INTERNATIONAL CENTRE FOR SETTLEMENT

OF INVESTMENT DISPUTES

RAILROAD DEVELOPMENT CORPORATION

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB/07/23

STATEMENT OF JORGE SENN

JORGE SENN, being duly sworn, deposes and says:

1. I am the General Manager of Compañia Desarrolladora Ferroviaria, S.A., which does business as Ferrovias Guatemala ("FVG"). I submit this statement based upon my personal knowledge and in support of RDC's claims in *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, which have been brought against Guatemala pursuant to the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA"). I also submit this Statement to place before the Tribunal certain information and documents germane to RDC's claims and Memorial on the Merits.

2. I have been the General Manager of FVG since July 2002. As General Manager, I have been responsible for managing the day-to-day operations and business of FVG, including the company's dealings and relationship with FEGUA and other agencies, entities and officials of the Government of Guatemala.

3. Prior to joining FVG, I spent five years with Terex Corporation, based in Westport, Connecticut, as Regional Manager for Latin America. My responsibilities included parts sales and marketing for heavy equipment for the construction and mining industries. Prior to this position, I served as Equipment & Service Manager of several heavy equipment dealers within Guatemala, including Caterpillar. My regional experience has also included serving as General Manager of Automotive Services Ltd., the representative for Jeep-Chrysler Corporation and National Car Rental for the country of Belize.

A. The Usufruct Contracts, Including the Replacement of Deed 41 with Deeds 143/158

4. The Guatemala Usufruct for Rail Transportation (the "Usufruct") consisted of three agreements entered into by and between FEGUA and FVG (collectively, the "Usufruct Contracts"), each of which are necessary to operate the railroad:

(i) Onerous Usufruct Contract of Right of Way, documented by Deed Number 402 dated November 25, 1997 ("Deed 402"). Deed 402 came into force on May 23, 1998 and has a term of fifty (50) years;

(ii) Trust Fund for the Rehabilitation and Modernization of the Railroad System in Guatemala, documented by Deed Number 820 dated December 30, 1999 ("Deed 820"), with a term of twenty-five (25) years expiring on December 31, 2025[1]; and

(iii) Onerous Usufruct Contract Involving Railway Equipment, documented by Deed Number 41, dated March 23, 1999 ("Deed 41"), granting FVG the

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

"use, enjoyment, repair and maintenance of railway equipment" owned by FEGUA for the purposes of rendering railway transportation services.

5. Deed 41 provided that it would become effective thirty days after the Government Resolution approving the contract was published in the Official Journal of Guatemala. However, through no fault of FVG, Deed 41 was never formally approved by Government Resolution, despite the fact that FVG had already rehabilitated and been using the FEGUA rolling stock and equipment for four years pursuant to the terms of Deed 41 without issue.

6. In 2003, Government officials approached FVG to request that Deed 41 be replaced with a new Usufruct Contract for Railway Equipment, Deed Number 143 ("Deed 143"). It was represented by the Government that a replacement contract was necessary for technical legal reasons due to the Government's failure to approve the Deed 41 by resolution. The Government further represented to and assured FVG that the replacement of Deed 41 with Deed 143 could be accomplished without a new public bidding process or Presidential or Congressional approval, and that it would have no material effect on FVG's rights or obligations under the Usufruct.

7. The Government did, however, propose at least one material change from Deed 41. Under Deed 41, FVG paid a Canon fee to the Trust Fund in the amount of 1% of the gross traffic freight of the railroad, not to exceed 300,000 quetzals per year. However, in 2003, when the Government requested that Deed 41 be replaced by a new railway equipment contract, it demanded that the Canon fee be increased to 1.25%, with no annual limitation and paid directly to FEGUA. After receiving assurances from the Government that this higher Canon fee was necessary for legal reasons, FVG acceded to the Government's demand.

8. Thus, on August 28, 2003, Deed 41 was replaced, at the Government's request, by Deed 143. Deed 143 has a term of 44 years, 8 months and 25 days, to May 22, 2048, the termination date of the original 50-year Usufruct.

9. Deed 143 was drafted entirely by the Government and states that the parties decided to terminate Deed 41 and enter into Deed 143 "to regularize the relation between [FVG] and FEGUA" and because "in spite of having been endorsed by both parties, [FEGUA and FVG], and having complete validity, [Deed 41] was never in force seeing that it was not approved by the President of the Republic. . . ." Deed 143, clause 1, secs. V-VI.

