INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of the Arbitration between

RAILROAD DEVELOPMENT CORPORATION (RDC)
Claimant

and

REPUBLIC OF GUATEMALA
Respondent

ICSID CASE NO. ARB/07/23

DECISION ON CLAIMANT'S REQUEST FOR SUPPLEMENTATION AND RECTIFICATION OF AWARD

MEMBERS OF THE TRIBUNAL
Dr. Andrés Rigo Sureda, President
Honorable Stuart E. Eizenstat, Arbitrator
Professor James Crawford, Arbitrator

SECRETARY OF THE TRIBUNAL
Natalí Sequeira

REPRESENTING THE CLAIMANT:

Mr. C. Allen Foster
Mr. Kevin E. Stern
Ms. Ruth Espey-Romero
Greenberg Traurig, LLP

Mr. Juan Pablo Carrasco de Groote
Díaz-Durán & Asociados Central-Law

Ms. Regina K. Vargo
Greenberg Traurig, LLP

REPRESENTING THE RESPONDENT:

Mr. Larry Mark Robles Guibert
Attorney General of the Republic of Guatemala

Mr. Sergio de la Torre
Minister of Economy of the Republic of Guatemala

Ms. María Luisa Flores
Vice Minister of Trade and Commercial Integration
of the Republic of Guatemala

Mr. Marvin Gustavo Lau López
Under Secretary General of the Office of the President

Mr. Carlos Samayoa Flores
Administrator of Ferrocarriles de Guatemala

Mr. Whitney Debevoise
Ms. Margarita R. Sánchez,
Arnold & Porter LLP

DATE OF DISPATCH: January 18, 2013

I. Procedure

1. On August 10, 2012, Claimant filed a "Request for Supplementation and Rectification of Award" under Article 49(2) of the ICSID Convention (the "Request"). The Secretary-General registered the Request on August 20, 2012.

2. On August 23, 2012, the Tribunal fixed the following time-limits for exchange of submissions by the parties: September 12, 2012 for Respondent to file its observations on the Request and 13 days each for Claimant and Respondent to file their respective reply and rejoinder. Claimant filed its Reply on September 25 and Respondent its Rejoinder on October 8, 2012.

3. Pursuant to CAFTA Article 10.20.2, on November 9, 2012, the Tribunal invited the non-disputing Parties to submit observations, if any, regarding the interpretation of the Agreement by November 16, 2012. No observations were filed.

4. On November 15, 2012, The Tribunal invited the Parties to submit by November 27, 2012, any observations they may have on the following issues:

> "The weight, if any, to be given by the Tribunal to the fact that funds from real estate rents have been accumulating in the hands of Claimant since September 2006 and may have generated further income for the Claimant;
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> Whether in the consideration of discounting the real estate rents any weight should be given to the decision of the Tribunal to award compound interest on damages as from September 2006."

5. Both Parties filed their observations on November 27, 2012.

6. On November 28, 2012, Respondent objected to Claimant's submission of new materials not in the record together with its observations. On the same day the Tribunal invited the Claimant's observations on Respondent's objection. Claimant filed its observations on November 29, 2012.

7. The Tribunal deliberated by teleconference on several occasions.

II. Summary of the parties' arguments

1. The Request

8. Claimant argues that it claimed and it is entitled to recover a reasonable rate of return on its investment up to the date of Respondent's breach and that the Tribunal failed to address this claim. According to Claimant, the legal authorities and "the damages experts presented by both parties are in agreement that inclusion of a reasonable rate of return on the amounts invested is necessary to put Claimant back in the same position it would have been absent Respondent's breach." (para. 5). Claimant submits that the Tribunal should apply to the sunk investment costs the same rate as applied by the Tribunal to calculate the NPV of the future income stream of FVG's existing leases. In addition, Claimant submits that, "Regardless of what rate of return the Tribunal ultimately chooses to apply, the rate should compounded for the same reasons the Tribunal awarded compound pre-award interest from the date of Lesivo." (para. 15)

9. Claimant also points out that the Tribunal made two arithmetical errors. First, it miscalculated the net present value ("NPV") of FVG's existing real estate leases when applying the discount rate. Second, the Tribunal also erred by not applying the same discount rate to determine the NPV of FVG's existing real estate leases to the actual rent amount received by FVG since the date of *Lesivo*.

