

**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**

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**RESPONDENT'S OBSERVATIONS ON CLAIMANT'S REQUEST FOR  
SUPPLEMENTATION AND RECTIFICATION OF THE AWARD**

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## I. INTRODUCTION

1. After almost five years of proceedings, extensive pleadings, an eight-day hearing on the merits and the issuance of an award that enables the parties to put an end to their dispute, Guatemala and the Tribunal now receive an “unpleasant surprise”<sup>1</sup> in the form of Claimant’s Request for Supplementation and Rectification of Award (“Request”) pursuant to Article 49(2) of the Convention on Settlement of Investment Disputes between States and Nationals of Other States (the “Convention”).
2. Guatemala hereby presents its observations on Claimant’s Request. Claimant attempts to demonstrate that the Tribunal failed to address a question presented by Claimant and made certain errors in quantifying and calculating compensation in the Award. For the reasons set forth, below this Request is without merit and should be dismissed in its entirety with a cost award in favor of Respondents.
3. The ICSID supplementation and rectification procedure exists to address *inadvertent omissions* and *minor technical errors* in awards, respectively.<sup>2</sup> These remedies are not designed to allow the parties to reopen arbitrations that do not go their way, nor are they intended to permit the parties to rehash arguments that were addressed and decided by the Tribunal.<sup>3</sup>
4. Disappointed by the Tribunal’s rejection of their initial request for more than US\$ 64 million in damages, Claimant now seeks to reopen a substantive debate on issues already decided by the Tribunal, and even to submit new material and advance new theories not previously advanced by it. As will be shown, Claimant misapplies the legal standard and misconstrues the scope of the procedure it invokes. This reconstituted Tribunal should not be beguiled by Claimant’s selective quotations and misleading interpretation of article 49(2) of the Convention,

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<sup>1</sup> Claimant’s own authority characterizes these type of post-award proceedings as such. *See* **CL-190**, Maria Hauser-Morel & Jan Heiner Nedden, Correction and Interpretation of Arbitral Awards and Additional Awards, POST AWARD ISSUES: ASA SPECIAL SERIES NO. 38. 19, 25 (Pierre Tercier ed., 2011), p.1.

<sup>2</sup> **CL-27**, Christoph H. Schreuer, *The ICSID Convention: A Commentary* 849 ¶28 (2d ed. 2009).

<sup>3</sup> **CL-189**, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Claimant’s Request for Supplementary Decision (8 July 2008), ¶ 16; **RL-199**, *Compania Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Supplementation and Rectification of Annulment Decision (28 May 2003), ¶¶ 11,19.

into abusing the extraordinary remedy provided. In this case, it cannot be said that the Tribunal omitted to address any of Claimant's arguments on damages, nor that the Tribunal has made the type of errors set forth in Article 49(2) of the Convention. The Request should therefore be denied with an award of costs for Respondent.

## **II. CLAIMANT'S REQUEST FOR SUPPLEMENTATION AND RECTIFICATION EXCEEDS THE LIMITS OF ARTICLE 49(2) OF THE CONVENTION**

5. In its Request, Claimant alleges that the Tribunal failed to address a claim presented by the Claimant and made certain errors in quantifying and calculating the compensation awarded to Claimant. According to the Request, the Tribunal should have added to RDC's investment of \$6,576,861 an additional amount representing a reasonable rate of return on that investment from the dates of investment up to the date of Respondent's breach.<sup>4</sup> Claimant also requests the rectification of what it considers two arithmetical errors in the Award. First, Claimant contends that the Tribunal miscalculated the NPV of FVG's existing real estate leases. Second, Claimant asserts that the Tribunal erred in not discounting future rent payments when calculating mitigation of damages.<sup>5</sup> In assessing the Request, the Tribunal should bear in mind the source of its authority to act.

### **A. Claimant's Request Does Not Qualify Under Article 49(2) of the Convention**

6. Article 49(2), of the Convention establishes grounds for a request for supplementation and rectification of an award:

(2) 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. ...

7. The specific requirements for supplementation and rectification request are further delineated in ICSID Arbitration Rule 49, which provides in relevant part as follows:

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<sup>4</sup> Claimant's Request ¶¶ 5, 8.

<sup>5</sup> Claimant's Request ¶ 6.

(1) Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award ... The request shall:

(c) state in detail:

- (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
- (ii) any error in the award which the requesting party seeks to have rectified; and ...

8. As noted by Professor Schreuer in his Commentary on the Convention, “Article 49(2) provides a remedy for *inadvertent omissions* and *minor technical errors* in the award.”<sup>6</sup> Article 49(2) is not designed to afford a substantive review or reconsideration of the decision, nor to permit the parties to reargue questions already addressed and resolved by the Tribunal.