10. Importantly, unlike Deed 41, Deed 143 expressly provided that it did not require approval by Government Resolution in order for it to be enforceable: "This contract shall be in force as of its endorsement, *without need of subsequent authorization from any other authority.*" Deed 143, clause 6 (emphasis added).

11. Deed 143 was further amended on October 7, 2003 by Deed Number 158 ("Deed 158"). Deed 158 amended Deed 143 by, among other things, amending the inventory and appraisal of the rail equipment granted in usufruct.

B. FVG's Success in Operating the Usufruct Prior to Lesivo

12. From 2000 through 2005 (the year prior to the Lesivo Resolution), FVG was successful in steadily increasing railway traffic tonnage shipments:

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

See **Exhibit C-40**, FVG Traffic Tonnage Report 2000-06, attached hereto. Railway traffic tonnage, however, was less than the initial projections set forth in FVG's original Business Plan due in large part to FEGUA's failure to remove squatters and failure to make its contractually obligated payments into the Railway Rehabilitation Trust Fund, as discussed below. In 2006, total tonnage shipments declined from the prior year to only 92,566 tons due to the Government's Lesivo Declaration.

13. Pursuant to its right to develop and earn income on alternative uses for the right of way, prior to the Lesivo Resolution, FVG entered into long-term easement right contracts with four different companies (Planos y Puntos/Gesur, Zeta Gas, Texaco Guatemala and Genor) and a long-term lease with Chiquita for a port facility at Puerto Barrios. Those contracts generated over $700,000 in income for FVG from 2000 through April 2007. During this time period, FVG also earned $334,938 from house rentals on station yards, commercial booths and billboards within the railway stations and right of way.

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

Year	FVG Payments (Quetzals)
2000	714,652
2001	866,602

2002	825,971
2003	1,366,345
2004	2,156,755
2005	1,404,198
2006	901,207

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

C. FEGUA's Pre-Lesivo Breaches of the Usufruct Agreements

15. Despite FVG's success in rehabilitating and re-opening the national railroad, FEGUA consistently failed to perform its obligations under the Usufruct Contracts prior to the Lesivo Resolution. Under Deed 402, FEGUA was obligated to prevent squatters and other third parties from hindering or interfering with the rail and non-rail activities of FVG. FEGUA consistently breached this obligation by failing to remove individual and industrial squatters from the right of way. The industrial squatters principally involve private telecommunications and electricity distributors placing or maintaining utility poles and running transmission lines along the right of way without FVG's permission or compensating FVG. As of FVG's commencement of the local arbitration actions against FEGUA in 2005, the known industrial squatters on FVG's right of way (and the approximate year when their trespasses began) were as follows:

a. <u>INDE (trespass began approximately 1994) and Municipalidad de Puerto Barrios (trespass began approximately 2002) in the Puerto Barrios to Bananera right of way</u>. Both have had utility poles and transmission lines on FVG right of way covering 62.76 km.

b. <u>INDE (1994) and Municipalidad de Gualán (2002) in the Bananera to Gualán right of way</u>. Both have had utility poles and transmission lines on FVG right of way covering 74.03 km.

c. <u>Municipalidad de Sanarate (2002) and DEORSA (2002) on the Gualán to Sanarate right of way</u>. Both have had utility poles and transmission lines on FVG right of way covering 146.79 km.

d. <u>EEGSA (1994) and DEORSA (2002) on the Sanarate to Zone 1 right of way</u>. Both have had utility poles and transmission lines on FVG right of way covering 70.53 km.

e. EEGSA (1996) on Santa Maria to Tecún Umán right of way. Since 1996, utility poles and transmission lines on FVG right of way covering 112.65 km.

f. DEORSA (2002) on the Santa Maria to Tecún Umán right of way. Since 2002, utility poles and transmission lines on FVG right of way covering 16.09 km.

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

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

18. On June 13, 2005, after extensive efforts to convince FEGUA to meet its contractual obligations, FVG initiated a local arbitration action against FEGUA for FEGUA's failure to pay monies owed to the Trust Fund. On July 25, 2005, FVG filed another, separate arbitration claim against FEGUA based on breach for its failure to remove squatters from the railroad right of way pursuant to its obligations under Deed 402. In both of these arbitrations, FVG requested that the arbitrators order FEGUA to comply with its contractual obligations in terms of paying into the Trust Fund and removing squatters from the right of way. FVG has also requested an award of monetary damages for the losses FVG has suffered as a result of the breaches.