10. As to the first rectification request, Claimant explains how by applying the discount rate used by the Tribunal the NPV of existing leases amounts to $6,818,865 of which $5,591,469.30 represents the 82% ownership of FVG held by Claimant.

11. As regards the second rectification request, Claimant notes that the Tribunal required FVG's projected real estate income to be discounted but it did not require that the actual set-off income be similarly discounted.

12. Claimant requests the following relief:

> "a. That the Tribunal supplement the Award to include, as additional compensation to Claimant, a reasonable rate of return, compounded annually, on Claimant's awarded sunk investment costs of $6,576,861, calculated from the dates of investment to the date of *Lesivo* (August 25, 2006);
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> b. That the Tribunal rectify and amend paragraphs 277 and 283(2) of the Award by correcting its calculation of the NPV of FVG's existing real estate leases measured over their remaining life as of the date of *Lesivo*, so that Claimant is awarded $5,591,469.30 (or 82% of $6,818,865) rather than $3,379,450.93 (i.e., 82% of $4,121,281.62); and
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> c. That the Tribunal rectify and amend the Award to require that the actual rents received by FVG since the date of *Lesivo* be discounted and valued as of the date of *Lesivo* at a discount rate of 17.36% before this amount is deducted from the NPV of FVG's existing real estate leases." (para.26)

2. Respondent's Observations

13. Respondent considers that Claimant misapplies the legal standard and misconstrues the scope of the procedure under Article 49(2) of the ICSID Convention. According to Respondent, "Article 49(2) is not designed to afford a substantive review or reconsideration of the decision, or to permit the parties to reargue questions already addressed and resolved by the Tribunal." (para. 8) Respondent observes that a threshold issue concerns what is a "question" under Article 49(2) the Convention and Arbitration Rule 49(1). Respondent notes that "ICSID jurisprudence has consistently recognized that tribunals are not obliged to opine directly on every argument put forward by the parties, provided they address the essential issues in the case." (para. 12)

14. According to Respondent, "The real questions before the Tribunal on damages were whether Claimant proved that: (1) it suffered quantifiable, compensable damages; (2) whatever damages it suffered were proximately caused by the *Lesivo* Declaration; and (3) quantum." (para. 14) It is the view of Respondent that the Tribunal addressed all three.

15. Respondent argues that Claimant is attempting to resurrect the argument that the net capital contribution ("NCC") approach is appropriate in this case. Respondent explains that this approach requires updating historical investments by a theoretical rate of return and refers to the Tribunal's finding that

the losses incurred by Claimant in 2000-2006 were not attributable to *Lesivo*. Respondent concludes that "[i]mplicitly, therefore, the Tribunal was ruling that no updating of Claimant's investment was required." (para. 20)

16. According to Respondent, "The Tribunal correctly grounded its award on known quantities, including the actual negative return after eight years of operation, a negative return not attributable to Respondent's violations of CAFTA. Accordingly, the Tribunal accepted the view of Guatemala's expert on FVG's losses, namely, that it is inappropriate to update the value of an investment using a theoretical rate of return when a business has been in operation for a considerable time after the date of the investment and there is an observable track record. Respondent concludes: "There was no omission of a question or failure to consider Claimant's arguments. The Tribunal considered them and Claimant lost. Claimant cannot now reargue the issue." (para. 24) In support of this conclusion Respondent also refers to the Tribunal's finding that, given FVG's losses, the claim of lost profits was speculative, and that, since the only lost profits granted by the Tribunal were the NPV of existing real estate leases, there was no need to amortize Claimant's lost investment in order to avoid double counting. (para. 25)

17. Respondent alleges the use of new material as a basis for the Request to supplement the Award. According to Respondent, "Claimant presents new evidence and proposes three distinct methodologies resulting in additional damages of $14,199,805, $5,894,578 or $3,086,856. In essence, Claimant is asking the Tribunal to revise its reasoning and increase the damages awarded." (para. 26) Claimant adds that the Tribunal would exceed its powers if it were to rule "on matters not pleaded by the parties and material not in the record before it closed." (para. 28)