9. ICSID Tribunals—including among others, the *LG&E v. Argentina* Tribunal cited in Claimant’s own Request—have noted that “the supplementation process is not a mechanism by which parties can continue proceeding on the merits or seek a remedy that calls into question the validity of the Tribunal’s decision.”<sup>7</sup> The *Vivendi v. Argentina* Committee likewise reasoned that:

any supplementary decision or rectification as may result, in no way consists of a means of appealing or otherwise revising the merits of the decision subject to supplementation or rectification. Those sorts of proceedings are simply not provided for in the ICSID system.<sup>8</sup>

10. Professor Schreuer endorsed this approach when commenting on Argentina’s request for supplementation in the Vivendi’s annulment, saying “[t]he Committee rejected the application

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<sup>6</sup> CL-27, Christoph H. Schreuer, *The ICSID Convention: A Commentary* 849 ¶ 28 (2d ed. 2009).

<sup>7</sup> CL-189, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Claimant’s Request for Supplementary Decision (8 July 2008), ¶ 16.

<sup>8</sup> RL-199, *Compania Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Supplementation and Rectification of Annulment Decision (28 May 2003), ¶ 11.

for a supplementary decision because the Committee had already addressed and decided the matters in its Decision on Annulment. Article 49(2) [does] not permit a tribunal or committee to revisit the merits of their decisions.”<sup>9</sup>

**B. The Tribunal Has Already Addressed the Matter on Which Claimant Seeks Supplementation**

11. In its request for supplementation, Claimant argues that the Tribunal omitted “a key component” in the calculation of the compensation awarded to the Claimant.<sup>10</sup> According to the Request, the Tribunal failed to address whether the Claimant was entitled to recover a reasonable rate of return on its sunk investment costs, even though this claim was “specifically presented” by Claimant to the Tribunal during the arbitration,<sup>11</sup> and was “discussed extensively” by the parties’ damages experts.<sup>12</sup> Claimant further states that “[a]ddressing this claim now is necessary if the Tribunal is to achieve its stated intent ‘to compensate [Claimant] fully for the injury suffered.’”<sup>13</sup>

12. A threshold issue under Article 49(2) of the Convention and Arbitration Rule 49(1) concerns what is a “question” which the Tribunal omitted to decide in the award. Convention article 48(3) also uses the term “question” and requires that, “The Award shall deal with every question submitted to the Tribunal.” 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.<sup>14</sup> “It may appear superfluous to address an argument directly, since it is logically ruled out or made irrelevant by something the Tribunal has

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<sup>9</sup> CL-27, Christoph H. Schreuer, *The ICSID Convention: A Commentary* 863 ¶ 76 (2d ed. 2009), citing to RL-199, *Compania Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Supplementation and Rectification of Annulment Decision (28 May 2003), ¶ 19.

<sup>10</sup> Claimant’s Request ¶ 8.

<sup>11</sup> Claimant’s Request ¶ 9.

<sup>12</sup> Claimant’s Request ¶ 9.

<sup>13</sup> Claimant’s Request ¶ 5, citing Award ¶ 267.

<sup>14</sup> CL-27, Christoph H. Schreuer, *The ICSID Convention: A Commentary* 816-818 ¶ 44-53 (2d ed. 2009).

found.”<sup>15</sup> In the decision on a request for supplementation and rectification in *Genin v. Estonia*, for example, the Tribunal stated that:

“[it] did not consider it necessary to address in its Award, specifically and in detail, the three provisions of the BIT identified in Claimant’s Request. However, it is important to state that the Award itself reveals that the issues now raised by Claimants [were] in fact dealt with, implicitly if not explicitly, in both the reasoning and the conclusions set out in the Award.”<sup>16</sup>

13. Similarly, the *Vivendi v. Argentina* Tribunal found that it was not necessary to address certain issues in order to make its decision.<sup>17</sup>

14. The circumstances here are analogous, insofar as the Tribunal did not consider it necessary expressly to articulate its evaluation of each component of every theory of damages, expert analysis or evidence presented by the parties. 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. The Tribunal addressed all three<sup>18</sup> and tellingly observed that “the diverging results in the calculation of damages performed by the parties’ experts show the malleability and uncertainty of such calculations.”<sup>19</sup>

15. The Tribunal transparently set forth its approach to damages involving full reparation for “a measure which has an injurious effect, falling short of expropriation on assets which continue in possession of the Claimants.”<sup>20</sup> The Tribunal started with the Claimant’s total accumulated investment and deducted its share of the accumulated losses, obtaining a value of US\$6,576,861. Contrary to what Claimant suggests, there is no mention in the award that the Tribunal adopted

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<sup>15</sup> Schreuer 1020, ¶ 427.

