question for the Tribunal is what was the situation just prior to the *Lesivo* Resolution on August 25, 2006, which is to be re-established? There can be no question that, on August 24, 2006, Claimant had the benefit of the entirety of its investment in FVG and that the deprivation of this investment constitutes *damnum emergens*. But, Claimant also had much more than just its investment in FVG. It had the expectation that the then-current stream of cash flow would not only continue, but also be augmented by additional cash flow from additional real estate leases and easements and operating profits from railroad operations, for the remainder of the term of the usufruct, which was approximately 42 years. Respondent’s *Lesivo* Resolution deprived Claimant of this reasonable expectation of future cash flow, and that head of damage is known as *lucrum cessans*. Accordingly, it cannot be seriously contested that the formulation of *Factory at Chorzów* supports an award of both invested or sunk costs and loss of profits thereon.

(b) *Siemens AG v. Argentine Republic*

456. As discussed in Claimant’s Memorial, this conclusion is also directly supported by *Siemens*. The *Siemens* tribunal noted that the ILC Articles “are currently considered to reflect most accurately customary international law on State responsibility” and quoted Article 36 on Compensation:

¹⁰⁴⁵ Counter-Memorial on Merits ¶ 567.

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.¹⁰⁴⁶

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.”¹⁰⁴⁷

457. Thus, the issue in *Siemens* was whether the scope of damages (reparations) for a violation of 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*.¹⁰⁴⁸

458. Under this formulation, Siemens claimed both the value of the investment at the date of expropriation (*damnum emergens*) and lost profits (*lucrum cessans*),¹⁰⁴⁹ whereas Argentina, as Respondent and Dr. Spiller do here, argued that the “fair market value” provided by the Treaty and customary international law did not include lost profits.¹⁰⁵⁰ 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

¹⁰⁴⁶ RL-80, *Siemens Award*, ¶ 350.

¹⁰⁴⁷ *Id.* ¶ 351.

¹⁰⁴⁸ *Id.* ¶ 352 (emphasis added).

¹⁰⁴⁹ 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*). RL-80, *Siemens Award*, ¶ 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. *Id.* ¶¶ 329, 342.

¹⁰⁵⁰ *Id.* ¶¶ 331-32.

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.¹⁰⁵¹

459. 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.¹⁰⁵² However, it ultimately found that Siemens had not adequately proved the lost profits in question.¹⁰⁵³

460. In its Counter-Memorial, Respondent contends that the result in *Siemens* depended upon the "particular circumstances of that case" and that Claimant "has not explained what particular circumstances in this case would give merit to its request that the Tribunal deviate from the normal rule and accept Claimant's request for double compensation."¹⁰⁵⁴ Respondent is wrong. First, Claimant is not asking the Tribunal to deviate from the normal rule. As shown in the extensive discussion herein, the "normal rule" is that, in the case of an illegal expropriation or other treaty violations, "full reparation" includes both the recovery of sunk costs *and* lost profits.

461. In addition, contrary to Respondent's assertion, Claimant, in its Memorial, discussed at length the similarities of the instant case to the *Siemens* case,¹⁰⁵⁵ which led the *Siemens* tribunal to hold that both the value of the investment and lost profits, if proven, were the

¹⁰⁵¹ *Id.* ¶ 355.

¹⁰⁵² *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, . . .").

¹⁰⁵³ *Id.* ¶¶ 379-85; *see also* CL-38, *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).

¹⁰⁵⁴ Counter-Memorial on Merits ¶ 576.

¹⁰⁵⁵ Memorial on Merits ¶¶ 173-82.

proper measure of damages.¹⁰⁵⁶ First, similar to *Siemens*, a substantial portion of Claimant’s investment was made “before the first peso of revenue [was] realized.”¹⁰⁵⁷ Thus, the investment was “‘wasted’ in the effort to produce the revenues from which those profits would have been derived.”¹⁰⁵⁸

462. Furthermore, as Claimant’s damages experts Robert MacSwain and Louis Thompson have opined, Claimant’s investment in the rehabilitation of the railroad was unconnected from 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.¹⁰⁵⁹ 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.¹⁰⁶⁰ 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.¹⁰⁶¹ As explained by Professor Marboe, “[d]ouble counting does not occur if wasted costs and expenses are not directly related to the expected profits.”¹⁰⁶²

¹⁰⁵⁶ The *Siemens* tribunal’s belief that unusual circumstances were necessary to award both sunk costs and lost profits appears to have been based upon the parties’ failure fully to brief the consistent and authoritative view that “full reparations” includes both types of damages; whereas, in this case, the Tribunal has the benefit of that briefing in Claimant’s Memorial and in this Reply Memorandum.

¹⁰⁵⁷ RL-80, *Siemens* Award, ¶ 355.

¹⁰⁵⁸ *Id.*

¹⁰⁵⁹ Robert F. MacSwain, “Valuation of Right of Way, Yard and Station Real Estate Granted in Usufruct to Ferrovias Guatemala,” (“First Expert Report of R. MacSwain”), ¶ 4.2(a); Louis F. Thompson, “Evaluation of the Railroad Development Corporation/Ferrovias Guatemala Usufruct of Rail Right-of-Way and Equipment in Guatemala Report” (“First Expert Report of L. Thompson”), ¶¶ 50-56.

¹⁰⁶⁰ As previously discussed, as of the *Lesivo* Resolution, FVG remained entitled to exploit all of the Usufruct real estate assets because it had fully complied with its railway rehabilitation obligations under Contract 402 and Respondent had not asserted any breach of such obligations or right to reclaim any real estate properties granted in usufruct.

¹⁰⁶¹ First Expert Report of L. Thompson ¶¶ 56-57.

¹⁰⁶² CL-70, I. Marboe, *Compensation and Damages in International Law: The Limits of “Fair Market Value,”* 4 *Transnat’l Dispute Mgmt.* 723, 746 (2007).

463. Furthermore, Claimant’s investment in the rehabilitation of the railroad was almost exclusively a benefit to Guatemala, not to Claimant.¹⁰⁶³ Put another way, the *quid pro quo* or consideration to Guatemala for granting the Usufruct to FVG was Claimant’s committed investment in the rehabilitation of the railway. While unstated, as a logical matter, it would have been expected that this investment would be recovered by Claimant through the operation of the railroad for 50 years, such recovery being accompanied by only a minor profit on railroad operations. As a result, as to the railroad operations themselves, the *Lesivo* Resolution destroyed Claimant’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 Claimant received – the reasonably certain and expected income stream from the leasing of the right-of-way and adjacent parcels that had been granted in usufruct. It is from this stream of income over the life of the Usufruct that Claimant reasonably expected to make the profit that would make its significant up front investment worthwhile.

464. In its Counter-Memorial, Respondent attempts to deflect these unassailable points, contending that “it could hardly be argued that the investment in the rehabilitation of the railroad was almost to the exclusive benefit of Guatemala when Claimant in this case did not comply with its obligations under Contracts 402 and 143/158, used cheap and poor-quality materials in its “rehabilitation’ of Phase 1 which led to derailments and accidents, encouraged squatters to inhabit the right-of-way, and abandoned its obligations to provide a functioning railway to Guatemala.”¹⁰⁶⁴ To the contrary, as extensively discussed throughout this Reply, Respondent has not presented any proof that FVG breached any contractual obligation, used cheap or poor-quality materials, caused excessive derailments or accidents, encouraged squatters or that FVG failed in any way to provide a functioning railway to Guatemala.¹⁰⁶⁵ Indeed, the record evidence demonstrates beyond peradventure that RDC and FVG took an abandoned

¹⁰⁶³ First Expert Report of L. Thompson ¶¶ 56, 58.

¹⁰⁶⁴ Counter-Memorial on Merits ¶ 577. Respondent’s argument ignores the fact that Respondent *never* accused FVG of being in breach of its obligations under Contract 402. Indeed, it was the Government’s breaches of its obligation to provide security to and contribute to the Trust Fund that impeded the development of the railway in Guatemala.

¹⁰⁶⁵ See Section II.W, *supra*.

railway that had been ridden into the ground through the incompetence and negligence of FEGUA; successfully and carefully rehabilitated 206.9 miles of track, 15 locomotives and 200 rail cars;¹⁰⁶⁶ used materials which were entirely consistent with its commitments and good railroad practice; labored under the burden of squatters which the Government wholly failed in its obligation to remove;¹⁰⁶⁷ shouldered the burden of repairing unforeseen damages from two devastating hurricanes in 1998 (Mitch) and 2005 (Stan); and provided a functioning railway to Guatemala until the Government decided to take Claimant's investment away from it in order to benefit a powerful local oligarch. Thus, for Respondent to say that Claimant has not demonstrated facts which should outrage this Tribunal and cause it to award "full reparation" to Claimant is, simply, nonsense.

465. It is also important that FVG's business plan demonstrated that the operation of the railroad, by itself, could not justify the investment and was, therefore, explicitly based upon its ability to achieve substantial cash flow from real estate leasing. Thus, it was certainly Claimant'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.

4. Numerous Authorities Support the Award of Both Lost Investment and Lost Profits

466. In addition to the plain meaning of the words of *Factory at Chorzów*, the literature and international jurisprudence are replete with authority that, having shown an illegal expropriation or other internationally wrongful act, Claimant is entitled to recover both *damnum emergens* and *lucrum cessans*.¹⁰⁶⁸

467. The *Factory at Chorzów* full reparation principle of "re-establish[ing] the situation which would, in all probability, have existed if that act had not been committed" is not

¹⁰⁶⁶ First Statement of H. Posner III ¶ 22.

¹⁰⁶⁷ *Id.* ¶ 21; First Statement of J. Senn ¶ 15.

¹⁰⁶⁸ Even an award of fair market value cannot be limited to the amounts invested. As Judge Brower put it very colorfully in his concurring opinion in *Amoco International Finance v. Iran*, the award there "seems to be saying that one who for the price of a chicken turns out to have acquired the proverbial goose that lays golden eggs can legitimately demand back only the price of a chicken when his goose is taken by his landlord and not the value of the goose." RL-2, *Amoco* Partial Award, ¶ 29 (Brower, J., concurring).

the same as putting the investor in the position he would have been *if the investment had never been made*, i.e., restitution of his investment/sunk costs only; it means placing the investor in the position he would have been *had the contract been performed*, which means recovery of *both* lost investment and lost profits. As Professor Marboe explains:

[I]n cases of damages following breaches of contract, the application of the differential method with regard to the hypothetical situation is necessary, since – as has been explained above – in these cases too, the principle of full reparation has to be respected. It would be inadequate to reimburse only the expenses left or the decrease of asset values. In such a case the injured person would only be put in the position he or she would have been in, if the contract had never been concluded. This would, however, not be correct. On the contrary, it is important to put him or her in the position he or she would have been in, if the contract had been duly performed.¹⁰⁶⁹

468. Professor Marboe further states that “the function of compensation is primarily the replacement of the value of the expropriated property, while the function of damages is the full reparation of the damage incurred.”¹⁰⁷⁰ This conclusion would be meaningless if “the replacement of the value of the expropriated property” – *damnum emergens* – was not less than the “full reparation of the damage incurred” – *damnum emergens plus lucrum cessans*.¹⁰⁷¹

469. In the first official United States compilation of international investment arbitration awards, *Damages in International Awards*, the reporter, Ms. Marjorie M. Whiteman, states without qualification:

The Roman and likewise the civil-law systems allow damages described as *damnum emergens* (the actual loss sustained) and as *lucrum cessans* (the cessation of profit). Numerous decisions in international cases, including cases arising in tort as well as those arising in contract, have allowed indemnity for *damnum emergens* and *lucrum cessans*.¹⁰⁷²

¹⁰⁶⁹ CL- 175, Marboe, *Calculation of Compensation and Damages* ¶ 2.110 (emphasis added).

¹⁰⁷⁰ *Id.* ¶ 2.96.

¹⁰⁷¹ *Id.*

¹⁰⁷² CL-188, Marjorie M. Whiteman, 3 *Damages in International Law* 1838. (U.S. Dept. of State 1934). One of the more colorful cases which Ms. Whiteman cites is *Braithwaite v. United States*, a decision of a Commission established under the 1871 treaty between the United States and Great Britain to resolve claims of British citizens arising out of the Civil War. In that case, Mr. Braithwaite’s horse had been requisitioned by United States authorities in Kentucky. His claim for both the value of the horse (\$150) and lost income from renting the horse for

470. Similarly, commentator Brice M. Clagett describes the recovery of both *damnum emergens* and *lucrum cessans* as “universally accepted law:”

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.”¹⁰⁷³

471. Other international law scholars also acknowledge this full reparation standard. Professors Sergey Ripinsky, Kevin Williams and Mark Kantor agree that, while double counting is indeed a risk that may exist when awarding both *damnum emergens* and *lucrum cessans*, they also agree that double counting can be avoided through properly amortizing the value of the investment against the projected lost cash flow/profits.¹⁰⁷⁴ As discussed in further detail below, this is exactly what Claimant has done in its revised damages calculation.

472. The award of past capital expenditures plus *lucrum cessans* reduced by amortization (depreciation) of these expenditures was approved by the tribunal in *Himpurna v. PLN*:

[T]he quantification of lost profits must result in a lower amount [compared to the DCF valuation in its pure form] to avoid double counting To ask for the full amount of the future revenue stream when also claiming recoupment of all investments is wanting to have your cake and eat it too [W]hen the victim of a breach of contract seeks recovery of sunken costs, confident that it is entitled to its *damnum*, it may go on to seek lost profits only with the proviso that its

farm use (“it being the cropping season he lost at least \$50 more”) was allowed and he was awarded \$225 in gold. *Id.* at 1841.

¹⁰⁷³ CL-65, 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).

¹⁰⁷⁴ CL-179, Sergey Ripinsky with Kevin Williams, *Damages in International Investment Law* 297 (2008) (“Indeed, amortization greatly reduces the risk of double recovery [...] [a]ll expenses must be deducted if double counting is to be avoided.”); CL-172, Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* 200 (2008) (“If arbitrators do rely upon the categories of sunk investment costs and lost profits to calculate compensation, it will be necessary to back out [amortize] of an Income-Based forecast any amounts attributable to invested capital separately recovered as *damnum emergens* to avoid such double counting.”)

*computations reduce future net cash flows by allowing a proper measure of amortization.*¹⁰⁷⁵

473. Article 74 of the Convention on Contracts for the International Sale of Goods (“CISG”) provides that “damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.”¹⁰⁷⁶ Obviously, if the loss of the investment was exclusive of or included in loss of profit, the CISG would not refer to “the loss, *including* the loss of profit.”¹⁰⁷⁷ Similarly, Article 36(1) of the ILC Draft Articles on State Responsibility refers to the damage caused by the internationally wrongful act, “insofar as this damage is not made good by restitution.”¹⁰⁷⁸ In other words, this Article contemplates, first, restitution, i.e., restoration of the investment or sunk costs, and, then, *in addition*, other damages. Further, Article 36(2) makes it clear that such other damages, in addition to restitution, include “loss of profits insofar as it is established.”¹⁰⁷⁹

474. Indeed, lost profits and sunk investment costs have been previously awarded in international arbitration cases against Guatemala involving facts and circumstances quite similar to the present case. In *The May Case*, Mr. Robert H. May, a U.S. citizen, contracted with Guatemala for the operation of a railroad (apparently, part of the usufruct involved in this case).¹⁰⁸⁰ May was to receive a subsidy of \$35,000 per month, plus \$2,000 for painting the Puerto Barrios station and \$2 each for replacing 5,000 wooden sleepers.¹⁰⁸¹ Guatemala failed to pay May much of the amount due and, as a result, he was unable to pay his employees, who went

¹⁰⁷⁵ CL-146, *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listrik Negara*, 25 Y.B. Comm. Arb. 13 (4 May 1999) (“*Himpurna Award*”), ¶ 242 (emphasis added).