18. Respondent agrees with Claimant that to supplement an ICSID award is discretionary but disagrees on Claimant's proposed application of Article 49(2). According to Respondent, "When a Tribunal declines either explicitly or implicitly to adopt a party's argument, it does not thereby open the door to Article 49(2) supplementation." (para. 29) In the view of Respondent, "Even if [it]

succeeds in showing that the Tribunal failed to answer the alleged question – which it has not, this alone would be insufficient to support a supplemental decision, *absent proof* that the Tribunal simply failed to address *quantum*. No such proof exists in this case as it is clear that the Tribunal paid extraordinary attention to quantum in the Award. (para. 29, emphasis in the original)

19. As to the rectification requested, Respondent disputes that the Tribunal had made any clerical, arithmetical or similar error that is susceptible of rectification. Respondent refers to the fact that Claimant invited the Tribunal to use the model designed by Claimant's expert and, therefore, "Claimant can hardly complain now that the Tribunal made an erroneous calculation." (para. 34) Respondent adds: "A reasonable estimate of such costs [the costs associated with revenues] produces numbers in the neighborhood reached by the Tribunal. The key point, however, is that the purpose of a rectification proceeding is not to reproduce accurately every cell of an Excel model. The Tribunal had available to it the tools it needed and cannot now be said to have engaged in a mathematical error." (para. 34)

20. On the second alleged error, Respondent argues that it is in fact the result of Claimant's own legal theory that rents collected post-*Lesivo* constituted mitigation of damages and applied to everything. Respondent notes that Claimant's expert did not discount the rental income received from 2007 to 2010; the expert "simply added the rents collected and deducted the sum from the total damages claimed, which were computed as of December 2006." (para. 35). Respondent also points out that counsel for Claimant maintained this position in closing argument.

21. Respondent disputes the correctness of the amount of NPV put forward by Claimant, and adds: "Significantly, the very fact that arguments about these new calculations exist should put an end to any rectification request." (para. 36).

22. Respondent requests that the Tribunal "(A) deny Claimants [sic] Request in its entirety; and (B) order the Claimants [sic] to assume all fees and

costs of the Republic's legal representation and other costs incurred by the Republic in connection with such proceeding." (para. 37)

3. Reply

23. Claimant disagrees with Respondent that the Request seeks substantive review or reconsideration of questions decided by the Tribunal. Claimant argues that Article 49(2) allows the Tribunal to decide any question it omitted to decide in the Award, and refers to Professor Schreuer's explanation that an inadvertently omitted question must concern "an issue that affects the Award and is of sufficient importance to justify the procedure leading to a supplemental decision." [1] In the view of Claimant the Tribunal omitted inadvertently a question in the calculation of damages which, if decided in its favor, would substantially increase the damages awarded. It follows, according to Claimant, within the proper scope of Article 49(2) of the ICSID Convention. Claimant finds no support under Article 49(2) or in the jurisprudence for Respondent's argument that the Tribunal is not obligated to decide a material omitted question relating to the calculation of damages unless the Award is completely silent on the amount of damages awarded.

24. Claimant also disputes that the Tribunal addressed implicitly Claimant's request that its sunk investment costs be updated to the date of breach by a reasonable rate of return. Claimant observes that it is undisputed that there is no mention in the Award of such request despite the prominence of this issue in the parties' briefing. This leads Claimant to believe that it was an inadvertent omission by the Tribunal. Claimant points out that the Award explicitly states that Claimant should not recover a portion of its sunk investment costs, and argues that "had the Tribunal decided that these sunk costs are not compensable because they represent the actual negative rate of return on Claimant's investment [as argued by Respondent], it would have said so in the Award rather than expressly denying recovery of these costs on entirely different grounds." (para. 11)

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[1] C. H. Schreuer, *The ICSID Convention: A Commentary*, 853 (2nd edition, 2009).