<sup>16</sup> **RL-200**, *Alex Genin Eastern Credit Limited, Inc. and A.S Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Decision on Claimants’ Request For Supplementary Decisions and Rectification ¶ 14 (4 April, 2002).

<sup>17</sup> **RL-199**, *Compania Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Supplementation and Rectification of Annulment Decision (28 May 2003), ¶ 15.

<sup>18</sup> The dispositive section of the Award contains the so called “catch-all” phrase, dismissing “all other Claimant’s claims.” Award ¶ 283 (8).

<sup>19</sup> Award ¶ 268.

<sup>20</sup> Award ¶ 260.

the Net Capital Contribution (“NCC”) approach advanced by Claimant during the proceeding. Accordingly the Tribunal cannot now be criticized for compensating Claimant for its sunk investment costs, without grossing up its value.<sup>21</sup>

16. After concluding that Claimant’s investment had not been expropriated, the Tribunal addressed the issue of assessment of damages *directly*, finding that

\$19,025,321 represents the total amount invested in FVG by Claimant and local shareholders, of which \$15,108,861 (79%) were contributed by Claimant. A portion of these funds claimed as investment, viz \$10.8 million, was invested by FVG’s shareholders to cover the losses of FVG (Counter-Memorial, para. 615, First Report of Dr. Spiller, Respondent’s expert, para. 82 and Exhibit C-27); of this, \$8,532,000 corresponds to the 79% contributed by Claimant. The Tribunal considers that 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.<sup>22</sup>

17. The Tribunal also found that part of the funds invested by FVG’s shareholders were used to restore the railway equipment necessary to bring trains back into service. This approach had the “additional merit of arguably representing benefits which may be considered to accrue to Respondent on payment of the amount awarded to Claimant.”<sup>23</sup> Based on these findings the Tribunal awarded Claimant \$6,576,861 (\$15,108,861 minus \$8,532,000) to compensate it fully for the injury suffered under the minimum standard of treatment under CAFTA.<sup>24</sup> The wording of the Tribunal’s award is unambiguous.

18. If the Tribunal had wanted to compensate Claimant for sunk investments it would have granted Claimant the full US\$15,108,861 invested plus a theoretical return from the date of investment onwards. That, as suggested by Claimant’s authority cited in paragraph 11 of its Request, would have sought to “place the investor back in the same position as if the lost

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<sup>21</sup> Claimant’s Request ¶¶ 8-11.

<sup>22</sup> Award ¶ 270.

<sup>23</sup> Award ¶ 269.

<sup>24</sup> Award ¶¶ 267-270.

investment had never been made.”<sup>25</sup> That is not the case here. As Claimant itself contends, the Tribunal is seeking to “place Claimant in the same position it would have been absent Respondent’s breach.”<sup>26</sup>

19. The losses incurred by Claimant between 2000 and 2006 were not a result of Guatemala’s alleged breach. The Award recognized that the losses were not related to the *Lesivo*, when it specifically determined that “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.”<sup>27</sup> These losses represent the actually observed “rate of return” of Claimant’s investments, as the Tribunal sees it. There is no need to look for a theoretical rate, as the actual rate—which provided a negative return, *i.e.*, losses—was not a result of the *Lesivo*. In the Tribunal’s view, Claimant invested approximately \$15.1 million between 1998 and 2006, and lost approximately US\$ 8.5 million. The US\$ 6.6 million the Tribunal computed already represents the value of the investments as of December 2006.

20. Claimant is attempting to resurrect in the present proceeding the argument that the NCC approach requiring updating historical investments by a theoretical rate of return was appropriate in this case. A closer look at the Award reveals that the parties’ arguments on this point were set forth in paragraphs 241 and 246 of the Award. The Tribunal provided a thundering answer on this complex of issues: It assessed the effect the breach of CAFTA had on Claimant’s investment as part of its damages assessment,<sup>28</sup> saying that operating losses incurred were not attributable to Guatemala.<sup>29</sup> Implicitly, therefore, the Tribunal was ruling that no updating of Claimant’s investment was required.

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<sup>25</sup> Claimant’s Request ¶ 11, citing M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods, and Expert Evidence*, p. 56 (2008)

<sup>26</sup> Claimant’s Request ¶ 8.

<sup>27</sup> Award ¶ 270.

<sup>28</sup> Award ¶ 236.