¹⁰⁷⁶ CL-185, U.N. Comm’n on Int’l Trade Law, *UNCITRAL Digest of Case law on the United Nations Convention on the International Sale of Goods*, p.6, U.N. Doc. A/CN.9/SE.C/DIGEST/CISG/74 (8 June 2004).

¹⁰⁷⁷ *Id.* (emphasis added).

¹⁰⁷⁸ RL-29, ILC Draft Articles 36(1).

¹⁰⁷⁹ RL-29, ILC Draft Articles 36(2).

¹⁰⁸⁰ CL-150, *Guatemala v. May (U.S.)*, 15 U.N.R.I.A.A. 7 (16 Nov. 1900) (“*The May Case*”).

¹⁰⁸¹ *Id.* at 55.

on strike.¹⁰⁸² The Government then demanded that May deliver up the railroad, which he did, following which May brought a claim against Guatemala.¹⁰⁸³

475. The arbitrator considered the claims on each side and found that Guatemala's breach had prevented May's performance and that, therefore, Guatemala was liable to May for both the unpaid subsidy and expenses he had incurred which increased the inventory value of the railroad during May's tenure, certain explosives he had purchased, Puerto Barrios "commissaries," "wood left on hand," and his expenses incurred in removing his property.¹⁰⁸⁴ In addition to these sums, May was also awarded his lost profits quoting a leading authority on Guatemalan law:

The law of Guatemala, says Don Jorge Munoz (to which the claimant is subject in this case), establishes, like those of all civilized nations of the earth, that contracts produce reciprocal rights and obligations between the contracting parties and have the force of law in regard to those parties; that whoever concludes a contract is bound not only to fulfill it, but also to recoup or compensate (the other party) for damages and prejudice which result directly or indirectly from the nonfulfillment or infringement by default or fraud of the party concerned, and that such compensation includes both the damage suffered and the profits lost. *Damnum emergens et lucrum cessans*.¹⁰⁸⁵

476. In the *Shufeldt* case, previously discussed in paragraphs 310-16, *supra*, the arbitrator also explicitly held that both damages suffered and lost profits were recoverable by Mr. Shufeldt against Guatemala:

[W]hoever concludes a contract is bound not only to fulfill it but also to recoup or compensate (the other party) for damages and prejudice which result directly or indirectly from the nonfulfillment or infringement by default or fraud of the party concerned and that such compensation includes both damage suffered and profits lost: *damnum emergens et lucrum cessans*.¹⁰⁸⁶

¹⁰⁸² *Id.* at 55, 58.

¹⁰⁸³ *Id.* at 56.

¹⁰⁸⁴ *Id.* at 67-8.

¹⁰⁸⁵ *The May Case* at 72-73 (emphasis added).

¹⁰⁸⁶ RL-128, *Shufeldt* Decision at 1099, quoting *The May Case*, *supra*.

In computing those damages, the arbitrator awarded amounts which consisted of Mr. Shufeldt's investment (including Mr. Shufeldt's performance deposit, amounts due to laborers, chicleros and contractors, other current accounts due, the cost of work animals and equipment, boats, office furniture and equipment, general merchandise), all of which was "incurred on the strength of the contract lasting ten years at least."¹⁰⁸⁷ On top of this investment, the arbitrator also awarded lost profits for the remaining four years of the concession.¹⁰⁸⁸ The arbitrator also awarded damages for the "loss of time, injury to credit, and grave anxiety of mind on account of cancellation of the contract." and interest and attorneys fees in connection with Mr. Shufeldt's attempts to negotiate a settlement with the Government of Guatemala.¹⁰⁸⁹

477. Similarly, in *Liberian Eastern Timber Corp. (LETCO) v. the Government of Liberia*,¹⁰⁹⁰ the claimant had a 20-year concession for the harvesting, processing, transport and marketing of timber and the right to extend the concession for a further 15 years.¹⁰⁹¹ Liberia unilaterally reduced the area of the concession to the extent that, according to LETCO, it was no longer able to exploit the concession properly or profitably.¹⁰⁹² After finding that Liberia had breached its obligations under the concession and thereby violated international and Liberian law, the tribunal turned to the issue of damages, citing no less than six prior investment dispute decisions for the proposition that LETCO was entitled to recover both sunk investment costs and lost profits.¹⁰⁹³

¹⁰⁸⁷ *Id.* at 1100.

¹⁰⁸⁸ *Id.* at 1099. Although the arbitrator did not consider the issue of double counting, it bears noting that his award of lost profits was computed net of expenses which, presumably would have included many, if not all, of the investment amounts awarded, either as deductions or as depreciation.

¹⁰⁸⁹ *Id.* at 1101.

¹⁰⁹⁰ CL-122, *Liberian Eastern Timber Corp. (LETCO) v. the Government of Liberia*, ICSID Case No. ARB/83/2, Award (31 Mar. 1986) ("*LETCO Award*").

¹⁰⁹¹ *Id.* at 670.

¹⁰⁹² *Id.* at 660.

¹⁰⁹³ *Id.* at 674-5 (emphasis added). Respondent cites Professor Marboe as criticizing the *LETCO* decision for "double counting." See Counter-Memorial on Merits ¶ 568, n.1360. The award of the tribunal, however, makes it clear that, just as in the instant case, there was no double counting because the tribunal relied upon an accounting report by Peat Marwick which expressly depreciated the fixed assets of the investment over the life of the

5. To Eliminate the Possibility of Double Counting, Claimant has Amortized Its Invested or Sunk Costs Over the Life of the Usufruct After *Lesivo*

478. Respondent’s contention that Claimant’s damage claim involves “double counting” is notably thin and weak. It is limited to five citations from authorities who “worry about” or “are concerned about” double counting when lost profits and sunk investment costs are both awarded, plus a considerable number of citations to its own expert, Dr. Spiller.¹⁰⁹⁴ Indeed, Claimant readily concedes that international investment arbitration scholars, including those cited by Claimant, have “worried about” double counting for a long time. However, that is not the issue.

479. As discussed above, it is well-established that, in awarding damages, Claimant is entitled to be put back in the position that it would have been in had the internationally wrongful acts not been committed by the Respondent, and the greater number of and better reasoned authorities hold that this measure of damages properly includes both Claimant’s investment expenditures (*damnum emergens*) and lost profits (*lucrum cessans*). It is the task of Claimant, and, subsequently, the Tribunal, to do that computation in a way that does not result in double counting. Put another way, even though Professors Wälde, Sabahi, Gotanda, Crawford, Kantor and Marboe all warn that tribunals should be careful to avoid awards which include double counting, none of them says that an award of both *damnum emergens* and *lucrum cessans* always or necessarily involves double counting, or that it cannot be corrected.¹⁰⁹⁵ Like everything else, the devil is in the details. So, let us turn to the details.

480. As described above, with regard to Claimant’s lost investment, to return Claimant to the virtual position it was in before the *Lesivo* Resolution, it is necessary to construct a damage model that gives Claimant back its investment and, thereby, enables it (again, virtually) to execute its business plan for both the operation of the railroad and the leasing of the right of

concession. CL-122, *LETCO* Award at 673 (“Fixed assets would have depreciated on a straight line basis throughout their useful life.”).

¹⁰⁹⁴ Counter-Memorial on Merits ¶¶ 567-79.

¹⁰⁹⁵ Counter-Memorial on Merits ¶ 568, n.1360.

way and adjacent parcels.¹⁰⁹⁶ If that virtual award were made, then Claimant would conduct that operation of its business plan in exactly the same way as it would have done in the absence of *Lesivo* Resolution. And, in that regard, Claimant would have, in accordance with accepted accounting and economic practice and confirmed by, *inter alia*, Professors Ripinsky and Kantor, amortized its investment over the remaining 42 years of the Usufruct.¹⁰⁹⁷ In other words, the entire investment would be subtracted from the future stream of income, pro rata. In this way, Claimant is not engaging in double counting.

481. This result is in accordance with generally accepted accounting principles, where income is required to be matched to expenses and capital investments are amortized over their useful life.¹⁰⁹⁸ Indeed, accrual, rather than cash, accounting is fundamentally based upon this requirement to match expenses against the income which is created by them.¹⁰⁹⁹ That is the reason why capital assets are capitalized and depreciated.¹¹⁰⁰ Most nearly analogously, that is the reason why leasehold improvements are amortized over the term of the lease.¹¹⁰¹ And, the same is true of economic principles. As Claimant's cost of capital and valuation expert, Dr. Shannon Pratt, opines, when Claimant amortizes its investment/sunk costs – *damnum emergens* – over the life of its lost cash flow stream – *lucrum cessans* – there is no double counting, either as an economic or accounting matter.¹¹⁰²

¹⁰⁹⁶ We say “virtual” because Claimant is not seeking physical restitution and, indeed, no rational person would put himself in the position of having actually to take back the railroad properties and operate the railroad and leasing activities, because that would mean more wasted investment to repair the damage that has been done to the railroad properties since FVG was forced to stop operations and would involve dealing, again, with FEGUA and the Government, which have demonstrated that they are wholly unreliable and perfidious. For a similar conclusion, see *LETCO* at p. 668.

¹⁰⁹⁷ CL-179, Ripinsky with Williams, *Damages in International Investment Law* 297; CL-172, Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* 200.

¹⁰⁹⁸ Shannon P. Pratt, “Opinion of Cost of Capital and Other Issues in the Matter of Railroad Development Corporation v. Republic of Guatemala” (“Expert Report of S. Pratt”) at p.13.

¹⁰⁹⁹ CL-187, J. Weygandt, P. Kimmel & D. Keiso, *Financial Accounting* 300, 430-36 (John Wiley & Sons, Inc. 2008)

¹¹⁰⁰ *Id.* at 424-31.

¹¹⁰¹ See CL-167, Financial Accounting Standards Board, *Determining the Amortization Period for Leasehold Improvements*, Issue No. 05-6, 2-3 (2005).

¹¹⁰² Expert Report of S. Pratt, pp. 12-13.

482. Dr. Spiller is also entirely incorrect when he says that the fair market value of Claimant’s investment is all that anyone would ever pay for FVG.¹¹⁰³ It is accepted economic analysis that the market is not entirely efficient, and certainly not when there *are not* hundreds or thousands of comparable transactions which, when averaged, *might* indicate market value.¹¹⁰⁴ And, modern economic analysis recognizes that there are also psychological forces which distort the market and render it inefficient.¹¹⁰⁵

483. Moreover, Dr. Spiller’s proposition that the fair market value of FVG cannot exceed the discounted value of the cash that it expected to receive in the future¹¹⁰⁶ is inconsistent with the reality of markets, even the most efficient markets. For example, the idea that the price of, say, a dividend paying stock, is always equivalent to no more than the discounted value of expected dividends is both erroneous and wholly inapplicable.¹¹⁰⁷ It is demonstrably erroneous because, even in the most efficient market in the world, the market for U.S. large capitalization stocks, prices are highly volatile, without any intervening information to justify the price swings; indeed, there is an index to measure price volatility (the VIX) which, itself, is used to price options on those very stocks, the price of which (options) varies between buyers and sellers (“spread”) and from day to day, because people cannot agree on how to value those expected dividends or upon the likely price of the stock during the term of the option.¹¹⁰⁸

484. Furthermore, Dr. Spiller’s construct is inapplicable because that method of determining value is founded upon the assumption that the purchaser of the stock is going to hold it forever, *i.e.*, that the future stream of dividends is infinite. Thus, the investment is never

¹¹⁰³ Expert Report of P. Spiller ¶¶ 17-21.

¹¹⁰⁴ See, CL-180, Barr Rosenberg, Kenneth Reid & Ronald Lanstein, *Persuasive Evidence of Market Inefficiency* 13 J. Portfolio Mgmt. 9 (1985); CL-178, J. Nocera, *Poking Holes in a Theory on Markets*, N.Y. Times, 6 June 2009. See also generally Richard Posner, *A Failure of Capitalism* (2009); Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward and Delusion on Wall Street* (2009).

¹¹⁰⁵ See generally Robert Schiller, *Irrational Exuberance* (2005).

¹¹⁰⁶ Expert Report of P. Spiller ¶¶ 22-24.

¹¹⁰⁷ *Id.* ¶¶ 21-24.

¹¹⁰⁸ We will not even explore the fact that, in highly illiquid markets – such as the one for operational usufructs of railroads in developing countries – prices vary widely depending upon the negotiating positions and abilities of the owners and potential operators. In such markets, it is really a nonsensical construct even to talk about “fair market value” being determined by the marketplace or even by a “willing” buyer and seller.

converted into a return of principal (a terminal value); rather, the principal is always used in the production of the dividends. In comparison, if one were to purchase an annuity with a fixed term (say, 42 years), the price of the annuity would have to be amortized over its term in order to determine the return on the investment.¹¹⁰⁹ And, here, Claimant's investment is like the purchase of the annuity. Claimant made the investment in order to operate a railroad on which it was not going to make very much profit – indeed, by itself, the railroad operation would have been an uneconomic investment which no one would have ever undertaken. But Claimant also made that investment in order to be able to create an additional income stream from leasing the right of way and adjacent parcels. Therefore, it is logical and proper business, accounting and economics procedures for Claimant to amortize its investment in the Usufruct over the term in which it is going to earn that leasing income stream.¹¹¹⁰

485. Accordingly, Respondent and Dr. Spiller's contention that Claimant cannot recover both *damnum emergens* and *lucrum cessans* because, in their view, the combination of the two inevitably results in double counting, misses the mark. As the foregoing discussion demonstrates, both heads of damage are entirely appropriate recoveries in the case of internationally wrongful acts when reparations, not compensation, are the measure of damages.¹¹¹¹ The only caveat to this combination is that their use in tandem should not result in double counting, a pitfall Claimant has completely avoided here by amortizing the investment or sunk cost over the life of the expected income stream.

C. Claimant Should Be Awarded Its Lost Profits

486. Respondent's argument to deny Claimant's lost profits claim boils down to two main points, one factual – Claimant was not profitable before the *Lesivo* Resolution – and one

¹¹⁰⁹ Indeed, that is precisely the way the United States Internal Revenue Service analyzes annuities to determine what portion of the annual income is return of principal (and, therefore, not taxable) and what portion is income on the investment (and, therefore, taxable). See CL-170, IRS Publication 939 (2003).

¹¹¹⁰ Notably, if RDC was going to get its investment back at the end of the Usufruct, proper accounting procedures would still require RDC to amortize it over the life of the Usufruct but the ownership of even a totally depreciated investment would have a "terminal value" at the end of the Usufruct. That terminal value would be computed – it would undoubtedly far greater than the original investment – and that computed terminal value would be discounted to the date of *Lesivo*, to be included in RDC's damages. Because the Usufruct did not provide for the return of RDC's investment, however, RDC is not entitled to the NPV of that terminal value.

¹¹¹¹ And, as a result, both the net capital contribution (NCC) method of measuring the amount of the investment and the DCF method of measuring the lost cash flow are appropriate.

legal – a business which is not profitable before an internationally wrongful act cannot recover lost profits.¹¹¹² Both are wrong.