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

D. FVG's Dealings With Ramon Campollo

20. I first became involved in FVG's dealings with Ramon Campollo in late 2004, when Mr. Campollo requested a meeting with FVG. Ramon Campollo has long been one of the wealthiest and most powerful and politically influential oligarchs in Guatemala. His primary business is sugar cane cultivation and refining, with ownership

of the Madre Tierra sugar mill in Santa Lucia. He also holds extensive investment interests in real estate, electricity (he is a member of Empresa Electrica de Guatemala, S.A. (EEGSA), the largest electricity generator and distributor in Guatemala), and in oil and gas exploration and distribution.

21. On December 3, 2004, FVG's President, Bill Duggan, and I met with Mr. Campollo at the law offices of Greenberg Traurig in Miami, Florida. Also attending the meeting on Mr. Campollo's behalf was Juan Esteban Berger, his lawyer and the son of the President of Guatemala, Oscar Berger.

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

23. In response to Mr. Campollo, Mr. Duggan reiterated that, although it would consider an equity investment in the company by the Campollo group, FVG had no intention of giving up its control of the Usufruct. FVG added further that it was not obligated and had no immediate plans to open the South Coast corridor unless it was cost beneficial to FVG. Campollo, however, said that he had a deserved reputation of being a "lone wolf" and did not desire any "partners." He made it clear that he was not offering to purchase an interest in the Usufruct or to invest in FVG; rather, he wanted FVG to *give him* controlling interest in order to avoid his thinly veiled threat of retaliation.

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

25. In early 2005, Mr. Campollo again demanded a meeting with FVG and, prior thereto, on March 9, 2005, his front man and go-between, Hector Pinto, delivered by email a written "option offer." The essence of Campollo's "option offer" was a

demand, once again, that FVG give him FVG's Usufruct rights and assets for essentially nothing. President Berger's son, Juan Esteban, was copied on the offer. The key terms of Campollo's "offer" were as follows:

- Desarrollos G [Campollo's company] was to be granted a 180-day first option "to initiate and develop businesses or projects related to property and rights" granted to FVG by the Usufruct Deeds, with "businesses or projects" defined as "any lucrative activity;"
- FVG compensation would be limited to an amount to be "formalized" in a period "not to exceed 180 days";
- Desarrollos G would be given the right to take over any existing contracts upon their expiration;
- FVG would agree not to undertake businesses or projects which competed with Desarrollos G; and
- 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.

A true and correct copy of Mr. Pinto's email and "offer" are attached hereto as **Exhibit C-41**.

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

27. On March 15, 2005, Henry Posner, Mr. Duggan, RDC's President, Bob Pietrandrea, and I met with Mr. Pinto at the Marriott Hotel in Guatemala City. At this meeting, Mr. Pinto announced that, if FVG did not "cooperate with Mr. Campollo's companies on joint ventures" for both FVG lines of business (*i.e.,* rail operations and real estate development) in accordance with the "option" Mr. Pinto had just sent, Mr. Campollo would "take" the business with or without FVG. In response, Mr. Pietrandrea told Mr. Pinto, in no uncertain terms, that RDC had no interest in Mr. Campollo's "option" as written, but that FVG was willing to consider Mr. Campollo buying into FVG as an investor.

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

copy of an email I sent to Henry Posner on April 6, 2005 reporting on my April 5 conversation with Mr. Pinto is attached hereto as **Exhibit C-42**.

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

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

31. Subsequently, on April 15, 2005, Mr. Duggan and I met with President Berger's son, Juan Esteban, at Attorney Silva's office. There, Juan Esteban ostensibly apologized for Mr. Pinto's statements at the April 12 meeting. Later that 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 in December 2004 due to his participation in other businesses that would require most of his time. A true and correct copy of Mr. Campollo's letter is attached hereto as **Exhibit C-43**.