25. Claimant refers to the expert opinion of Respondent's expert in support of its argument that, "if sunk investment costs are awarded, those investments *must* be 'brought forward to the date of [breach] at a rate equal to the theoretical return these investments would have had in the absence of the breach'" (Rebuttal Report of P. Spiller, para. 30, quoted in para. 13 of the Reply). Claimant, relying on the same opinion, points out that this is the case whether or not the company concerned has a history of profitability.

26. Claimant also refers to the Respondent's expert recommendation that a compensation award measured by actual investment should be adjusted by business risk. Claimant observes that the Tribunal determined that Claimant should not recover certain investment costs because these costs represented risks that the Claimant took by investing in Guatemala. Hence Claimant concludes that, "while the Tribunal by all appearances adopted Dr. Spiller's actual investment NCC methodology with regard to adjusting Claimant's compensation downward by $8.5 million to take into account business risks Claimant had voluntarily assumed, it inadvertently omitted in the Award the other key element of the methodology, which requires that an award of sunk investment costs, after adjustment for risks, include 'a return equal to the opportunity cost of capital' (Rebuttal Report of P. Spiller, para 34). The Tribunal should correct this omission by granting Claimant's Request and supplementing the Award." (para. 18)

27. Claimant rebuts Respondent's argument that the Request is based on new material and explains that "the rate of return analysis of Claimant's awarded sunk costs presented in Annex I of Claimant's Request is completely supported by Respondent's own expert and entirely consistent with the record and the Tribunal findings. It is not 'new evidence', and has been presented by Claimant simply to assist the Tribunal in its consideration of Claimant's Request for supplementation." (para. 20)

28. Claimant then addresses Respondent's arguments on rectification of the Award. Claimant finds that Respondent offers little substance in its response and effectively concedes the error in its Observations. Claimant rejects

Respondent's argument that the Tribunal possibly made some cost deductions associated with the real estate lease revenue to arrive at the amount set forth in the Award. According to Claimant, "the Award sets forth on a step-by-step basis how the Tribunal proceeded from Mr. Thompson's NPV calculation to the Tribunal's NPV calculation, and the only input change from Mr. Thompson's calculation that the Tribunal discussed and adapted is the change from a 12.9% discount rate to a 17.36% rate. There is no explicit or implicit suggestion in the Award that the Tribunal made other, unspecified adjustments to Mr. Thompson's calculation which cause the NPV value to drop from $6,818,865 to $4,121,281.62." (para. 12)

29. As to the valuation of the set-off, Claimant acknowledges that, as pointed out by Respondent, Mr. Thompson did not discount the set-off in his report. This notwithstanding, Claimant considers that the failure of the Award to discount FVG's post-*Lesivo* rental income is a computational error that should be rectified. Claimant maintains that Respondent has not disputed that, "in order to determine the proper net amount owed by Respondent for FVG's existing leases, it is necessary that the set-off amount of rents paid to FVG since *Lesivo* be discounted at the same rate as FVG's leases. Respondent also does not dispute that the Award currently does not do this […] Furthermore, Respondent does not dispute that, if this computational error is not corrected by the Tribunal, it could lead to the absurd result of Claimant receiving *nothing* for (and Respondent potentially *profiting* from) this item of damages." (para. 30, emphasis in the original). Claimant concludes by saying that: "Article 49(2) does not afford the Tribunal discretion to tolerate an undisputed computational error in its damages calculation simply because Claimant's expert made a similar error." (para. 31)

30. Claimant confirms its relief request and adds that the Tribunal award Claimant its costs, attorneys' fees and administrative expenses incurred in prosecuting its Request. (para. 32)

4. Rejoinder

31. Respondent argues that the Request is based on the erroneous assumption that the Tribunal awarded Claimant sunk investment costs and

sought to place Claimant in the same position as if the investment had never been made. According to Respondent, Claimant is trying to reformulate the compensation standard applied by the Tribunal. Respondent affirms that: "The Tribunal listened to what Dr. Spiller said and awarded Claimant full reparation at the same time of the *Lesivo*, because that is when the breach of the Treaty obligation attributable to Guatemala occurred. Thus, the Tribunal's alleged failure to address whether FVG's sunk investment costs should be adjusted to the date of the *Lesivo* was *not* an inadvertent omission." (para. 6, emphasis in the original) Furthermore, Respondent argues that, if the Tribunal had wanted to place Claimant "in a position as if the investment had never been made", Claimant would not have been awarded damages on account of real estate leases.