1. Properly Evaluated, FVG was Generating Positive Cash Flow Prior to the *Lesivo* Resolution

(a) Any Comparison of FVG’s “Profitability” to Its Claim for Lost Profits/Cash Flow Must be Made on a Consistent EBITDA Cash Flow Basis

487. Whether Claimant was profitable prior to the *Lesivo* Resolution is relevant only in connection with determining whether it is likely that, in the absence of Respondent’s breaches, Claimant would have earned its projected future cash flows, which are then discounted under the DCF method. As Professor Marboe explains in detail, the future cash flows which are discounted consist not of future profits or earnings but of future cash flow – gross income less the expenses necessary to produce that income, because “cash flow [is] regarded as a better indicator of the value [of a business] than ‘earnings’, as the latter depends a lot on the accounting principles applied which are different from country to country, making them unsuitable for international comparisons.”¹¹¹³ These projected cash flows are the cash flows that are normally associated with EBITDA – earnings before interest, taxes, depreciation and amortization.¹¹¹⁴ Interest is added back because that is necessary to remove the effect of choices of capital structure. Taxes are added back because taxes will be paid on the recovery and, if taxes were subtracted from the cash flows, that would amount to double taxation.¹¹¹⁵ Depreciation and amortization are added back because those are non-cash charges which cannot be considered in an analysis of lost cash flow. In *CMS Gas Transmission Co. v. Argentina* the tribunal gave a detailed description of the two appropriate DCF methodologies:

¹¹¹² Counter-Memorial on Merits ¶¶ 580-607.

¹¹¹³ CL-175, Marboe, *Calculation of Compensation and Damages* ¶ 5.87 (“The basis for measuring the future income stream in modern valuation practices is usually not future profit or net earnings but future ‘cash flow.’”) (citing CL-174, W. Lieblich, “*Determining the Economic Value of Expropriated Income-Producing Property in International Arbitrations*,” 8 J. Int’l Arb. 59, 62 (1991)).

¹¹¹⁴ *Id.* ¶ 5.89.

¹¹¹⁵ Even without the fact, taxes would be added back in order to correct for the disparate tax situations of different investors and to be true to the principle that what is being measured is “cash flow,” not net cash flow.

One can start computations with the cash flows to the firm before interest and debt repayments, discount such flows at the weighted average cost of capital (the ‘WACC’) and add the discounted cash flows to the [value of the] firm to establish its value; then, the value of debt is subtracted and the residual value is the value of equity (‘the indirect equity value’). Alternatively, one can compute first the cash flow to equity (cash flows from operations minus interest and debt repayments), discount them at the cost of equity (‘COE’) and add the discounted cash flows to equity to establish the value of equity (‘the direct equity value’); then one adds the value of debt to establish the value of the firm.¹¹¹⁶

The former is the EBITDA methodology that has been used by Mr. Thompson in this case to calculate Claimant’s lost cash flows/profits claim. And, indeed, Dr. Spiller accepts EBITDA as the proper basis for the calculation of future cash flows.¹¹¹⁷ As a result, EBITDA is the proper basis for evaluating FVG’s past performance as a predictor of the likelihood that, in the absence of the *Lesivo* Resolution, FVG would have produced those future cash flows.

(b) FVG’s Reported Accounting Results Must Also Be Adjusted to Reflect the Rents that Were Not Paid into the Railway Trust Fund

488. In addition to adjusting FVG’s earnings on an EBITDA basis, when assessing whether FVG had achieved profitability prior to the *Lesivo* Resolution, the estimated amount of the payments which FEGUA should have paid, but did not pay, into the Railway Trust Fund for the benefit of FVG must also be added to FVG’s income statement.¹¹¹⁸ Otherwise, Respondent would be allowed to make an argument – that FVG was not profitable before *Lesivo* – which is factually based on Respondent’s own breach of its contracts with FVG.¹¹¹⁹

¹¹¹⁶ RL-92, *CMS Gas Award*, ¶ 430. Note that the tribunal “added” the DCF value of the future income stream to the “value” of the firm, thus combining *lucrum cessans* with *damnum emergens*.

¹¹¹⁷ Expert Report of P. Spiller ¶ 78, n.81.

¹¹¹⁸ Again, the Trust Fund adjustment is necessary because Respondent has raised a question about FVG’s pre-*Lesivo* economic performance. *Claimant has not included any such Trust Fund payments in its damage calculation.*

¹¹¹⁹ The amount must be estimated because FVG does not have, and FEGUA has never provided precise information on the items of income which, under Contract 820, FEGUA was required to pay into the Trust Fund. The amount can, however, be estimated with some accuracy. First, the vast amount of this income was FEGUA’s 2% of the revenues from the COBIGUA lease at Puerto Barrios. Because FVG received a like amount, FVG can be certain of that income. Second, based upon the years when FVG was aware of the other income amounts, Mr. Senn is confident that these other lease payments constituted, in the aggregate, an amount which is approximately 30% of FEGUA’s income from its COBIGUA lease. Third Statement of J. Senn ¶ 28, Annex 1. As a result, Mr. Senn has estimated FEGUA’s total obligation to the Trust Fund each year by taking FVG’s income from the COBIGUA lease and multiplying it by 1.3. *Id.*

489. In this regard, it is axiomatic that a respondent cannot rely upon its own breaches or fault in order to argue that a claimant has not met the standards for proving entitlement to recovery. “[T]he party who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable.”¹¹²⁰

Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply [this rule] would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.¹¹²¹

This principle has been recognized in international law:

It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, *particularly as a result of the behavior of the author of the damage*, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.¹¹²²

490. Indeed, FVG’s 2004 Annual Report bears out this point when it states that the company was, by then, operating on an almost breakeven basis from its Phase I operations and was on the verge of both *positive cash flow* and *profitability* but for the Government’s missing Trust Fund payments:

While financing for our company has remained elusive, we have succeeded in further reducing operating losses to the point *where we are almost breakeven on a cash flow basis*. This is important because it means the end of shareholder funding, an important consideration for all of us Because we are so close to breaking even, a single breakthrough – such as a new contract or use of our right-of-way, or *a resolution of how our infrastructure trust-fund is administered in conjunction with the government* – has the potential to eliminate the losses which have plagued us since inception.¹¹²³

¹¹²⁰ CL-140, *Crichfield v. Julia*, 147 F. 65, 71 (2d Cir. 1906).

¹¹²¹ CL-138, *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

¹¹²² CL-155, *Sapphire v. NIOC*, 35 I.L.R. 136, 187-8 Award (15 March 1963) (“*Sapphire Award*”) (emphasis added).

¹¹²³ Ex. C-27(g), FVG 2004 Annual Report, at RDC001204 (emphasis added).

491. The 2005 FVG Annual Report further points out that the single biggest problem FVG had with regard to achieving profitability and funding operations was not its failure to reopen the South Coast corridor or to achieve certain freight traffic levels, but because FEGUA had improperly retained more than \$2 million [nearly Q.16,000,000] in income that it had received from its third party leases rather than complying with its contractual obligation to deposit such funds into the Trust Fund.¹¹²⁴

2. When Appropriate Adjustments are Made, FVG has Demonstrated a Steady Climb to Profitability, which was Achieved by 2004

492. The following is a table which demonstrates that, after the adjustments described above, FVG had achieved profitability by 2004.¹¹²⁵ In particular, the chart sets forth FVG's accounting profit/loss before taxes, which is then adjusted to add back depreciation, amortization and interest¹¹²⁶ and the contributions to the Trust Fund that FEGUA should have made.

¹¹²⁴ Ex. C-27(h), FVG 2005 Annual Report, at RDC001276.

¹¹²⁵ *See also* Third Statement of H. Posner III, Annex 1.

¹¹²⁶ Note that the point made above – that it is necessary to add back interest in order to eliminate the distortions which would be caused by different capital structures – is demonstrated graphically in this chart. In particular, in 2000–03, FVG had substantial interest expense until, in 2003, nearly all of FVG's debt to RDC was converted into equity and, thereafter, interest expense drops almost to zero. If interest were not added back for the early years, the comparison to the later years would be “apples” and “oranges.”

FVG EBITDA Plus Estimated FEGUA Trust Payments 2000-06

	2000	2001	2002	2003	2004
Operating Profit (Loss) Before Taxes	(Q14,270,361.00)	(Q14,425,279.00)	(Q13,723,461.00)	(Q10,451,830.00)	(Q7,135,746.00)
Add Back Depreciation Expense	Q5,028,557.00	Q2,827,539.00	Q3,061,071.00	Q3,099,626.00	Q3,069,503.00
Add Back Amortization Expense	Q0.00	Q2,536,588.00	Q2,506,882.00	Q2,492,028.00	Q2,492,028.00
Add Back Interest Expense	Q3,195,282.00	Q3,811,575.00	Q608,997.00	Q201,800.00	Q3,743.00
Add Estimated FEGUA Trust Payments**		Q1,795,682.20	Q2,480,813.40	Q2,746,400.80	Q2,675,790.00
Profit (Loss)	(Q6,046,522.00)	(Q3,453,894.80)	(Q5,065,697.60)	(Q1,911,975.20)	Q1,105,318.00

	2005	2006
Operating Profit (Loss) Before Taxes	(Q9,778,643.00)	(Q12,135,719.00)
Add Back Depreciation Expense	Q3,011,126.00	Q2,841,795.00
Add Back Amortization Expense	Q0.00	Q0.00
Add Back Interest Expense	Q112,430.00	Q202,347.00
Add Estimated FEGUA Trust Payments	Q3,356,681.90	Q2,963,993.50
Profit (Loss)	(Q3,298,405.10)	(Q6,127,583.50)

493. Thus, FVG went from a cash flow deficit of over Q.6 million in 2000 to a positive cash flow of more than Q.1.1 million in 2004 and was poised to increase its positive cash flow in the future until its business was derailed by the *Lesivo* Resolution. As a result, the fundamental premise of Dr. Spiller’s criticism of Claimant’s lost profits claim – that FVG was never profitable and, therefore, could not reasonably be expected to have been profitable in the future – is baseless.

3. It Is Not Necessary for FVG to Have Earned Profits, or Have Positive Cash Flow, Prior to Respondent’s Expropriatory Measure to be Awarded Lost Profits

494. Even if FVG had not shown profitability prior to the *Lesivo* Resolution, there is no requirement under international law that a claimant *must* show prior profitability in order to recover lost profits damages. For instance, the ILC Draft Articles specifically provide for the recovery of “any financially assessable damage, including loss of profits” and only limit that expansive head of damage with the words “insofar as it is established.”¹¹²⁷ Furthermore, in one of his first mentions of the subject, Professor Crawford notes:

In many cases the damage that may follow from a breach . . . may be *distant, contingent or uncertain*. Nonetheless States may enter into immediate and unconditional commitments in their mutual long-term interests in such fields. Accordingly, Article 31 defines “injury”: in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.¹¹²⁸

495. Ultimately, Professor Crawford posits the test as being whether “an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.”¹¹²⁹ In this connection, Professor Crawford considers them more appropriate when, as here, there has been a contractual relationship between the investor and the country in question.¹¹³⁰ Another portion of his discussion of Article 36(2) is even more precise:

¹¹²⁷ RL-29, ILC Draft Articles, art. 36(2).

¹¹²⁸ CL-165, Crawford, “*Commentaries*” 203 (¶ 8) (emphasis added).

¹¹²⁹ *Id.* at 228 (¶ 27).

¹¹³⁰ *Id.* at 230, n.608.

As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behavior of the parties and, more generally, a concern to reach an equitable and acceptable outcome.¹¹³¹

496. Under this formulation, where, as here, Claimant has incurred substantial immediate costs in return for the opportunity to earn future profits over a long term, and has performed its obligations honorably under difficult circumstances and, in contrast, Respondent has violated its CAFTA obligation to deal fairly and equitably and has ultimately expropriated Claimant's investment in bad faith and for reasons not in any way related to the public good or interest, every latitude should be accorded to Claimant in proving its damages.

497. From the earliest jurisprudence, international tribunals have held that it is not necessary for an investor, whose property has been illegally expropriated, to show that he had profits or positive cash flow before the expropriation in order to be awarded lost profits; indeed, it is not even necessary that the business be a going concern at the time of the expropriation. In *Delagoa Bay and E. Africa Ry. Co.*, the claimant had been granted a railroad concession for 35 years to construct a railroad from what is now Angola to the Transvaal in what is now South Africa.¹¹³² While the railroad was under construction, the Portuguese government increased the required length of the railroad and decreased the time for completion, as compared to the terms of the concession.¹¹³³ As a result, the enterprise could not perform and the Government terminated the concession for non-performance.¹¹³⁴ The claimant contended that the Government's action constituted an unlawful expropriation.¹¹³⁵

498. The award and reasoning of the tribunal are important for the instant case. First, the tribunal decided that

¹¹³¹ *Id.* at 220 (¶ 7).

¹¹³² CL-141, *Delagoa Bay and E. Africa Ry. Co.* (U.S. & Gr. Brit.-Port. 1900), reported in M. Whiteman, 3 *Damages in International Law* 1694-1703 (U.S. Dept. of State 1934).

¹¹³³ *Id.* at 1694-95.

¹¹³⁴ *Id.* at 1695.

¹¹³⁵ *Id.*

[w]hether one would, indeed, brand the action of the Government as an arbitrary and despoiling measure or as a sovereign act prompted by reasons of State which always prevails over any railway concession, or even if the present case should be regarded as one of legal expropriation, the fact remains that the effect was to dispossess private persons from their rights and privileges of a private nature conferred upon them by the concession, and that in the absence of legal provisions to the contrary – none of which has been alleged to exist in this case – the State, which is the author of such dispossession, is bound to make *full reparation* for the injuries done by it.¹¹³⁶

As a result, the tribunal held that

there is only one principle of law which can be applied to determine the “compensation” to be allowed by the Tribunal; that principle can only be that of damages [*dommages et intérêt*], that of the *id quod interest*, including according to universally accepted rules of law, the *damnum emergens* and the *lucrum cessans*; the damages that has been sustained and the profit that has been missed.¹¹³⁷

499. When the tribunal turned to the calculation of lost profits, Portugal objected on the ground that the expert’s computation included projected increases in railway traffic and income of 10% per year over the life of the concession, because such a computation did not take into account the hazards of the enterprise in a new country and because such a rate of progression was already disproved by facts, virtually the same objections made by Dr. Spiller here.¹¹³⁸ The tribunal, however, decided that it could not “dispense from taking into account in the appraisal of the railway in dispute the prospects of a gradual increase in its income,” particularly because it enjoyed a monopoly in a country susceptible of great development.¹¹³⁹ And, the tribunal explained that, even after considering all the risks involved, the fact that the railroad had operated at a loss for three years, and “the fact that such a computation made in advance on the basis of purely theoretical data cannot hope to be absolutely accurate but only comparatively likely,” the tribunal still determined that the period for computing lost profits was the entire length of the concession, that the computation should include escalation for revenues

¹¹³⁶ *Id.* at 1698 (emphasis added).

¹¹³⁷ *Id.* at 1697. Note that the tribunal awarded both lost investment and lost profits. It did, however, apparently amortize against the lost profits an investment that Portugal would have been required to make. *Id.* at 1702 (“deducting therefrom the amount necessary for amortization”).

¹¹³⁸ *Id.* at 1700.