E. The Lesivo Resolution

32. As discussed above, in June and July 2005, FVG initiated arbitration proceedings against FEGUA for its breaches of the Usufruct Contracts. Subsequent to the arbitration filings, RDC and FVG made consistent efforts to resolve their disputes with FEGUA through outreach, consultation and negotiation with the Government of Guatemala. After numerous unsuccessful attempts to reach an understanding with FEGUA, a meeting was scheduled and took place with President Berger on March 7,

2006. Among the attendees at the meeting on FVG's behalf were Henry Posner, Bill Duggan, and Frederico Melville and Mario Montano, Directors of Cementos Progreso (which Guatemalan company is a minority investor in FVG).

33. At the March 7 meeting President Berger instructed that a new high level railroad commission be established, purportedly to work with RDC and FVG on Governmental support of FVG's railroad operations and to address the issues of public, private and commercial squatters, as well as theft and vandalism, all of which were hindering railroad operations.

34. The new railroad commission was established and a number of meetings took place from March to June 2006. I served as FVG's principal representative on the commission. However, while Government representatives attended the meetings, the Government never made a substantive proposal or offered a plan for compliance with the Usufruct Contracts or resolving FVG's claims. Within approximately three months of its establishment, the Government suspended the commission meetings, despite multiple requests by FVG to continue negotiations. No commission meetings were convened after the Government issued the Lesivo Resolution.

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

36. On August 11, 2006, Henry Posner reported to me that he had 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 Usufruct "*lesivo*" or "injurious to the interests of the State." Mr. Melville reportedly added that this action seemed to be "the doing of Mr. Campollo," and a step toward revoking the concession. FVG's counsel, Juan Pablo Carrasco, also reported that he had a separate conversation with Mario Montano on the same day which echoed Mr. Melville's report.

37. These identical reports proved to be accurate because, in fact, on August 11, 2006, President Berger, signed the Lesivo Resolution, which declared the usufruct of the rolling stock (the railroad cars and engines) under Deeds 143/158 to cause "*lesion*," *i.e.*, the agreements were "INJURIOUS to the interests of the State of Guatemala."

38. By the week of August 21, 2006, FVG was told by the Government that, unless changes to the Usufruct Contracts that were satisfactory to the Government could be agreed upon before the end of the week, the declaration of *lesivo* would be made

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

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

40. As agreed, the FVG - FEGUA meeting reconvened with the same participants on August 24, 2006. There, FEGUA presented FVG with a "settlement offer" in which FVG would have had to agree to significantly modify the economic terms of the Usufruct Contracts, drop its local breach of contract arbitrations against FEGUA, and release undeveloped railway segments (*i.e.*, the South Coast route) to other interested investors (as Mr. Campollo had been pressing for almost two years). A true and correct copy of the Government's "settlement offer" is attached hereto as **Exhibit C-44**. FVG's attorneys delivered a legal opinion to the Government which specifically noted the adverse commercial side effects of any *lesivo* declaration, particularly the obstruction of current dealings with potential investors in the various real estate projects then being negotiated.

41. Later that evening of August 24, Mario Fuentes, the assistant to the Mega-Projects Commissioner who had been chairing the negotiations between FVG and FEGUA, reported to me of a meeting that had just taken place between him and Jorge Arroyave Reyes, the President's General Secretary. At the meeting, Mr. Arroyave Reyes informed Mr. Fuentes that "if no agreement is reached on the above terms [a commitment to agree to the "settlement offer"], we [the Government] already have a strategy designed to undermine and terminate the other two [Usufruct] contracts as well because, as the government, we have the power to do so." According to Mr. Fuentes, the Government's apparent strategy was that, by declaring the Usufruct Contract for Railway Equipment to

be *lesivo*, FVG would be forced to default on the "providing service" obligations of the primary Right of Way Usufruct Contract, Deed 402.

42. FVG refused the Government's unreasonable and bad faith "take it or leave it offer" and the Lesivo Resolution was made official the next day, on August 25, 2006, by publication in the Guatemala Official Gazette.

43. Less than two weeks later, on September 5, 2006, Hector Pinto, on behalf of Mr. Campollo, wrote Emmanuel Seidner Aguado, an official working for Mickey Fernandez, the Minister of Competitiveness (with a blind copy to me), informing him that railway service between Puerto Quetzal to Ciudad del Sur in Santa Lucia would be restored shortly for the purposes of transporting sugar from Mr. Campollo's mill to the Port. A true and correct copy of Mr. Pinto's September 5, 2006 email, on which I was blind copied, is attached hereto as **Exhibit C-45**.