32. As to the NPV calculation, Respondent disputes that it conceded that the Tribunal erred as affirmed in Claimant's Observations and makes a calculation based on certain assumptions that result in an amount close to the amount calculated by the Tribunal.

33. Respondent also disputes that the Tribunal committed a mathematical error by failing to discount FVG's post-*Lesivo* rental income. Respondent recalls that Mr. Thompson's [Claimant's expert] did not discount post-*Lesivo* rental and adds "…when it is clear that the Tribunal used Mr. Thompson's analysis, and that Claimant now argues that such analysis was erroneous, there is no reason to fault the Tribunal for not discounting rents actually received when calculating mitigation damages…Article 49(2) should not be used by a party to change the methodology proposed by the Claimant for mitigation of damages." (para. 22)

34. Respondent confirms its request for relief.

5. Replies to the Tribunal's Questions

35. In their replies to the questions posed by the Tribunal the parties agree, although for different reasons: (a) that no weight should be given by the Tribunal to the fact that funds from real estate rents have been accumulating in the hands of Claimant since September 2006 and may have generated further income for the Claimant; and (b) that, in the consideration by the Tribunal of

discounting the real estate rents, no weight should be given to the decision of the Tribunal to award compound interest on damages as from September 2006.

III Considerations of the Tribunal

36. At the outset it will be useful to reproduce Article 49(2) of the ICSID Convention:

> "The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered."

37. The Tribunal will first consider the issue of the new evidence submitted by Claimant with its reply to the Tribunal's questions followed by the requests to supplement the Award and rectify it.

1. The Issue of New Evidence

38. The Tribunal considers that congruent with the limited scope of a rectification request under Article 49(2) of the ICSID Convention no new evidence should be filed by the parties at such stage of the proceedings. In the instant case, in the Tribunal's opinion, no new evidence was necessary to reply to its questions and it, therefore, upholds the objection of Respondent. The new evidence has been ignored in the deliberations of the Tribunal.

2. Supplementation

39. The Tribunal observes that the parties are in agreement that the Tribunal has discretion as to whether or not to supplement an award under the terms of Article 49(2) of the ICSID Convention. The term "may" leaves no doubt that this is the case when the Tribunal has omitted to decide a question submitted to it. Hence the first issue to be addressed by the Tribunal is whether it

omitted to decide in the Award a question submitted by Claimant. The parties disagree in this respect. Claimant alleges that the Tribunal omitted to deal with the question of discounting the sunk costs up to the date of *Lesivo*, Respondent considers that this matter was implicitly covered in the Tribunal's considerations underlying the damages calculation.

40. The parties' disagreement turns on what is a question under the Convention. The Black's Law Dictionary defines "question" as follows: "A subject or point of investigation, examination or debate; theme or inquiry; problem; matter to be inquired into." In the instant case the problem faced by the Tribunal was "how to assess the compensation on account of a measure which has an injurious effect, falling short of expropriation on assets which continue in possession of Claimant." (Award, para. 260)

41. There is no precise formula to determine damages on account of the infringement of the fair and equitable standard. Here, the Tribunal's damages analysis is additionally influenced by its decision to require "Claimant, on the full and effective payment of the prescribed compensation by Respondent, to transfer to Respondent or its nominee all of the Claimant's shares in FVG." (Award para 265). This remedy, combined with the speculative nature of Claimant's claim of lost profits, led the Tribunal to award Claimant reparations based on "certain known quantities related to the amount invested and the actual rents received from leases of the real estate" that "have the additional merit of arguably representing benefits which may be considered to accrue to Respondent on payment of the amount awarded to Claimant." (Award para 269.) In the Tribunal's estimation, this damages framework provides compensation for Guatemala's CAFTA breach, reflects the transfer of ownership that will take place when Guatemala makes payment of the prescribed compensation, and takes account of the fact that Claimant's investment was losing money for reasons independent of *Lesivo*.