¹¹³⁹ *Id.* at 1699.

and profits and that the DCF method should be used to make the computation.¹¹⁴⁰ Thus, even though the railroad had not been completed, and not a cent of revenue had been realized at the time the concession was terminated; even though the actual results (after the government had completed the railroad) showed operational losses for several years; even though the expert posited increases in revenues and profits of 10% per year; and even though the relevant period for the projection was 35 years, the tribunal had no difficulty in coming to the conclusion that claimant's damages had been appropriately proved.

500. Similarly, in *Sapphire International v. NIOC*, the contractual relationship between the investor and Iran was at an early stage (even the sum invested to date was small - \$650,875), no well had been drilled and the claimant had no data whatsoever on past performance in the concession in question, the arbitrator reviewed international investment arbitration jurisprudence, as well as judicial practice in the United States, Great Britain and France, and concluded that an award of lost profits was appropriate because “the plaintiff has satisfied *the legal requirement of proof by showing a sufficient probability of the success* of the prospecting undertaken, if they had been able to carry it through to a finish.”¹¹⁴¹

501. The problem in *Sapphire*, however, was that there were no data on past performance to assist in calculating such profits. Nonetheless, the arbitrator concluded that when the exact damage could not be known “particularly as a result of the behaviour of [respondent],” it is the arbitrator's responsibility to use its discretion to determine compensation by considering all of the circumstances.¹¹⁴² As a result, the Tribunal reasoned:

Another factor to be considered is that NIOC, who certainly have an extensive documentation available and possess great experience, would not have made a concession of an area where they did not think that there was a serious chance of discovering oil. It is reasonable to suppose that they would not have required a

¹¹⁴⁰ *Id.* at 1699-1701.

¹¹⁴¹ CL-155, *Sapphire Award* at 187-9 (emphasis added).

¹¹⁴² *Id.* at 188-89. While the arbitrator used the term ‘*ex aequo et bono*,’ Professors Ripinsky and Williams observe that it was not used in the sense of Article 38(2) of the ICJ Statute (deciding a case on the principles of fairness, rather than under the rules of positive law). “Here, the arbitrator did not depart from the rules of positive law but simply exercised its discretion within the boundaries afforded by those rules to fix the amount of lost profit.” CL-179(i), Sergey Ripinsky with Kevin Williams, “Case Summary Prepared in the Course of Research for *Damages in International Investment Law*,” at p.9.

minimum investment of \$U.S. 8 million from a company if they did not think that these investments had a serious possibility of being turned to a profit, of which they and the Iranian Government would take the largest share.”¹¹⁴³

502. As a result, in addition to an award of \$650,875 in investment or sunk costs, the arbitrator awarded \$2 million for the loss of the chance to earn future profits.¹¹⁴⁴ Here, similar reasoning applies: Respondent was highly knowledgeable concerning the economic prospects for the railroad operation and, of course, it had the advantage of historical operational knowledge. And, it is unreasonable to suppose that Respondent would have required RDC to invest at least \$10 million if it did not think that such investment had a serious possibility of generating profits, of which it would gain a part through canon fees on gross revenues. Indeed, one of Respondent’s complaints in this arbitration is that its expectations with regard to canon fees were not realized.¹¹⁴⁵ So, it certainly cannot be heard to say that the revenues which would generate those substantial canon fees (and, simultaneously, produce EBITDA cash flow for FVG) were not reasonably expected and probable.

503. Similarly, in *Societe Ouest Africaine des Bretons Industriels (SOABI) v. Senegal*, the contract was breached by Senegal before its term had begun (indeed, Senegal terminated the contract for alleged non-performance by the investor).¹¹⁴⁶ The Tribunal, however, had no difficulty in concluding that an award should be made in respect of this lost opportunity to earn profits:

In most cases, and particularly in a case such as this one which involves a construction project spanning ten years, it is impossible to calculate the profits that would have been made had the parties’ relations not been terminated. What gives rise to the claim in damages is not the loss of profits itself, but rather the loss of opportunity, the value of which is set in the discretion of the judge or arbitrator, as the case may be.¹¹⁴⁷

¹¹⁴³ *Id.* at 189.

¹¹⁴⁴ *Id.* at 187, 190.

¹¹⁴⁵ Counter-Memorial on Merits ¶ 179.

¹¹⁴⁶ *Societe Ouest Africaine des Bretons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB/02/6, Award of 25 Feb. 1988, 2 ICSID Reports 164 (“*SOABI Award*”), ¶ 5.77 *et seq.* (1994) *as cited in* CL-175, Marboe, *Calculation of Compensation and Damages* ¶ 3.222.

¹¹⁴⁷ *Id.*

504. As a result, the Tribunal awarded damages consisting of the entire investment already made (thus, a prior history of profitability was not necessary for the investor to recover his sunk costs either), plus 2.7% of the *amount claimed* as lost profits, plus compensatory interest at the rate of 10%.¹¹⁴⁸

505. The relative unimportance of a demonstrated prior history of lost profits or cash flow is also reflected in the cases of *Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and Pt. PLN (Persero)* and *Himpurna California Energy Ltd v. Pt. PLN (Persero)*, both of which involved contracts to develop geothermal electricity projects in West Java, Indonesia.¹¹⁴⁹ As a result of the Asian financial crisis in 1997-98, the Government issued decrees which prevented the governmental entity contracting parties from performing the contracts.¹¹⁵⁰ Each claimant brought an arbitration before different tribunals. Even though neither claimant had any history of actual operations, each tribunal awarded both the amount of the relevant investment or sunk costs – *damnum emergens*¹¹⁵¹ – and lost profits – *lucrum cessans*.¹¹⁵²

506. The respective tribunal’s methodology for computing lost profits in the absence of operating history is instructive. In *Karaha Bodas*, the tribunal discussed the various risks that could have affected the amount of profits that the claimant might have attained and noted “[t]he too many variables involved in such an evaluation process.”¹¹⁵³ The tribunal, however, concluded that it had the “inherent power to assess the quantum of damages on the basis of

¹¹⁴⁸ SOABI Award, ¶¶ 6.27, 9.26, 12.06, as cited in CL-175, Marboe, *Calculation of Compensation and Damages* ¶ 3.223.

¹¹⁴⁹ CL-147, *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and Pt. PLN (Persero)*, Award (18 Dec. 2000) (“*Karaha Bodas Award*”), ¶ 1; CL-146 *Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listrik Negara*, 25 Y.B. Comm. Arb. 13 (4 May 1999) (“*Himpurna Award*”), ¶ 1.

¹¹⁵⁰ CL-147 *Karaha Bodas Award*, ¶ 6; CL-146, *Himpurna Award*, ¶ 2, 24.

¹¹⁵¹ CL-147, *Karaha Bodas Award*, ¶ 108; CL-146, *Himpurna Award*, ¶ 289. It is important that, in both cases, the respondents challenged the amount of the investment on the ground that the costs had been wasteful or unreasonable, and both tribunals rejected such a challenge, ruling that, so long as there was evidence that the expenses were incurred by the investor in pursuit of the relevant investment, the tribunal would not question their reasonableness. CL-147, *Karaha Bodas Award*, ¶ 100; CL-146, *Himpurna Award*, ¶ 258.

¹¹⁵² The *Karaha Bodas* tribunal applied Indonesian law and did not mention international law while the *Himpurna* tribunal applied governing Indonesian law and international law. CL-147, *Karaha Bodas Award*, ¶ 121; CL-146, *Himpurna Award*, ¶¶ 34-43.

¹¹⁵³ CL-147, *Karaha Bodas Award*, ¶ 136

evidence submitted by both parties” and selected the round number of \$150 million as the amount of lost profits (approximately 30% of the amount claimed).¹¹⁵⁴

507. In *Himpurna*, the tribunal employed a similar “estimation” methodology. First, it reduced the claim for lost profits by the percentage that it found the claimant’s estimate of proven reserves to be overstated.¹¹⁵⁵ Second, while noting that “damages for the loss of a bargain may in principle be granted even when the victim of a breach has not yet incurred significant costs,”¹¹⁵⁶ the tribunal computed lost profits as the ratio between the investment which the claimant had actually made as compared to its projected investment over the life of the project, times the lost profits claimed.¹¹⁵⁷

508. The foregoing authorities demonstrate that there is ample precedent for an award of lost cash flow/profits even in the absence of an established record of profitability prior to the State’s illegal acts.

¹¹⁵⁴ *Id.*

¹¹⁵⁵ CL-146, *Himpurna* Award, ¶¶ 315.

¹¹⁵⁶ *Id.* ¶ 317.

¹¹⁵⁷ *Id.* ¶ 347. Professor Louis T. Wells, who concedes that he has been a “frequent consultant to the Indonesian government” for thirty years, has criticized the result in the *Karaha Bodas* and *Himpurna* cases as “double counting.” See RL-165, L. Wells, *Double Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia*, 19(4) *Arb. Int’l* 471 (2003). Other commentators, however, have defended the decisions on the ground that the tribunals in those cases applied contract, rather than compensatory expropriation damage principles. See, CL-171, M. Kantor, *Compensation for Non-compliance on PPAs and Similar Long-term Contracts*, 1 *Transnat’l Dispute Mgmt.* 1 (2004). That distinction is relevant here because, as we have seen, Respondent’s wrongful expropriation entitles Claimant to reparation, in which damages are based upon contract principles. Even more important, however, even a cursory examination of the awards in these cases demonstrates that there was no double counting. In both cases, the methodology of the arbitrators included an amortization of investment or sunk costs, and a deduction for future costs, associated with the production of those profits. In *Karaha Bodas*, the claim was for the project’s projected cash flows over the 30-year life of the energy sales contract, discounted at 8.5%, minus its prior investments as evidenced by the report of its expert. CL-147, *Karaha Bodas* Award, ¶ 109. As discussed below, this is precisely the methodology employed by Mr. Thompson in this case. In *Himpurna*, as noted above, the tribunal expressly noted that a claimant may seek lost profits only with the proviso that its computations reduce future net cash flows by allowing a proper measure of amortization. CL-146, *Himpurna* Award, ¶ 242. As a result, there was no double counting there either.

4. An Award of Lost Profits is Also Warranted Here Based Upon Claimant's Proven Track Record of Successfully Achieving Its Business Plans in Similar Investments Under Similar Circumstances

509. It has also been recognized that an award of lost profits can be supported in the absence of a record of profitability for the subject concession where the Claimant has demonstrated a level of expertise in the concession's line of business and a proven record of profitability operating similar concessions elsewhere under similar circumstances.¹¹⁵⁸ Such expertise and record of success exists here for RDC.

510. RDC is a railway investment and management company which focuses primarily on railways plus other complementary businesses in developing countries. In addition to Guatemala, RDC has invested in and operated railways outside the U.S. in Argentina, Peru, Malawi, Mozambique and Estonia. In each of these ventures, RDC has successfully executed its business plan and achieved profitability.

511. In Argentina, a RDC-led consortium began operation of the ALL-Central and ALL-Mesopotámica in 1993 pursuant to a 30-year concession awarded by the Argentine Government.¹¹⁵⁹ ALL-Central is a 5,690 km/3,535 mile broad gauge railway which extends westward from the city of Buenos Aires to the western provinces of Mendoza and San Juan, close to the border with Chile.¹¹⁶⁰ ALL-Mesopotámica is a 2,704 km/1,680 mile standard gauge railway which extends north from Buenos Aires to the northeastern cities of Posadas and Corrientes.¹¹⁶¹

512. At the time of privatization, both ALL railroads were grossly overstaffed and barely functioning.¹¹⁶² Traffic was limited to low-value, bulk commodities such as stone and oil that could withstand unreliable transit times.¹¹⁶³ For both railways, the restoration cost was in

¹¹⁵⁸ RL-135, *Vivendi II* Award, ¶ 8.3.4.

¹¹⁵⁹ Third Statement of H. Posner III ¶ 26.

¹¹⁶⁰ *Id.*

¹¹⁶¹ *Id.*

¹¹⁶² *Id.* ¶ 27.

¹¹⁶³ *Id.*

the tens of millions of dollars.¹¹⁶⁴ RDC's business plan for both ALL railways was based on traffic growth and diversification – for example, winning back markets such as wine and containers that had been lost due to poor service.¹¹⁶⁵ By focusing on other markets and rationalizing the operation around them, profitability was achieved and both railways were simultaneously integrated into the Brazilian company ALL, ultimately resulting in the successful IPO of ALL on the Brazilian stock exchange.¹¹⁶⁶

513. In Peru, the Government of Peru awarded the privatization of Ferrocarril del Centro (FCCA) to a consortium led by RDC for 30 years in July 1999.¹¹⁶⁷ The FCCA is 535 km/332 miles long and links the Pacific port of Callao and the capital city of Lima with Huancayo and Cerro de Pasco.¹¹⁶⁸ The physical condition of the railway at the time of RDC's takeover could be best described as a combination of deferred maintenance and poorly executed investment, as opposed to any single major problem.¹¹⁶⁹ The investment in FCCA was roughly equivalent to Guatemala.¹¹⁷⁰ RDC's business plan was achieved more or less as planned.¹¹⁷¹ RDC's success in Peru can be partially attributed to Peru's stability and pro-business climate, as compared to Guatemala, but it is mostly attributable to the quality of FCCA's management and business plan.¹¹⁷² Because of the strength of the company's performance and the underlying faith in both its traffic potential and management team, FCCA has not only been able to meet, but to exceed, its mandate.¹¹⁷³

514. Through the East African Railways Consortium, RDC operated Malawi Railways and the CDN railroad through the Nacala Corridor between Malawi and Mozambique from

¹¹⁶⁴ *Id.* ¶ 28.

¹¹⁶⁵ Third Statement of H. Posner III ¶ 29.

¹¹⁶⁶ *Id.*

¹¹⁶⁷ *Id.* ¶ 30.

¹¹⁶⁸ *Id.*

¹¹⁶⁹ *Id.* ¶ 31.

¹¹⁷⁰ *Id.*

¹¹⁷¹ Third Statement of H. Posner III ¶ 32.

¹¹⁷² *Id.*

¹¹⁷³ *Id.* For example, it has instituted for-profit passenger service for the tourist market and engaged in modest research and development programs such as the use of natural gas as a locomotive fuel. *Id.*

1999-2008 pursuant to a 15-year concession.¹¹⁷⁴ Upon privatization of the railroads, RDC encountered extremely low traffic volumes and very inefficient operations,¹¹⁷⁵ a result of a combination of deferred maintenance and poor investment choices during railroads' times as state entities.¹¹⁷⁶ Combined investment in the Nacala Corridor, which also included the Port of Nacala, totaled roughly \$30 million.¹¹⁷⁷ Realizing this business plan proved particularly challenging in this instance because of the difficulty in achieving financing for almost five years longer than the business plan originally contemplated.¹¹⁷⁸ However, through the diligence of the management team in maintaining operations despite being under-capitalized, the result was ultimately successful.¹¹⁷⁹ RDC eventually sold its interest in the companies to a local investor group *at a profit*.¹¹⁸⁰

515. RDC also achieved profitable success as part of a private consortium which took over the operation of Estonia's State-owned national railway, Eesti Raudtee (EVR), a 691 km/431 mile broad gauge railway, in 2001.¹¹⁸¹ This was the first privatization of a vertically integrated railway in Europe, as well as the first privatization of a former Soviet railway.¹¹⁸² The investment in EVR included purchase price of the shares of Estonian Railways from the government and purchase of used locomotives from North America which, due to their low purchase price and efficiency, had the effect of radically changing the nature of the railway's economics.¹¹⁸³ A combination of equity and third-party commercial financing resulted in an investment that exceeded US\$100 million.¹¹⁸⁴ Efficiency and sophisticated marketing resulted in the achievement of the business plan, despite a combination of increased competition from other

¹¹⁷⁴ Third Statement of H. Posner III ¶ 33.