44. On December 29, 2006, Inngmar Iten, a successful Guatemalan recycling businessman, reported to me that, in May 2006, he had met with Hector Pinto. At this meeting, Mr. Pinto said to Mr. Iten that it was not going to be long, probably within the current year (2006) before the Government of Guatemala would "take the railway away from Ferrovias [FVG]," and that the railway assets would be awarded to a business consortium managed by Mr. Pinto on behalf of Ramon Campollo. Mr. Pinto said that any future purchase of scrap metals derived from railway assets or equipment by Mr. Iten would therefore have to be negotiated with Mr. Pinto.

F. The Lesivo Resolution Destroyed FVG's Business and RDC's Investment

45. The immediate effect of the Lesivo Resolution was to financially and commercially destroy FVG's business and RDC's investment in the Usufruct by causing a critical number of FVG's current and prospective customers, suppliers and lenders to refuse to continue to do business or contemplate doing any additional business with FVG.

46. As a result of the Lesivo Resolution, FVG suffered an immediate and permanent loss of customers for transport of goods. This loss was reflected in the immediate, dramatic decline in use of the railroad for freight transportation. After six years of steady traffic increases, for the first time in FVG's operational history, a precipitous reduction of the yearly tonnage was experienced from 125,466 tons in year 2005 to only 92,566 tons in 2006. Local companies refused to enter into agreements for future carriage by the railroad, and FVG met stiff resistance from existing customers who refused to contract exclusively with FVG or for any term longer than meeting immediate needs. Many of FVG's regular customers switched their business to truck transportation providers.

47. The Lesivo Resolution also caused FVG's principal suppliers to significantly reduce or withdraw their credit terms and/or services to FVG and prevented FVG from securing new credit lines with either financial institutions in country or new suppliers of essential goods and services. Local Guatemalan banks and suppliers that had

heretofore lent money or provided credit to FVG or expressed willingness to lend money now considered FVG non-credit-worthy, based not on FVG's performance or credit history, but due to the rightfully-perceived imminence of its demise as a result of the Government's declaration of *lesivo*.

48. As discussed above, prior to the Lesivo Resolution, FVG had been engaged in leasing of real estate within the right of way and station yards, such activities being expressly contemplated and allowed under the Usufruct and essential to FVG's overall business plan in order to subsidize rail operations. During this time FVG was also engaged in active discussions and negotiations with parties who had expressed interest in leasing or partnering with FVG to develop the right of way, rail stations and yards and other large parcels of land controlled by FVG for commercial use. However, after the Lesivo Resolution, these potential customers, joint venture partners and investors immediately backed away from such negotiations and discussions. As just a few examples, the Lesivo Resolution caused the power supplier Gesur to back out of its preliminary agreement to add 32 km to its existing easement contract which would have averaged $3,200 per km over the term of the agreement. It also caused a large supermarket chain, Grupo Unisuper, to back out of a potential investment that would have converted most of the large station yards into commercial centers that would have included supermarkets. The Lesivo Resolution also caused potential joint venture partners to back out of a project to rebuild and reopen the South Coast corridor.

49. FVG's operating difficulties also increased dramatically after the Lesvio Resolution. These difficulties included an overwhelming increase in squatters of all types, ranging from families to private companies as well as judicial interference with and police indifference to and neglect of acts of theft and vandalism to FVG's property. The public perception became that, because FVG had been declared "harmful to the interests to the State" and was unavoidably heading toward bankruptcy or dissolution in a face-off with the Government, there was no reason for the police or local law enforcement authorities to respect or protect FVG's property rights.

50. Since the Lesivo Resolution, whenever a theft, act of vandalism or squatter invasion on its property was discovered by FVG, it has sent a written, documented report to the Public Ministry. From July 2007 to present, more than a hundred reports have been submitted. FEGUA has also been served with copies of these reports. Attached hereto as **Exhibits C-46** and **C-47** is a compilation of true and correct copies of FVG reports submitted to the Public Ministry and FVG correspondence with FEGUA regarding the same, respectively. The Government and the law enforcement authorities consistently ignored FVG's reports. Indeed, FVG is not aware of a single documented arrest or prosecution that has occurred in response to any report submitted after the Lesivo Resolution.

51. In some instances, these criminal activities against FVG's property rights were done by, or in collaboration with, the local authorities. One prime example occurred in 2007, when the Guatemalan army took over the Palin station in Escuintla and proceeded to rename it the "4th Squadron," where it remains to this day. Attached hereto

as **Exhibit C-48** are true and correct copies of photographs taken of the Palin station in August 2008 showing the army's takeover.