42. In propounding an automatic application of various elements of a financial formula to Claimant's investment amount, the Request advances an analysis that is detached from reality. The Tribunal considers that to discount the

investment made up to the date of *Lesivo* irrespective of the performance of the entity concerned would produce in the circumstances of this case an unfair and inequitable result. The assets invested overall generated losses not gains up to *Lesivo*. As the Tribunal noted (referring to the years of operation pre-*Lesivo*): "the funds invested by Claimant to cover these losses represent the risks Claimant took when investing in Guatemala and cannot be attributed to any action of Guatemala contrary to CAFTA" (Award, para 272; see also paras 274, 277, 278). To ignore this fact and discount sunk costs on the basis of what the return would be on an alternative investment is a theoretical exercise. Such exercise may perhaps be justified in cases where there is no record of the performance of the investment. In the instant case that record exists. The Tribunal would have engaged in contradiction if, after recognizing that the investment had made losses, it would have added to that investment a theoretical rate of return. To conclude, the Tribunal considers that in its calculation of compensation on account of the breach of the fair and equitable standard it dealt with all questions needed to reach its decision. In the view of the Tribunal the request to supplement the Award has no merit.

3. Rectification

a) NPV Calculation

43. In the Award the Tribunal did its own assessment of the appropriate discount rate to calculate the NPV of existing leases and noted the disagreement of the parties in this respect (Award, paras. 271 and ff). The Tribunal reached the conclusion that a discount rate of 17.36% would be appropriate. It is evident that the Tribunal misapplied the discount rate. The Tribunal has recalculated the NPV of the income streams of leased real estate set forth in Expert Thompson's Rebuttal Report[2] using the 17.36% discount rate. The results are identical to those in the table in paragraph 18 of the Request. Paragraphs 277 and 283(2) of the Award shall be rectified accordingly. The correct amount awarded to Claimant on account of the real estate leases is $5,591,469.30.

[2] Rebuttal Report of L. Thompson, Ex 1.

b) Discount of Actual Lease Rents

44. Respondent has noted and Claimant has recognized that in its pleadings Claimant did not discount the income FVG received post-*Lesivo* from leased real estate. It will be useful to reproduce here the relevant parts of Claimant's Reply on the Merits and of Expert Thompson's Rebuttal Report. The Reply states:

> "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*.
>
> 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." (Emphasis added by the Tribunal)

Expert Thompson's Rebuttal Report submitted with the Reply on the Merits states:

> "42. Although FVG's railway operations rapidly declined and eventually ceased after the Lesivo Declaration, FVG has continued to collect income from four long-term right-of-way easement agreements and one long-term lease (COBIGUA) and other short-term rental activities. *This mitigation income should rightly be deducted from the value of the claim*.
>
> 43. Table Seven shows the lease and easement income that FVG has received from 2007 through the end of 2010. *The total amount of income is US$2,704,310. Deduction of this amount from the revised damages* claim yields a total revised net damages claim of US$63,778,212, as shown in Table Eight**." (**Emphasis added by the Tribunal**)**

45. This notwithstanding it is Claimant's view that the Tribunal committed an error by not discounting the income received by FVG post-*Lesivo* at the same discount rate that it discounted the stream of that income from the end of the railway concession to 2006. Claimant has argued that by "discounting FVG's projected real estate income over the remaining term of the Usufruct, but not similarly discounting the amount that it is to be deducted from this amount, the Tribunal has created an apples-to-oranges calculation, where the plus side of

the equation has been valued as of the date of *Lesivo* (August 25, 2006), while the set-off amount – the total actual rental payments received to date – have been valued as of the respective dates the payments were received by FVG from September 2006 to the present." (Reply, para. 22)

46. The power of the Tribunal to rectify the Award is limited. The threshold question is whether the rectification requested falls within the parameters of Article 49(2) of the ICSID Convention. The parties disagree on whether the request concerns a pure mathematical error or a change of methodological approach.