¹¹⁷⁵ *Id.* ¶ 34.

¹¹⁷⁶ *Id.*

¹¹⁷⁷ *Id.* ¶ 35.

¹¹⁷⁸ *Id.* ¶ 36.

¹¹⁷⁹ *Id.*

¹¹⁸⁰ Third Statement of H. Posner III ¶ 36.

¹¹⁸¹ *Id.* ¶ 37.

¹¹⁸² *Id.*

¹¹⁸³ *Id.* ¶ 39.

¹¹⁸⁴ *Id.*

ports and rampant local corruption.¹¹⁸⁵ Renationalization of this privatization resulted in significant profits for RDC and the other shareholders.¹¹⁸⁶

516. This uninterrupted track record of success and achieving profitability in other similar long-term railway investments throughout the world, when combined with RDC's expertise in operating railways in countries similar to Guatemala, such as Argentina and Peru, makes it quite likely that, had it not been for the *Lesivo* Resolution, Claimant would have achieved long-term profitability operating the Usufruct in Guatemala.

5. Claimant's Projected Real Estate Valuations Are Not Speculative

517. Dr. Spiller's contention that the projected real estate valuations of Mr. MacSwain are "speculative and unsubstantiated" is without merit.¹¹⁸⁷ To the contrary, it is Dr. Spiller's assumption that, in the absence of the *Lesivo* Resolution, FVG would not have leased *any additional* real estate over the remaining 42-year term of the Usufruct, which is wholly unreasonable and should be rejected.

518. In Mr. MacSwain's original expert report, he opined that it is reasonable to expect that, but for the *Lesivo* Resolution, FVG would have continued to earn income through the remaining 42-year term of the Usufruct from its four existing long-term utility easement agreements (Planos y Puntos/Gesur, Texaco Guatemala, Zeta Gas and Genor) and its Puerto Barrios lease with COBIGUA.¹¹⁸⁸ In his report, Dr. Spiller agrees with Mr. MacSwain's analysis of and income projections for these five agreements.¹¹⁸⁹ Accordingly, there is no dispute that, in the absence of the *Lesivo* Resolution, FVG would have continued to earn income from these easements and leases.¹¹⁹⁰

¹¹⁸⁵ *Id.* ¶ 40.

¹¹⁸⁶ Third Statement of H. Posner III ¶ 40.

¹¹⁸⁷ Expert Report of P. Spiller ¶ 55.

¹¹⁸⁸ First Expert Report of R. MacSwain § 5.0.

¹¹⁸⁹ Expert Report of P. Spiller ¶ 118.

¹¹⁹⁰ One adjustment Mr. MacSwain made from his prior analysis of the COBIGUA lease was that the income from this was increased for 2007-14 by using a rate of escalation based on FVG's actual experience from 2002 to 2006 (11%). The rent under the COBIGUA lease is based directly on traffic in the port on which FVG received 2% of the gross revenues (and on which FEGUA received a like amount through 2014). The terms of the agreement

519. There should also be no dispute about the income from the short-term rentals which FVG has collected for many years and which, obviously, FVG could reasonably expect to collect in the future. The projected annual income from these rentals is \$125,000 per year.¹¹⁹¹

520. As a result, the following is the expected lease income, and its NPV, at the time of the *Lesivo* Resolution:¹¹⁹²

Easement/Lease	Annual Income	NPV
1. Planos y Puntos/Gesur	\$80,200	\$736,675
2. Texaco Guatemala	4,150	33,690
3. Zeta Gas	500	3,924
4. Genor	25,782	238,099
5. COBIGUA	382,684	8,775,988
6. Short-Term Rentals	125,000	963,061

Thus, at the time of *Lesivo*, FVG's pre-existing easements and leases had a NPV of \$10,751,437.

521. Finally, the Tribunal should also consider FVG's projected cash flow from its Tecún Umán trans-loading operation, which Dr. Spiller also accepts.¹¹⁹³ Tecún Umán's trans-loading operation showed steady and substantial increases from year to year until it was disrupted by Hurricane Stan. The railway segment that connects Mexico to Tecún Umán is now scheduled to resume operations in 2011 and the only reason that FVG is not going to receive this income is the *Lesivo* Resolution.

Operation	Annual Income	NPV
Tecún Umán	\$425,000	\$6,453,619 ¹¹⁹⁴

specify that, commencing in March, 2015, FVG will receive the entire 4% of COBIGUA's gross revenues. After 2014, the income is escalated at the rate used by Dr. Spiller (3.47%). Rebuttal Report of R. MacSwain ¶ 18.

¹¹⁹¹ Rebuttal Report of L. Thompson ¶ 12.

¹¹⁹² Thompson, Ex.1 (Real Estate Spreadsheet).

¹¹⁹³ See Ex. LECG-14.

¹¹⁹⁴ Thompson Ex. 1 (FVG Operations Spreadsheet).

522. Thus, when considering whether Claimant's estimates of future cash flow are reasonable and proved with sufficient certainty, the Tribunal should take into account the fact that, in seven years of leasing and operating activity, FVG entered into easements and leases and the trans-loading operation at Tecún Umán which produced, in accordance with their terms or operating histories, net future cash flow with a discounted present value of over \$17.2 million.¹¹⁹⁵ FVG's success in negotiating and executing these leases is strong proof of the reasonableness of Mr. MacSwain's projections of additional easements and leases which would have produced future cash flow with a discounted present value of over \$29.8 million.¹¹⁹⁶

523. Dr. Spiller, however, disagrees with Mr. MacSwain's opinion that, in addition to the four utility easements that FVG entered into prior to the *Lesivo* Resolution, it is reasonable to expect that FVG would have entered into additional easement agreements for telecommunications and electric transmission covering both the main lines (North and South Coast) and rural spur lines.¹¹⁹⁷ Dr. Spiller also criticizes Mr. MacSwain's assumption that these easement contracts would have been priced at \$3,200 per kilometer for the main lines.¹¹⁹⁸ Dr. Spiller further objects to Mr. MacSwain's projection that FVG would have entered into additional commercial property leases in the absence of the *Lesivo* Resolution.¹¹⁹⁹ In Dr. Spiller's opinion, there is not sufficient evidence to support any of these assumptions. He is wrong.

¹¹⁹⁵ Despite the fact that Claimant is not including in its damage calculations the lease payments which FEGUA was obligated to, but did not, pay into the Trust Fund, Claimant would submit that those payments should be taken into account by the Tribunal in considering whether Mr. MacSwain's projections of future leasing income are reasonable. Indeed, failure to consider them in this fashion would allow Respondent to profit from its own wrongdoing. Those projected lease revenues had a NPV of \$3,947,337 as of the date of *Lesivo*.

¹¹⁹⁶ The total NPV of lost future cash flow from real estate is \$40,572,153, to which is added the NPV of lost future cash flow from railroad operations is \$29,133,121. As a result of operating expenses and Claimant's investment claim (\$42,943,553) being amortized over the remaining 42 years of the Usufruct, the resulting NPV of the lost future cash flow claim is \$22,188,540. See Thompson Ex. 1.

¹¹⁹⁷ Expert Report of P. Spiller ¶¶ 120-24, 126-27.

¹¹⁹⁸ *Id.* ¶ 125.

¹¹⁹⁹ *Id.* ¶¶ 128-33.

(a) Mr. MacSwain's Utility Easement Projections are Substantiated and Reasonable

524. Dr. Spiller's claim that there is not sufficient evidence to support Mr. MacSwain's additional utility easement projections ignores a key fact which was highlighted in Mr. MacSwain's original report: prior to the *Lesivo* Resolution, 555.67 kilometers of the right-of-way was already being used for utility transmission. This includes not only FVG's four existing utility easement contracts covering a total of 72.82 km, but also the six pre-*lesivo* industrial squatters which covered an additional 482.85 km of the right-of-way.¹²⁰⁰ This large scale presence of industrial squatters demonstrates that there was, prior to the *Lesivo* Resolution, strong existing demand by utilities to use the right-of-way for transmission purposes. This demand is further demonstrated by the fact that, as of today, there is an overwhelming industrial squatter presence on the *entire* main right-of-way (both main and rural spur lines) consisting of utility poles and transmission lines installed by power companies, as shown on Annex 1 to Mr. MacSwain's statement and illustrated by photographs that were taken by FVG in February and March 2011.¹²⁰¹ Accordingly, based upon this overwhelming evidence of past and current demand, it is quite reasonable for Mr. MacSwain to assume that, had the Government not issued the *Lesivo* Resolution, FVG would have taken steps either to legalize these industrial squatters by entering into long-term easement agreements with them or FEGUA would have complied with its obligation to evict them¹²⁰² and FVG would have had the opportunity to enter into formal agreements with other utilities to take their place. In contrast, Dr. Spiller's assumption that FVG would have tolerated and never monetized the large-scale presence of industrial squatters on the right-of-way for 42 years is inherently *unreasonable*.

525. Dr. Spiller's rejection of Mr. MacSwain's \$3,200 per kilometer valuation for his projected utility easements is also unfounded. This value was derived from the virtually

¹²⁰⁰ See First Expert Report of R. MacSwain § 6.0.

¹²⁰¹ See Rebuttal Report of R. MacSwain, Annex 1 (map of entire right-of-way showing current locations of all observed industrial squatters); Third Statement of J. Senn, Annex 3 (February-March 2011 photographs of industrial squatters on right-of-way).

¹²⁰² Respondent cannot make the argument that the squatters would have remained and thereby prevent FVG from leasing the right-of-way because that position depends upon FEGUA not complying with its obligation to remove them. Post-*Lesivo*, FEGUA's failure to remove squatters is remediable under CAFTA. See Second Decision on Jurisdiction ¶ 155.

completed agreement FVG negotiated with power line supplier Gesur in 2006 to add 32 km to its existing easement contract. That addition would have averaged over \$3,200 per km over the term of the agreement.¹²⁰³ The agreement was not consummated only because of the *Lesivo* Resolution.¹²⁰⁴ According to Mr. MacSwain, based on his over 25 years of experience in the railroad real estate business (of which Dr. Spiller has none), it is common and accepted practice that the last agreed upon price for use of a right-of-way “sets the bar” for future valuations.¹²⁰⁵ Thus, it is more than reasonable and proper to use the \$3,200 per km valuation that FVG had negotiated with Gesur on the eve of the *Lesivo* Resolution as the basis for valuing future easement agreements it would have entered into for the main lines of the railway.¹²⁰⁶

526. In addition to the \$3,200/\$1,200 per km pricing, the other key financial terms of Mr. MacSwain’s projected utility easements are also reasonable. Mr. MacSwain has assumed that the two projected utility easement contracts would have been for an initial 20-year term with 5% inflation increases every five (5) years and three (3) five (5)-year renewal options.¹²⁰⁷ These terms are based not only on the actual terms of the easement agreements FVG entered into prior to the *Lesivo* Resolution, but also on his own experience in personally negotiating and executing on behalf of *eight different railroads* several long-term rights-of-way easement agreements with AT&T, Sprint, BellSouth, MCI and other utilities.¹²⁰⁸ None of these agreements Mr. MacSwain negotiated were for less than 20 years with 3 to 5-year renewal options and a minimum of 5% inflation increases for each option period, or for a price of less than \$5,000 per mile per annum.¹²⁰⁹

527. Mr. MacSwain, however, has made some adjustments to his original easement valuation analysis to address some of Dr. Spiller’s criticisms and also to factor in more accurate

¹²⁰³ Rebuttal Report of R. MacSwain ¶ 7.

¹²⁰⁴ See First Statement of Planos y Puntos/Gesur at 4-5.

¹²⁰⁵ Rebuttal Report of R. MacSwain ¶ 7.

¹²⁰⁶ For the rural spur lines, where utility transmission demand would be lower, Mr. MacSwain uses a valuation of \$1,200 per km, or approximately one third of the main line valuation. First Expert Report of R. MacSwain ¶ 7.1.5; Rebuttal Report of R. MacSwain ¶ 7. Dr. Spiller does not criticize this valuation in his report.

¹²⁰⁷ Rebuttal Report of R. MacSwain ¶ 8.

¹²⁰⁸ Rebuttal Report of R. MacSwain ¶ 8.

¹²⁰⁹ *Id.*

information which came to his attention after he submitted his original report. First, in Mr. MacSwain's initial report, his right-of-way easement valuations were based upon the main right-of-way totaling 495 km and the rural spur lines totaling 185.40 km. However, the correct total distance of the main right-of-way is 644.04 km and the rural spur lines is 157.72 km.¹²¹⁰ Mr. MacSwain's revised valuation is now based on the correct distances. Second, in response to Dr. Spiller's criticism that his original analysis unrealistically assumes that the entire rail network would have been covered by easement agreements in 2007, in Mr. MacSwain's revised analysis he is now assuming that, for the main line easements, there would have been a ramp up period from 2007-2012, with 10% occupancy in 2007, 20% occupancy in 2008, 40% occupancy in 2009, 50% occupancy in 2010 and 60% occupancy in 2011, achieving full occupancy in 2012 with a 20% vacancy applied.¹²¹¹ This is a more conservative and very realistic assumption given the fact that, as of 2006, 555.67 km of the main lines were already occupied for electric and gas transmission.¹²¹² Finally, for the rural spur lines, Mr. MacSwain now assumes more conservatively that utility easements on those lines would not have begun until 2011 rather than 2007, and that there would have been a ramp-up period beginning in 2011 with 10% occupancy in 2011, 20% occupancy in 2012, 40% occupancy in 2013, 50% occupancy in 2014, and 60% occupancy in 2015, with full occupancy in 2016 with 25% vacancy.¹²¹³

(b) Mr. MacSwain's Valuation of Commercial Station and Station Yard Leases is Substantiated and Reasonable

528. Dr. Spiller also dismisses as speculation all of Mr. MacSwain's projected valuations for commercial leases for station and station yards that FVG would have entered into absent the *Lesivo* Declaration.¹²¹⁴ Thus, Dr. Spiller is of the opinion that, even in the absence of the *Lesivo* Resolution, FVG would not have been successful in leasing *any* of the stations and station yard parcels over the remaining 42-year term of the usufruct.

¹²¹⁰ *Id.* ¶ 9.

¹²¹¹ *Id.* ¶ 10.

¹²¹² *Id.*

¹²¹³ *Id.* ¶ 11.

¹²¹⁴ Expert Report of P. Spiller ¶¶ 128-33.