52. Another egregious incident took place in 2008, when the Municipality of Puerto Barrios paved over the railroad tracks in the town center and permanently converted the right of way into a public street and "green spaces," thereby directly expropriating the right of way from FVG. When FVG protested these actions to the Mayor of Puerto Barrios, he told FVG that he did not care about the Municipality's lack of authorization for its actions and challenged FVG to file a claim in the local courts. FVG did file a claim in April 2008, but the court has taken no action since then except to excuse the Mayor from responsibility for the Municipality's actions. Attached hereto as **Exhibit C-49(a)** is a true and correct copy of FVG's filed claim and as **Exhibit C-49(b)** are true and correct copies of "before and after" photographs taken of the right of way at Puerto Barrios in September 2007 (before) and in August 2008 and February 2009 (after), respectively.

53. Another example of a local municipality taking unilateral action against FVG's Usufruct property rights because of the Lesivo Resolution occurred in January 2009, when the Council of the Municipality of San Antonio La Paz authorized its Mayor to carry on with the installation of a drinking water pipeline alongside the railway without FVG's permission or authorization "due to the fact that [FVG] is not able to grant authorization" as a result of the Lesivo Resolution. Attached as **Exhibit C-50** are true and correct copies of the San Antonio La Paz Council's resolution dated January 9, 2009 and the Mayor's February 27, 2009 letter to FVG informing FVG of the same.

54. After the Lesivo Resolution, law enforcement authorities also intervened against FVG in legal actions brought by FVG to enforce and protect its property rights. For example, in 2003, FVG instituted a criminal invasion law suit against Empresa Electrica (EEGSA) – the electricity distribution company in which Ramon Campollo holds a large investment stake – for maintaining illegal electric utility poles along various sectors of the right of way, in violation of FVG's rights under Deed 402. In 2008, however, just as the court was about to rule on the merits of the suit, the District Attorney filed a motion on EEGSA's behalf claiming that, because of the Lesivo Resolution, FVG had no enforceable contract rights and, therefore, no legal standing to make a claim against EEGSA or, for that matter, any one else for trespassing on the right of way. A true and correct copy of the District Attorney's motion is attached hereto as **Exhibit C-51**.

55. Another direct result of the Lesivo Resolution was that even common legal issues now resulted in Guatemalan judges issuing injunctions and other precautionary measures against FVG based on an expectation that FVG was going to declare bankruptcy, be dissolved or face a Government-imposed shut down and transfer of its assets. For example, less than one month after the Lesivo Resolution, in September 2006, FVG was sued by an adjacent landowner, Carlos Waldemar Aguilar, claiming invasion to his property on a river bank where dredging work had been carried out by FVG to protect the Carrizo railroad bridge. The landowner petitioned the court to attach FVG's bank accounts, arguing that the Lesivo Resolution meant that FVG could no

longer continue to operate the railroad system and railway equipment and that this could eventually cause the company to cease operations and become insolvent. The judge, *ex parte*, issued a preliminary injunction against FVG without providing so much as an opportunity for FVG to be heard. The injunction provided for, among other measures, attachment of FVG's bank accounts and an order precluding FVG's General Manager (*i.e.*, me) from traveling outside Guatemala. True and correct copies of the landowner's petition and the court's injunction are attached hereto as **Exhibit C-52**.

56. The Lesivo Resolution also had a devastating impact on the morale and performance of FVG's workforce. Workers became concerned that their jobs were in jeopardy and started looking for employment elsewhere.

57. By mid-2007, the traffic decreases and financial and operational difficulties had reached such a point that FVG had no choice but to shut down railroad operations in September 2007. Since this time, FVG has continued to monitor, document and report incidents of theft, vandalism and squatters on the right of way. In an effort to partially mitigate its damages, FVG also continues to receive rental payments from the utilities that entered into right of way easement contracts prior to the Lesivo Declaration.

FURTHER THIS AFFIANT SAITH NOT.

Republic of Guatemala
City and Department of Guatemala) ss
Embassy of the United States
of America

Jorge Senn

Sworn to and subscribed before me this
23 day of June, 2009

Notary Public
María C. Alvarado
Vice Consul of the United States