47. The Tribunal first observes that Claimant benefited from expert advice in the approach it took to claim and quantify damages. The Tribunal accepted that approach to the extent that concerns us here. With hindsight Claimant has realized that the approach that informed its pleadings had certain unfavorable mathematical implications and has asked the Tribunal to correct them. The Tribunal considers that to do so would exceed the terms of its powers under Article 49(2). It was not for the Tribunal to go beyond what Claimant pleaded prior to the Award and consider the mathematical implications of Claimant's approach when Claimant itself did not take them into account. In these circumstances to rectify the Award as requested is not just a simple mathematical operation, it implies the Tribunal accepting a change of pleading in the context of a rectification request. This is beyond the power of the Tribunal under Article 49(2) of the ICSID Convention.

48. Claimant has also argued that "if there is no discounting and the Award is not paid by Respondent until 2015, then the absurd result will obtain that Claimant will likely *owe* Respondent money for this item of damage, as Claimant's share of FVG's actual non-discounted real estate income since the date of *Lesivo* will by then likely *exceed* Claimant's share of the NPV of FVG's lost future real estate income. The Tribunal certainly could not have intended such an incongruous result, where Respondent could potentially *profit from* Claimant's mitigation of its damages." (Request, para. 24. Emphasis in the original)

49. The Tribunal recalls that Claimant in its Reply and during oral hearings pleaded the application of rental income to mitigation of *all* damages. It is not absurd that the mitigation of damages may exceed one of the damages items. Claimant will not owe Respondent money. As Claimant has pleaded, the amount of post-*Lesivo* income will be deducted from the total damages awarded by the Tribunal.

50. To conclude, the Tribunal considers that the Request does not concern rectification of a computational error but involves a change of approach by Claimant in respect of the treatment of the payments received post-*Lesivo* outside the scope of the terms of Article 49(2) of the ICSID Convention.

III. Costs

51. The Tribunal has found merit in part of the Request. None of the parties has fully prevailed. Therefore, each party shall bear the costs and expenses of their respective counsel, and half of the Tribunal fees and expenses and of the administrative expenses of ICSID.

IV. Decision

For the above reasons, the Tribunal decides:

1. To uphold the objection to the new evidence submitted by Claimant with its reply to the Tribunal's questions.

2. To reject the Supplementation Request and the Rectification Request as it relates to "Not Discounting the Actual Rents Received by FVG Since the Lesivo Resolution."

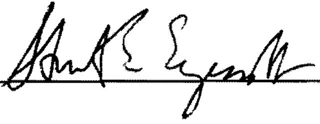
3. To rectify the Award as follows:
    a) the amounts in line 7 of para. 277 shall be deleted and replaced by "$6,818,865" and "$5,591,469.30" respectively.
    b) The amounts in line 5 of para. 283(2) shall be deleted and replaced by "$6,818,865" and "$5,591,469.30" respectively.
4. That each party shall be responsible for 50% of the administrative expenses of ICSID and of the fees and expenses of the Tribunal related to this decision.

5. That each party shall be responsible for its own counsel fees and expenses.

Dissent in respect of the Second Rectification Request
of Arbitrator Stuart E. Eizenstat

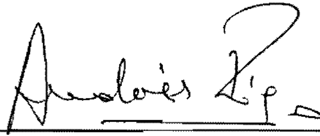
I agree with my colleagues that Claimant's new evidence should not be considered; that Claimant's Request for Supplementation should be rejected; and that Claimant's First Request for Rectification should be granted. I write separately because I would grant Claimant's Second Request for Rectification. I view the failure to discount the set-off amount for actual rents received post-*Lesivo* as an arithmetical error that could be addressed at this stage of the proceedings. Insofar as Claimant's expert erred in not discounting these rents, it is my view that the Tribunal shares in the error. Therefore, the Tribunal should correct it and I would do so. For that reason, I respectfully dissent from this part of the decision.

The Tribunal



Hon. Stuart E. Eizenstat
Arbitrator
Date: 12/18/12

Professor James Crawford
Arbitrator
Date: 14-1-13



Dr. Andrés Rigo Sureda
President of the Tribunal
Date: 12·18·12