529. As Mr. MacSwain explains in his rebuttal report, Dr. Spiller’s opinion is, charitably, difficult to comprehend.¹²¹⁵ Although the station and station yard properties granted in usufruct to FVG are located in the center core of Guatemala’s most populated cities, towns and communities, Dr. Spiller’s analysis gives no credence to *any* commercial leasing activity taking place on these prime location properties at any price over a 42-year period. In other words, according to Dr. Spiller, even prior to the *Lesivo* Resolution, the properties granted in usufruct to FVG were *worthless*; he entirely negates the real estate component of the Usufruct. As Mr. MacSwain, with his vast experience in precisely the business on which he opines here, says, “I do not view such a position to be even remotely reasonable.”¹²¹⁶

530. Further underscoring the unreasonableness of Dr. Spiller’s opinion is the fact that he dismisses undisputed evidence of at least two commercial lease projects that FVG would have entered into but for the *Lesivo* Resolution – (1) a project to establish Grupo Unisuper supermarkets at the railway stations, starting with Zacapa; and (2) the leasing of the Gerona station yard parcel as a parking lot.¹²¹⁷ Dr. Spiller asserts that this evidence is not sufficient by itself because Claimant has not presented documentation showing “any terms of the potential contract[s].”¹²¹⁸ Dr. Spiller’s evidentiary burden is patently unreasonable and unsupportable, as it would deny a claimant recovery of any projected future cash flows unless the claimant can provide documentation showing the specific economic terms of every deal or opportunity that has been foreclosed as a result of the respondent State’s illegal acts. This is precisely the evidence that Respondent’s Declaration of *Lesivo* has foreclosed and, as previously discussed, Claimant cannot be expected to produce evidence that Respondent’s actions have prevented. Based on his expertise in railroad real estate leasing, Mr. MacSwain has provided reasonable and conservative estimates of what the terms of the commercial leases would have been for Zacapa Station and the Gerona Parking Lot.¹²¹⁹ That proof, based on detailed analysis by a highly

¹²¹⁵ Rebuttal Report of R. MacSwain ¶ 13.

¹²¹⁶ *Id.*

¹²¹⁷ *See* Expert Report of P. Spiller ¶¶ 131-32.

¹²¹⁸ *Id.*

¹²¹⁹ Rebuttal Report of R. MacSwain ¶¶ 16.1 (Gerona Parking Lot); 16.2(a) (Zacapa Retail and Industrial). Mr. MacSwain has also provided in his Rebuttal Report recent photographs of the Gerona Parking Lot and Zacapa

competent and experienced professional railroad real estate expert, is more than sufficient for Claimant to meet its evidentiary burden.

531. In order to make his projections even more conservative, however, Mr. MacSwain has made additional adjustments to his prior analysis, each of which had the effect of *lowering* most of his previously estimated real estate valuations. In particular, in his revised real estate analysis, Mr. MacSwain made the following changes:

- (i) He delayed the lease start dates for all properties for an additional five (5) years except for Zacapa Industrial and Gerona Parking Lot;
- (ii) He removed any projected improvements to the leased properties, so that all projected leases are now based upon unimproved land;
- (iii) He removed all inflationary increases in rents except for six (6) parcels (Zacapa Retail and Industrial, El Rancho, Gerona Station and Parking Lot and Escuintla); and
- (iv) For the parcels that have inflationary increases, he used a very conservative assumption of 10% every five years after the first ten years (2% per annum), except for the Gerona Parking Lot, which has a 10% inflation rent adjustment every five years starting in 2007.¹²²⁰

The results of Mr. MacSwain's revised valuation of commercial station and station yard leases are set forth in paragraphs 16.1-16.3 of his Rebuttal Report.¹²²¹ These valuations as well as his easement valuations have been inputted into Mr. Thompson's revised damages model, which is discussed immediately below.

6. Mr. Thompson's Revised Calculations of Lost Future Cash Flow are Conservative and Not Speculative

532. Just as in his original damages analysis, Mr. Thompson's revised damages analysis consists of two components: (1) lost future cash flow/profits, and (2) lost investment.

parcels which further demonstrate the obvious commercial demand and potential of these properties. *See id.*, Annexes 3 and 4.

¹²²⁰ Rebuttal Report of R. MacSwain ¶ 14.

¹²²¹ Respondent's argument that Claimant cannot recover damages for certain easements and real estate parcels because Claimant failed to rehabilitate and restore certain segments of the railway (Counter-Memorial on Merits ¶¶ 598-99) is thoroughly debunked in Section II.C, *supra*.

Mr. Thompson's lost profits calculation is a discounted cash flow (DCF) analysis comprised of Mr. MacSwain's revised real estate valuations, discussed above, and Mr. Thompson's revised railway operations valuation, which projects the results of railway revenues and costs over the remaining 42 years of the Usufruct.

533. Mr. Thompson's railway operations valuation is essentially unchanged from his previous analysis. The only change of note is that he has removed income taxes from his valuation because income taxes will ultimately have to be paid on the lost cash flow portion of the award in this case and, as a result, to impose taxes within the calculation would result in double taxation.¹²²²

534. With regard to his revised consolidated lost profits calculation, which adds together the results of the revised real estate and railway operations valuations, Mr. Thompson has made two notable adjustments from his previous calculation. First, instead of the 10% discount rate he utilized in his original lost profits analysis, Mr. Thompson has used the 12.9% weighted average cost of capital (WACC) rate calculated by Dr. Pratt,¹²²³ which is discussed in further detail below.¹²²⁴ Second, he has amortized the 2006 accumulated value of Claimant's lost investment claim over the remaining 42 years of the Usufruct.¹²²⁵ Consistent with the cases and authoritative literature previously discussed in Section IV.B.5, *supra*, Dr. Pratt confirms that such an amortization eliminates the possibility of double-counting from an accounting and economic point of view.¹²²⁶

535. Having made the foregoing modifications to his analysis and his model, Mr. Thompson calculates Claimant's lost profits/future cash flow to be **\$22,188,540**.¹²²⁷

¹²²² Rebuttal Report of L. Thompson ¶ 14.

¹²²³ Expert Report of S. Pratt, p. 8.

¹²²⁴ Rebuttal Report of L. Thompson ¶ 18.

¹²²⁵ *Id.* ¶ 15.

¹²²⁶ Expert Report of S. Pratt § IV.

¹²²⁷ Rebuttal Report of L. Thompson ¶ 18.

7. Dr. Spiller's Criticisms of Mr. Thompson's Damages Model Are Unfounded

536. Dr. Spiller criticizes Mr. Thompson's earlier damages analysis on three grounds: (1) the cost of capital Mr. Thompson used to calculate the NPV of future lost cash flows – 10% – under the DCF method is too low; (2) Mr. Thompson's traffic forecasts for the railway were too optimistic and (3) Mr. Thompson did not provide for enough investment to take potential capacity constraints into account.¹²²⁸ None of these criticisms is valid.

(a) Dr. Spiller's WACC is Inflated and Unreasonable

537. As to the first criticism, Mr. Thompson's revised damages analysis now relies upon the 12.9% WACC calculated by Dr. Pratt.¹²²⁹ Dr. Pratt has demonstrated that Dr. Spiller's proposed WACC of 18.7% is not supported by the standard and accepted bases for that calculation.¹²³⁰ In addition to a number of questionable minor differences which, more than anything else, demonstrate that Dr. Spiller consistently chooses narrow measures over more comprehensive ones (and which, unsurprisingly, equally consistently tend to increase the WACC), there are three principal differences which enable Dr. Spiller to arrive at his inflated and unreasonable 18.7% WACC.¹²³¹

538. First, Dr. Spiller absurdly assumes that RDC would have switched to borrowing in Guatemala at a hypothetical pretax borrowing cost of 18.67%, rather than continuing to borrow in the United States at a 7.08% rate as it had historically, thereby vastly increasing the cost of the debt portion of the WACC.¹²³² This baseless assumption increases Dr. Spiller's WACC by 1.8 percentage points.¹²³³

539. Second, Dr. Spiller incorrectly bases his size premium of Morningstar "category 10b" data. As Dr. Pratt points out, many knowledgeable practitioners do not use category 10b at

¹²²⁸ Expert Report of P. Spiller ¶¶ 69-70, 85-88.

¹²²⁹ Rebuttal Report of L. Thompson ¶ 20.

¹²³⁰ Expert Report of S. Pratt § III.

¹²³¹ *Id.* at p.9.

¹²³² *Id.* at p.11.

¹²³³ *Id.*

all because it contains an abundance of distressed companies.¹²³⁴ The effect is to increase the size premium from 6.27% to 9.68%.¹²³⁵ Had Dr. Spiller utilized the more commonly used category 10 size premium, it would have decreased his WACC by 2.66 percentage points.¹²³⁶

540. Third, without basis *and* contrary to the uncontradicted evidence, Dr. Spiller assumes that the WACC should be computed with a 50/50 weighting between railroad cost of capital and real estate cost of capital, whereas Dr. Pratt's calculation assumes, consistent with the actual facts as demonstrated by Mr. Thompson's model, an 8% contribution by the railroad and a 92% contribution by real estate.¹²³⁷ Dr. Spiller's unsupported weighting increases his WACC by 1.5 percentage points.¹²³⁸

541. Thus, Dr. Pratt concludes that, had Dr. Spiller used more reasonable and economically sound inputs in his WACC calculation, it would have resulted in a lower WACC by 6.4 percentage points, making it 12.3%, which is roughly the same as Dr. Pratt's WACC of 12.9%.¹²³⁹

(b) Mr. Thompson's Traffic and Growth Forecasts are Substantiated and Conservative

542. Dr. Spiller also criticizes Mr. Thompson's traffic forecasts for the railroad.¹²⁴⁰ However, the only significant difference between Dr. Spiller and Mr. Thompson's forecasts is in Mr. Thompson's projection of container traffic which uses a 15% growth rate between 2007 and 2017, as compared to Dr. Spiller's 7.5%.¹²⁴¹ But, as Mr. Thompson demonstrates, FVG's annual percentage growth in container tonnage from 2000 to 2005 was greater than 15% in every year

¹²³⁴ *Id.* at p.10.

¹²³⁵ *Id.*

¹²³⁶ *Id.*

¹²³⁷ Expert Report of S. Pratt, p.11.

¹²³⁸ *Id.*

¹²³⁹ *Id.*

¹²⁴⁰ Of course, when weighing the relative merit of Mr. Thompson's assumptions regarding railroad operations, as compared to Dr. Spiller's, the Tribunal should consider that, unlike Dr. Spiller, Mr. Thompson is a *railroad expert*, having been involved in analyzing railroads and railroad investments in developing countries for the World Bank for 17 years.

¹²⁴¹ Rebuttal Report of L. Thompson ¶ 23.

and actually averaged 40.5% over those five years.¹²⁴² Thus, it is Dr. Spiller's, not Mr. Thompson's, growth rate that is not supported by the record. In addition, Mr. Thompson demonstrates that total traffic through the Puerto Barrios port from 2000 through 2006 was increasing strongly, with the proportion of container traffic expanding.¹²⁴³ This further supports Mr. Thompson's projection of container traffic growth for the railroad. Furthermore, Mr. Thompson points out that, even with his higher growth rate for container traffic on the railroad, FVG's share of the container tonnage through the ports never exceeds 8.7% and FVG's share of non-container tonnage never exceeds 5.6%.¹²⁴⁴ Thus, Mr. Thompson's assumptions for railroad traffic growth are more reasonable than Dr. Spiller's.

543. Perhaps most importantly, Dr. Spiller's arguments about the railway section of Mr. Thompson's model do not affect the lost future cash flow claim significantly. Mr. Thompson has rerun his model using Dr. Spiller's assumptions about traffic and price growth, holding all other factors constant.¹²⁴⁵ Under those assumptions, Claimant's lost profits claim would be reduced by slightly more than \$930,000, or approximately 4.2%, from his calculated value of \$22,188,540.¹²⁴⁶

544. Dr. Spiller's third point – that Mr. Thompson does not forecast the need for sufficient investment to handle his growth forecasts – ignores the fact that Mr. Thompson achieves the same result through another, and simpler, assumption – he allows the expense for track and rolling stock to escalate much faster than other expenses in order to generate more funding for investment in increasing capacity. In particular, instead of a 2% rate of escalation that he uses for most expenses, Mr. Thompson assumes 6% increases for track repair and

¹²⁴² *Id.* ¶ 24.

¹²⁴³ *Id.* ¶¶ 25-6.

¹²⁴⁴ *Id.* ¶ 27. Indeed, Mr. Thompson only forecasts traffic for two product groups – containers and steel. Table 5 to his Rebuttal Report displays the results of two significant Guatemalan railway traffic analyses, one done for the Government and one done for FEGUA. They demonstrate that there were many commodities other than steel and containers that would have contributed to increased railway traffic (steel and containers made up only 41% of demand), none of which is included in Mr. Thompson's estimates. In addition, according to these studies, Mr. Thompson's projections of FVG railway volumes would, as late as 2048, constitute only *half* of the projected tonnage for the year 2000. Rebuttal Report of L. Thompson ¶¶ 30-1.

¹²⁴⁵ Rebuttal Report of L. Thompson ¶ 35.

¹²⁴⁶ *Id.*

materials, 5% for rolling stock repairs and 6% for rolling stock maintenance.¹²⁴⁷ The result of these assumptions over the remaining years of the Usufruct is a fund of \$13.7 million for rolling stock maintenance and repair, and a fund of \$33.3 million for track maintenance and repair, to finance the investment Dr. Spiller claims would be necessary.¹²⁴⁸ Thus, Mr. Thompson's model addresses this issue fully and completely.

D. Claimant's Revised Lost Investment Claim

545. In Claimant's original damages claim set forth in its Memorial on the Merits, its cumulative historical investment in FVG through 2006 was presented as totaling \$15,387,187.¹²⁴⁹ That investment amount was adjusted by Mr. Thompson to its 2006 value (*i.e.*, the value as of the date of expropriation/Respondent's breach) using a constant 10% interest rate, which yielded an adjusted value of \$26,840,908.¹²⁵⁰ Claimant has now revised this claim by including additional invested amounts that were previously overlooked and applying a more rigorously calculated interest rate.

546. In its original investment claim, Claimant inadvertently overlooked other indirect investment RDC made in or on behalf of FVG and on behalf of the Usufruct which should also be included as part of its lost investment claim. First, Claimant's original lost investment claim neglected to include certain pre-feasibility and due diligence expenses RDC incurred in 1998 in connection with the Usufruct. These investment expenses totaled \$545,629 and were never charged to FVG.¹²⁵¹ Claimant also neglected to include other indirect investment by RDC which consists of (1) RDC expenses for travel, consulting and legal services incurred on behalf of FVG and the Guatemala railway project (\$246,837.56); and (2) additional indirect investment consisting of allocated amounts of RDC personnel salaries attributable to FVG along with associated overhead costs (\$2,061,341.64).¹²⁵² Finally, Claimant's original lost investment claim

¹²⁴⁷ Rebuttal Report of L. Thompson ¶ 37.

¹²⁴⁸ Thompson Report ¶¶ 37-8.

¹²⁴⁹ Memorial on Merits ¶ 184.

¹²⁵⁰ *Id.* ¶¶ 187-88.

¹²⁵¹ Statement of J. Hensler ¶ 9; Statement of J. de León ¶ 8.

¹²⁵² Statement of J. Hensler ¶ 4; Ex. C-146, Railroad Development Corporation Analysis of CODEFE Investment and Expenses, 1998-2007.

failed to include \$735,192.33 in accrued interest from a series of loans RDC provided to FVG from 1999 through 2003.¹²⁵³ These loans were later converted into preferred and common equity by FVG, but the accrued interest never appeared as cash flow from financing activities on FVG’s books because accrued interest is a non-cash item.¹²⁵⁴

547. Regarding the RDC travel, consulting and legal expenses, those amounts were incurred by RDC and never charged to or reimbursed by FVG.¹²⁵⁵ With regard to the allocated RDC personnel salaries, these amounts were also paid entirely by RDC and were calculated by taking a reasonable estimate of the percentage of their time each of the five identified RDC employees devoted to FVG-related business and activities during the period from 1999-2007.¹²⁵⁶ For example, it was estimated that, from 1999-2007, RDC and FVG Chairman Henry Posner III spent an estimated 25% of his time on FVG business and RDC Vice President–Operations and FVG President, William J. Duggan, spent 75% of his time on FVG business.¹²⁵⁷ The percentage time estimate for each RDC employee was then multiplied by that employee’s salary for each year. To these allocated salaries a conservative overhead cost allocation was added consisting of 50% of the total allocated salary amounts for each year.¹²⁵⁸

548. Tribunals in other investment cases have awarded similar indirect investment expenses as part of the claimant’s recovery of its historical investment costs. In *MTD*, the tribunal included “salaries, travel [and] legal services” as eligible investment expenditures.¹²⁵⁹ In *Southern Pacific Properties*, the tribunal found it “reasonable and legitimate” to include salaries and properly documented costs incurred by the claimant’s executives and employees, including “overhead costs, travel and entertainment expenses, and costs incurred for recruiting and

¹²⁵³ Statement of J. Hensler ¶ 9; Statement of J. de León ¶ 8; Ex. C-146, Railroad Development Corporation Analysis of CODEFE Investment and Expenses, 1997-2007.

¹²⁵⁴ Statement of J. Hensler ¶ 9; Statement of J. de León ¶ 8.

¹²⁵⁵ Statement of J. Hensler ¶ 4.

¹²⁵⁶ Statement of J. Hensler ¶ 6; Ex. C-146, Railroad Development Corporation Analysis of CODEFE Investment and Expenses, 1998-2007.

¹²⁵⁷ Although Messrs. Posner and Duggan both hold management positions with FVG, their salaries have always been paid entirely by RDC. Statement of J. Hensler ¶ 6, n.5.

¹²⁵⁸ Statement of J. Hensler ¶ 6.

¹²⁵⁹ RL-113, *MTD Equity dn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (21 May 2004) (“*MTD Award*”) ¶ 240.

relocation of personnel, consultations concerning marketing and banking” in order to implement the project as recoverable investment costs.¹²⁶⁰ The Tribunal should likewise award such indirect investment costs here.

549. Based upon the foregoing, Claimant’s total revised investment claim from 1998-2006 is **\$19,025,323**, which is comprised of \$15,108,863 in direct and indirect investment from RDC and an additional \$3,916,460 in direct investment from FVG’s local shareholders.¹²⁶¹

550. In addition, after the *Lesivo* Resolution, FVG had to wind down and terminate its active business operations in an orderly way and establish whatever continuing functions were needed to secure the usufruct assets and attempt to mitigate its damages.¹²⁶² This required RDC in 2007 to contribute an additional \$1,035,000 in direct investment in FVG and an additional \$7,358.82 in travel expenses and \$308,070.50 in allocated labor costs for a total of **\$1,350,429**.¹²⁶³ These contributions were used by FVG primarily for operational expenses until shut down, supplier payments, labor costs, employee severance payments and canon payments to FEGUA.¹²⁶⁴

551. Investment tribunals have recognized that business wind down and termination expenses incurred as a consequence of the host State’s breach are recoverable.¹²⁶⁵ For example, in *Siemens*, in addition to the fair market value of its investment, the tribunal awarded the claimant additional expenses it sustained in maintaining a “skeleton operation” of its local

¹²⁶⁰ CL-16, *Southern Pacific Award*, ¶ 202.

¹²⁶¹ Rebuttal Report of L. Thompson ¶ 6, Table 1; Statement of J. Hensler ¶¶ 4, 10; Statement of J. de León ¶¶ 5-6; Ex. C-145, FVG Detailed Cash Flow Statement From Financing Activities, 1998-2007 (showing amounts invested by minority shareholders).

¹²⁶² Statement of J. Hensler ¶ 7; Third Statement of J. Senn ¶ 85.

¹²⁶³ Statement of J. Hensler ¶ 7; Third Statement of J. Senn ¶ 85; Ex. C-146, Railroad Development Corporation Analysis of CODEFE Investment and Expenses, 1998-2007.

¹²⁶⁴ Third Statement of J. Senn ¶ 85; Ex. C-147, CODEFE Funding Towards Future Capitalizations for Year 2007 and Summary of Payments (RDC004070-80).

¹²⁶⁵ See CL-179, Ripinsky with Willaims, *Damages in International Investment Law* 302 (“If, following the breach, the investor decides to withdraw from the host country, it may incur expenses relating to winding-up its business, relocating personnel, payment of lay-off wages, etc. Such expenses must be considered incidental and be compensated if the decision to withdraw is causally linked to the breach.”).

subsidiary within the host State following the breach.¹²⁶⁶ Similarly, in *Vivendi II*, the tribunal awarded as part of the amount of the claimant's investment expenditure the loans the claimant made to its local subsidiary *after* the date of expropriation with the purpose to cover the operational deficits of the subsidiary.¹²⁶⁷

552. As Dr. Pratt opines, in order to return Claimant to the same financial position it would have been in absent Respondent's breach, Claimant's historical investment expenditure should be adjusted to the date of the breach (2006) by the same 12.9% WACC that he has estimated for Claimant's lost profits claim.¹²⁶⁸ Mr. Thompson has made such an adjustment, and this yields a total lost investment claim of **\$42,943,533**.¹²⁶⁹ When the 2007 business termination and wind down costs of \$1,350,429 are included, this yields a total lost investment claim of **\$44,293,982**.¹²⁷⁰

E. Under CAFTA Claimant Can Recover Both the Amount it Invested *and* the Amount FVG's Minority Shareholders Invested in FVG

553. Dr. Spiller asserts that Claimant's lost investment claim can only consist of those amounts that Claimant (*i.e.*, RDC) invested in FVG and cannot claim any amounts that were invested by FVG's minority shareholders.¹²⁷¹ Dr. Spiller is wrong. Under CAFTA, a claimant can claim losses not only on its own behalf, but also on behalf of the other shareholders of its investment enterprise. The relevant provisions are found in Article 10.16. Specifically, Article 10.16(1)(a) permits an investor to present a claim for loss or damage suffered by the investor:

[T]he claimant, on its own behalf, may submit to arbitration under this Section a claim that the respondent has breached an obligation under [Chapter 10,] Section A . . . and that the claimant has incurred loss or damage by reason of, or arising out of, that breach.¹²⁷²

¹²⁶⁶ RL-80, *Siemens Award*, ¶ 329.

¹²⁶⁷ RL-135, *Vivendi II Award*, ¶ 8.3.17.

¹²⁶⁸ Expert Report of S. Pratt, p. 13.

¹²⁶⁹ Rebuttal Report of L. Thompson ¶ 6, Table 1.

¹²⁷⁰ Rebuttal Report of L. Thompson ¶ 6.

¹²⁷¹ Expert Report of P. Spiller ¶ 80.

¹²⁷² RL-61, CAFTA art. 10.16(1)(a)

554. Article 10.16(1)(b), in contrast, also permits an investor to present a claim on behalf of an investment enterprise that it owns or controls for loss or damage suffered by the enterprise:

[T]he claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly may submit to arbitration under this Section a claim that the respondent has breached an obligation under [Chapter 10,] Section A . . . and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.¹²⁷³

555. Thus, CAFTA gives standing to the controlling foreign investor of a local investment enterprise to bring claims on behalf of that enterprise for losses suffered by the enterprise as a result of the host State's breach of the treaty, precisely what Claimant has done here: RDC is the controlling shareholder of FVG, a Guatemala corporation, and RDC has brought each of its claims both on its own behalf and on behalf of FVG, because both entities have suffered losses and damages as a result of Respondent's breaches.¹²⁷⁴ In particular, Claimant asserts that Guatemala's breaches of CAFTA Articles 10.7 (Expropriation), 10.5 (Minimum Standard of Treatment) and 10.3 (National Treatment) destroyed the value of FVG *as a whole* and thereby rendered the value of both its *and* the FVG minority shareholders' investments in FVG *worthless*. CAFTA expressly provides RDC with the right to bring claims for both its direct injuries and *indirect* injuries to its investment enterprise as a whole, which necessarily includes *all* amounts invested in FVG, including the amounts invested by its minority shareholders.

556. The terms of CAFTA Article 10.16(1) are virtually identical to NAFTA Articles 1116¹²⁷⁵ and 1117.¹²⁷⁶ As explained by the United States in a non-party submission in the *GAMI Investments* arbitration, NAFTA Article 1117 was intended to derogate from and supersede the

¹²⁷³ RL-61, CAFTA art. 10.16(1)(b)

¹²⁷⁴ Memorial on Merits ¶¶ 7-8, 11.

¹²⁷⁵ "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the investor has incurred loss or damage by reason of, or arising out of, that breach." RL-157, NAFTA art. 1116(1).

¹²⁷⁶ "An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that another Party has breached an obligation . . . and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach." RL-157, NAFTA art. 1117(1).

customary international law principles that a claim by or on behalf of a shareholder may not be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares and that no international claim may be asserted against a State on behalf of the State's own nationals.¹²⁷⁷ Article 1117 makes this change by allowing an investor of a Party that owns or controls an enterprise of another Party to submit a claim on behalf of the enterprise for loss or damage incurred by the enterprise.¹²⁷⁸

557. CAFTA Article 10.16(2) was intended to serve the same purpose as NAFTA Article 1117. It therefore gives RDC standing to claim indirectly all damages incurred by FVG as a result of Respondent's breaches, which necessarily includes the investment losses suffered by *all* of FVG's shareholders.¹²⁷⁹

F. Claimant's Total Revised Damages Claim

558. Based on the foregoing, Claimant's revised total damages claim is **\$66,482,522**, which is comprised of \$22,188,540 in lost profits/future cash flow and \$44,293,982 in lost investment and shutdown expenses.

G. Mr. Thompson has Made Deductions to Reflect the Result of Claimant's Conscientious Effort to Mitigate Its Damages

559. Claimant knew full well that, if it did not do everything in its power to mitigate its damages, Respondent would contend that Claimant's claim should be denied or reduced on that ground. As a result, after the *Lesivo* Resolution, despite the fact that it could not obtain any more long-term shipping commitments, FVG continued its railroad operations for a number of months in order to realize the income from existing contracts and not expose itself to damages for breach of contract.¹²⁸⁰ During that time, FVG also accepted whatever short term shipping orders that it

¹²⁷⁷ CL-143, *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Submission of the United States of America (30 June 2003), ¶¶ 9-10, 12.

¹²⁷⁸ *Id.* ¶ 12.

¹²⁷⁹ CAFTA Article 10.26 provides that, where a claim is submitted under Article 10.16(1)(b), the award shall provide that restitution is to be made, or monetary damages are to be paid, to the investment enterprise, not the claimant. This ensures that the claimant cannot deprive the enterprise or its minority shareholders of any award amount that it has no right to claim.

¹²⁸⁰ Third Statement of J. Senn ¶ 85.

could obtain.¹²⁸¹ Indeed, it was only when it was painfully apparent that essentially no one – customers, potential lessees, potential developers, suppliers, and bankers – was willing to continue to do business with “the dead man walking” that FVG decided to, and did, shut down its operations.¹²⁸²

560. Of course, with regard to FVG’s pre-existing long-term right-of-way easements and its COBIGUA lease, these lessees already had substantial sunk costs in the infrastructure – port facilities, electric utility poles and transmission lines and gas pipelines – when FVG terminated its active business operations, and they did not want to stop making lease payments to FVG without a guarantee that the Government would assume or honor their easements or leaseholds, which the Government did not offer to do.¹²⁸³ Indeed, these lessees were more able to assume that they would not be dispossessed by FVG so long as they paid their rent, as opposed to trusting the Government, which had already demonstrated its penchant for arbitrary and capricious decision-making.

561. Similarly, with regard to FVG’s short-term rentals of station yard houses and rooms, station warehouses, billboards and station yard spaces, these are month-to-month arrangements, and, as a result, these tenants are unconcerned with to whom they pay their rent so long as they are not evicted. FVG devoted itself to collecting these rents after the *Lesivo* Resolution for the purpose of mitigating its damages.¹²⁸⁴

562. As a result, it was fortunate for Respondent that, because of these factors, these lessees and tenants did not stop paying rent to FVG and FVG, therefore, has been able to mitigate its damages in the amount of \$2,704,310, which Mr. Thompson has deducted from Claimant’s total damage claim.¹²⁸⁵

¹²⁸¹ *Id.*

¹²⁸² *Id.*

¹²⁸³ *Id.* ¶ 86.

¹²⁸⁴ *Id.* ¶ 87.

¹²⁸⁵ Rebuttal Report of L. Thompson ¶ 43, Table 7.

563. Deduction of FVG’s mitigation income from Claimant’s total damage claim yields of total revised net damages claim of **\$63,778,212**.¹²⁸⁶

H. Even if the Tribunal were to Disallow Its Claim for Lost Cash Flow, Claimant Can Still Recover Its Amounts Invested/Sunk Costs

564. In the unlikely event that the Tribunal determines that an award of lost profits is not warranted in this instance, Respondent argues that the Tribunal should also find that Claimant is not entitled to recover its sunk costs/investment either. Respondent’s position neglects a long line of investment awards in which tribunals, having held that the respondent has committed a compensable treaty violation, have further determined that, at a minimum, the claimant is entitled to recover its sunk investment costs. The rationale of such an award is that it at least puts the investor back in the position in which it would have been had it never entered into its agreements with the host State and made its investments in reliance upon the same.¹²⁸⁷

565. For example, in *Metalclad*, the tribunal rejected the claimant’s damages calculation based upon the discounted cash flow analysis of future profits in a landfill project that would be relocated and instead awarded damages based upon its actual investment in the project.¹²⁸⁸ In *Vivendi II*, the tribunal held that there was not sufficient evidence to sustain Vivendi’s lost profits claim and therefore valued damages according to “investment value” – the amount actually invested prior to Argentina’s injurious acts.¹²⁸⁹ The tribunal determined that the total amount invested by Vivendi had been \$105 million, which consisted of \$30 million in initial capitalization and an additional \$75 million in loans to cover the investment enterprise’s operational deficits through the date of the arbitration hearings.¹²⁹⁰ Other cases that have awarded

¹²⁸⁶ Rebuttal Report of L. Thompson ¶ 43, Table 8.

¹²⁸⁷ CL-172, Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* 50 (“fair market value measures have been rejected in a number of cases in favor of compensation based on sunk investment costs – recovery of the ‘reliance interest’ by seeking to put the investor back into a position as if he had never made the investment”). As discussed above, the sunk costs/invested capital must be adjusted to the date of breach by the investments’ discount rate, which Dr. Pratt has estimated to be 12.9%. Expert Report of S. Pratt, p. 13.

¹²⁸⁸ RL-111, *Metalclad* Award, ¶¶ 121-22.

¹²⁸⁹ RL-135, *Vivendi II* Award, ¶¶ 8.3.11 - 8.3.13.

¹²⁹⁰ *Id.* ¶¶ 8.3.17, 8.3.20.

the amount invested as damages in lieu of lost profits include *MTD*,¹²⁹¹ *Siemens*,¹²⁹² *Southern Pacific Properties*,¹²⁹³ *Wena Hotels*¹²⁹⁴ and *Biloune v. Ghana*.¹²⁹⁵

566. Dr. Spiller asserts that an award of damages based upon the historical investment approach, or Net Capital Contributions (NCC), is normally only appropriate “when the expropriation takes place just close to the time of the original investment.”¹²⁹⁶ In support of this assertion, Dr. Spiller cites only one source – himself.¹²⁹⁷ However, international jurisprudence makes no mention of such a nonsensical requirement, and there is precedent which holds otherwise. For example, in *Vivendi II*, the tribunal awarded damages based upon the historical amounts invested by Vivendi where the concession had been in operation for at least three years and Vivendi had already invested \$51 million – including \$21 million in loans to cover the concession’s operational deficits – at the time of the indirect expropriation.¹²⁹⁸ In *Phelps Dodge Corp. v. Iran*, the Iran-U.S. Claims Tribunal awarded Phelps Dodge compensation equivalent to the amount it had invested where the investment had been made six years prior to the expropriation.¹²⁹⁹ What these and other cases show is that, where it is determined that there is insufficient evidence to support an award of lost profits – which is not the case here – tribunals turn to historical investment/sunk costs as an alternative measure of damages, regardless of the length of time the venture has been in operation.

¹²⁹¹ RL-113, *MTD* Award, ¶ 240;

¹²⁹² RL-80, *Siemens* Award, ¶¶ 375, 379-85, 403.

¹²⁹³ CL-16, *Southern Pacific* Award, ¶¶ 188, 198.

¹²⁹⁴ RL-137, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 Dec. 2000) (“*Wena Hotels* Award”), ¶¶ 124-25.

¹²⁹⁵ CL-137, *Biloune v. Ghana Investments Centre*, UNCITRAL, Award (30 June 1990), 95 I.L.R. 183 (“*Biloune* Award”), 228-29 (1990).

¹²⁹⁶ Expert Report of P. Spiller ¶ 75.

¹²⁹⁷ See Expert Report of P. Spiller n.77 (citing M. Abdala & P. Spiller, *Damage Valuation of Indirect Expropriation in Public Services*, 14 Am. Rev. Int’l Arb. 447, 457-58 (2003)).

¹²⁹⁸ RL-135, *Vivendi II* Award, ¶ 8.3.19. As noted in the preceding paragraph, the tribunal awarded Vivendi an additional \$54 million for amounts it was required to invest after the date of expropriation. *Id.*

¹²⁹⁹ CL-151, *Phelps Dodge Corp. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 121, ¶¶ 1, 31 (1986).

567. Dr. Spiller also argues that NCC is the wrong approach to measure the “fair market value” of Claimant’s investment in this case.¹³⁰⁰ But, it is Dr. Spiller who has taken the wrong approach by using “fair market value” as the proper measure here. As discussed above, *Factory at Chorzów* makes no mention of requiring or using “fair market value” to determine the appropriate measure of full reparations. Moreover, although some tribunals have used the term “fair market value” in awarding damages based upon the historical amounts invested, it is clear that none of these awards were attempting to measure the current value of the investor’s assets, *i.e.*, the price a willing buyer would pay a willing seller in an arm’s length transaction on the valuation date.¹³⁰¹ Rather, an award of actual investment or net capital contribution “is primarily a way to put the investor back in a position he would have been in *if the investment had never* occurred rather than a valuation method. It is similar to awarding *damnum emergens* in a contractual context.”¹³⁰²

I. Claimant Has Established Causation for Its Damages

568. Respondent attempts to brush away its unlawful conduct by arguing a “blame the victim” theory of damages which posits that, even if Guatemala unlawfully expropriated Claimant’s investment and denied Claimant’s investment fair and equitable treatment, full protection and security and national treatment, none of this conduct caused any damage or injury to Claimant. Instead, Respondent weaves a fanciful tale which pins the cause of the demise of FVG’s business after the *Lesivo* Resolution exclusively *on Claimant*. In particular, Respondent argues that FVG’s demise was not caused by the *Lesivo* Resolution, but by (1) Claimant’s press release issued after the publication of the *Lesivo* Resolution; and (2) Claimant’s alleged mismanagement of its own business, which included encouraging squatters and not adequately

¹³⁰⁰ Expert Report of P. Spiller ¶ 76.

¹³⁰¹ See, e.g., RL-135, *Vivendi II* Award, ¶¶ 8.2.11 (“it is appropriate to assess compensation . . . based on the fair market value of the concession”); RL-111, *Metalclad* Award, ¶ 122 (“the Tribunal agrees with the parties that fair market value is best arrived at in this case by reference to Metalclad’s actual investment in the project.”); RL-137, *Wena Hotels* Award, ¶ 125 (“the market value of the investment expropriated immediately before the expropriation’ is best arrived at, in this case, by reference to Wena’s actual investments in the two hotels”). See also CL-172, Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* 35.

¹³⁰² CL-179, Ripinsky with William, *Damages in International Investment Law* 230 (emphasis in original).

rehabilitating, operating and maintaining the railway.¹³⁰³ Respondent's theory is refuted by the unassailable facts.

569. In order to sever any causal linkage between its unlawful actions and Claimant's damages, Respondent's argues that FVG's performance under Contract 402 was not dependent on Contracts 143/158.¹³⁰⁴ This contention defies common sense and is inconsistent with the terms of Contract 402. At the time of the *Lesivo* Resolution, the only operating portion of the railway utilized the FEGUA narrow gauge equipment which is the subject of Contracts 143/158 and, therefore, FVG's business was obviously dependent at that time on the use of such equipment in order to keep its then-ongoing railway business operating. It is irrelevant that FVG would not have needed the FEGUA equipment for the eventually restored South Coast right-of-way; if FVG did not have the FEGUA equipment, it could not fulfill its performance obligations under Contract 402 because there was not a sufficient inventory of replacement narrow gauge rolling stock available elsewhere in the world that could be obtained at a reasonable cost.¹³⁰⁵

570. Respondent further claims that, because the *Lesivo* Resolution was directed only at the equipment contracts, it did not cause and would not have caused Claimant to lose its right to exploit or operate the railway under Contract 402.¹³⁰⁶ As noted above, this argument ignores the terms of Contract 402, which require Claimant to operate the railroad, which it could not do without the equipment.

571. Most importantly, as previously discussed in Section III.B.3, *supra*, Respondent's argument is nothing more than form over substance. The record evidence overwhelmingly demonstrates that, although the *Lesivo* Resolution did not have a *de jure* impact on FVG's rights under Contract 402 (and Claimant has never contended otherwise), it had a devastating *de facto* impact on the value of Claimant's investment. The *Lesivo* Resolution was understood and perceived by a critical number of FVG's current and potential customers, suppliers and lenders as not just a Government repudiation of Claimant's rights to use the FEGUA rolling stock, but

¹³⁰³ Counter-Memorial on Merits ¶¶ 6, 8, 117-18, 180-88.

¹³⁰⁴ *Id.* ¶ 253.

¹³⁰⁵ Third Statement of H. Posner III ¶ 59.

¹³⁰⁶ Counter-Memorial on Merits ¶ 559.

also a Government repudiation of Claimant’s rights to the entire railway usufruct, including Contract 402. As a result, all opportunities for FVG to grow its business through increased railway traffic, additional leases or easements, or restoration of the South Coast line dried up. In other words, even though FVG continued to ostensibly retain its legal rights to use and exploit the railway’s assets, those rights were rendered effectively worthless by the *Lesivo* Resolution. In the minds of FVG’s customers, suppliers, lenders and potential investors in the South Coast line, Respondent had declared the *entire usufruct* – not just the equipment contracts – “harmful to the interests of the State” and, as a result, they each decided independently that it was too risky to continue doing business with FVG and, thereby, be seen as siding against the clear edict of the Government of Guatemala.

572. Respondent’s argument that Claimant’s August 28, 2006 press release issued in the days after publication of the *Lesivo* Resolution somehow caused or contributed to FVG’s losses has already been thoroughly debunked in Section II.Z, *supra*. To reiterate briefly, Respondent has not presented *any evidence* that *any* current or prospective customer, supplier, lender or lessee of FVG first learned about the *Lesivo* Declaration from Claimant’s press release or took any action as a result of it. To the contrary, Claimant’s third party witnesses state that they first learned about the declaration of *lesividad* from media reports containing statements from President Berger and other Government officials and that it was these reports which led them to their respective decisions to stop doing or not do business with FVG.¹³⁰⁷ It was this “chilling message and media campaign”¹³⁰⁸ of President Berger and the Government following the publication of the *Lesivo* Resolution, not anything that FVG said or did, which exacerbated Claimant’s losses and damages. As Professor Reisman sums up:

The Respondent asks the Tribunal to ignore the *economic* effect of a public governmental condemnation of an investor’s contract as being harmful to the State’s interest as well as its initiation of a process of legal invalidation of a

¹³⁰⁷ First Statement of Planos y Puntos/Generadora del Sur (Gesur), cl. 3; Second Statement of Planos y Puntos/Gesur ¶ 6; Second Statement of M. Recinos, ALTRACSA ¶ 7; Second Statement of M. Jiménez, Reinter ¶ 5; Second Statement of M. Cifuentes, MAQCISA ¶ 4; Second Statement of A. Arriola, Grupo Unisuper ¶ 5. *See also* Exs. C-34, C-35(c), C-35(e), C-35(g), C-36 (letters from existing and potential FVG customers and suppliers informing it of their respective decisions to not do further business with FVG based upon local news and media reports concerning the *Lesivo* Resolution).

¹³⁰⁸ Counter-Memorial on Merits ¶ 563.

contract that is the lifeblood of the investment, and instead to blame the victim for the adverse economic consequences because of the public protest of its unfair treatment and declaration of its economic consequences by means of an advertisement in a newspaper....The Respondent's contention is not credible.¹³⁰⁹

573. Likewise, Respondent has not presented any evidence that a single existing or potential customer, lender or supplier of FVG stopped doing, or was not willing to do, business with FVG after the *Lesivo* Resolution because FVG did a poor job rehabilitating, operating or maintaining the railway. To the contrary, Claimant's third party witnesses all confirm that the *Lesivo* Resolution was the driving factor in their decision to not do business with FVG. Similarly, there is no evidence that the dramatic increase in squatters, thieves and vandals which occurred after the *Lesivo* Resolution can be attributed to FVG's act of charging rent to station yard tenants.

574. In sum, Respondent's attempt to blame FVG for its own losses after the *Lesivo* Resolution widely misses the mark. It is a theory that, like most of Respondent's arguments, finds no support in the record or has any basis in reality.

J. Claimant is Entitled to Receive Pre-Award Compound Interest

575. Respondent argues that Claimant is not entitled to compound pre-award interest because Claimant has not met "its burden of proof in demonstrating why, based on the particular facts of this particular case, it is entitled to compound interest."¹³¹⁰ Tellingly, Respondent does not identify that particular burden nor cite any authority to indicate the existence of such a burden. Moreover, in the same paragraph, Respondent admits that "there has been an increased tendency by international tribunals to award compound interest." Respondent's admission is an understatement.

576. As stated by Professors Ripinsky and Williams, "academic commentary on the subject of interest has been unified in its criticism of the simple interest rule."¹³¹¹ The reasons for this criticism are twofold. First, there is no rationale for awarding simple interest when

¹³⁰⁹ Second Opinion of M. Reisman ¶¶ 28-29.

¹³¹⁰ Counter-Memorial on Merits ¶ 624.

¹³¹¹ CL-179, Ripinsky with Williams, *Damages in International Investment Law* 383 (2008).

considering the compensatory function of interest being awarded.¹³¹² Second, an award including simple interest ignores that financial reality in which businesses operate. In short, in the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. As stated by Professor Gotanda, “it is neither logical nor equitable to award a claimant only simple interest when the respondent's failure to perform its obligations in a timely manner caused the claimant either to incur finance charges that included compound interest or to forego opportunities that would have had a compounding effect on its investment.”¹³¹³ In a worst case scenario, Claimant could certainly have placed its money in a savings account instead of investing in Guatemala and would have received the benefit of compound interest.

577. As a likely result of this academic commentary, the vast majority of recent international investment tribunal awards have included pre-award compound interest. Claimant has identified over fifteen awards in which international tribunals awarded pre-judgment compound interest to claimants in investor-state disputes.¹³¹⁴ Respondent only identifies two instances in which tribunals have recently determined awards based upon simple interest, and in neither of those awards was any “burden of proof” announced regarding simple or compound interest.¹³¹⁵ Furthermore, Respondent’s citation to the ILC Draft Articles on State Responsibility does not speak to current practice in international investment arbitrations.¹³¹⁶ Indeed, in line with the evolutionary potential of customary international law, the tribunals in *ADC*, *BG Group*, *Metalclad*, *Pope & Talbot*, *Sempra Energy* and *Siemens* all applied a customary international law

¹³¹² *Id.*

¹³¹³ CL-168, John Gotanda, *Compound Interest in International Disputes*, Oxford U. Comp. L. Forum 1, 18 (2004).

¹³¹⁴ See RL-135, *Vivendi II Award*, ¶ 11.1; RL-127, *Sempra Award*, ¶ 486; CL-142, *Enron Corp Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 452 (22 May 2007); CL-149, *LG&E Corp and Others v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, ¶¶ 103, 115 (25 July 2007); RL-80, *Siemens Award*, ¶ 399; RL-124, *PSEG Award*, ¶ 348; RL-77, *ADC Award* ¶ 522; RL-85, *Azurix Award*; RL-113, *MTD Award* ¶ 251; RL-133, *Tecmed Award*, ¶ 196; CL-156, *S.D. Myers Inc. v. Canada*, Ad-Hoc UNCITRAL Arbitration Rules, Second Partial Award ¶ 307 (21 Oct. 2002); RL-109, *Middle East Cement Award*, ¶ 175; CL-152, *Pope & Talbot Award re Damages* ¶ 90; RL-137, *Wena Hotels Award*, ¶ 129; RL-108, *EmilioAugustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, IIC 86, ¶ 277, Award (13 Nov. 2000); RL-111, *Metalclad Award*, ¶ 128; CL-154, *Santa Elena Award* ¶ 97 *et seq.* (17 Feb. 2000); CL-155, *Sapphire Award* p. 191.

¹³¹⁵ RL-118, *Occidental Award*; RL-99, *Feldman Award*.

¹³¹⁶ Counter-Memorial on Merits ¶ 625.

standard as the legal standard for compensation/reparation and awarded compound interest. As such, it is abundantly clear that tribunals routinely award compound pre-award interest and that Claimant should be entitled to similar treatment.

578. Dr. Pratt has opined that an appropriate pre-award interest rate here should be 9.34%, which is based upon the rate that the Republic of Guatemala paid to public and private creditors in 2006.¹³¹⁷ For the foregoing reasons, that rate should be compounded.

K. Claimant Should Be Awarded Its Costs and Fees

579. Finally, Claimant respectfully reiterates its request, pursuant to CAFTA Article 10.26.1 and Article 61(2) of the ICSID Convention, that it be awarded its costs, attorneys' fees and administrative expenses it has incurred in prosecuting its claims in these proceedings.

V. CONCLUSION AND RELIEF REQUESTED

580. For the foregoing reasons as well as the ones stated in its Memorial on the Merits, Claimant respectfully requests that the Tribunal make the following determinations:

- a. That the *Lesivo* Resolution and subsequent conduct of the Republic of Guatemala pursuant to and in furtherance of the *Lesivo* Resolution constitute an indirect expropriation of Claimant's covered investments, in violation of CAFTA Article 10.7;
- b. 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;
- c. That the Republic of Guatemala has violated the national treatment standard of CAFTA Article 10.3;
- d. That the Republic of Guatemala shall pay Claimant \$63,778,212 in damages plus compound pre-award interest at 9.34%; and
- e. That that the Tribunal, pursuant to its power under CAFTA Article 10.26, award Claimant its costs, attorneys' fees and administrative expenses incurred in prosecuting its CAFTA claims.

¹³¹⁷ Expert Report of S. Pratt, p. 14.

Respectfully submitted,



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