<sup>29</sup> Award ¶ 269.



21. Contrary to Claimant’s approach, Guatemala will not rehearse here its NCC arguments. However, it is important to note that Claimant conveniently left out the following text when citing to Guatemala’s damages expert’s academic article about the NCC method:

One of the characteristics of this method is that it computes a “theoretical” return on equity contributions that in general should not differ substantially from the “actual” historic return. However, there are circumstances in which there might be a gap between the two. Deviations can occur when management outperforms or underperforms investors’ expected returns. It can also occur as a result of business conditions that do not turn out as expected.<sup>30</sup>

22. Conveniently, Claimant neglects to mention this text in its Request, probably because it reflects exactly what happened with Claimant’s investment, namely FVG was a failed investment regardless of the *Lesivo*. Disappointed by the Tribunal’s decision, Claimant now accuses the Tribunal of failing to respond to its request for a return on sunk costs. However, as stated above, the Tribunal had no obligation to respond *explicitly* to every single question presented by the parties. Also, as Professor Schreuer explains, although the “normal way to deal with a question . . . would be to address it directly . . . [in] some situations it may appear superfluous to address an argument directly . . . .”<sup>31</sup>

23. In fact, the Tribunal paid close attention to the Claimant’s submissions. At closing argument, Claimant showed a slide expressing its Proof of Lost Investment<sup>32</sup> of \$63,778,212 consisting of four boxes:

- Investment of \$19,025,323 Brought to Accumulated Value  
EOY 2006 - \$42,943,553
- Reasonable Expectation of Future Profits, Reduced by  
Amortization of Lost Investment - \$22,188,540

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<sup>30</sup> **LECG-07**, M. Abdala & P. Spiller, *Damage Valuation of Indirect Expropriation in Public Services*, p.11 Am. Rev. Int’l Arb. 457-58 (2003). Respondent’s damages expert, Dr. Spiller, also explained very clearly in both his reports why the NCC was not an appropriate method in this case (First Expert Report of P. Spiller, ¶ 76; Second Expert Report of P. Spiller ¶ 30). Furthermore, it is not the method applied by the Tribunal.

<sup>31</sup> **CL-27**, Christoph H. Schreuer, *The ICSID Convention: A Commentary* 1020, ¶ 427 (2d ed. 2009)

<sup>32</sup> **RL-201**, Claimant’s closing argument slide 93. *See also RL-202*, Claimant’s closing argument slide 123 with identical numbers but changing the heading to “Damages Option 1: Sunk Costs plus Lost Profits Minus Amortization.

- Business Termination and Wind Down Costs - \$1,350,429
- Mitigation by Lease Income - \$2,704,310

24. What did the Tribunal do in the Award? It started with the \$19,025,323 of investment; found that 79% or \$15,108,861 were contributed by Claimant; found that \$10.8 million had been invested to cover losses, of which 79% or \$8,532,000 corresponded to Claimant's investment; subtracted that amount because the losses covered represented the risks Claimant took when investing in Guatemala and could not be attributed to any action of Guatemala contrary to CAFTA.<sup>33</sup> The Tribunal made no further adjustment to reflect what Claimant calls a "reasonable rate of return" on the investment from the date of investment up to the date of Respondent's breach. But in the view of the Tribunal none was required for full reparations. 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 Guatemala's submissions on FVG's losses and Professor Spiller's view that updating of an investment value using a theoretical rate of return is inappropriate when a business has been in operation for a considerable time following the investment and there is an observable track record.<sup>34</sup> 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.

25. The foregoing position is buttressed by the Tribunal's treatment of the second box in Claimant's slide -- "Reasonable expectation of future profits reduced by amortization of lost investment." The Tribunal "agree[d] with Respondent" and found "given the past performance of FVG, the claim of lost profits is speculative."<sup>35</sup> With this simple, direct sentence the Tribunal ruled out lost profits on the railroad operations. Further, since the only component of "lost profits" granted by the Tribunal was the NPV of existing real estate leases,<sup>36</sup> there was no need

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<sup>33</sup> Award ¶ 270.

<sup>34</sup> Second Report of P. Spiller; LECG-07, M. Abdala & P. Spiller, *Damage Valuation of Indirect Expropriation in Public Services*, p.11 Am. Rev. Int'l Arb. 457-58 (2003).

<sup>35</sup> Award ¶ 269.

<sup>36</sup> Award ¶ 275.

to amortize Claimant's lost investment to avoid double counting as mentioned in Claimant's second box.

**C. The Claimant Inappropriately Requests  
Supplementation Based on New Material**

26. Instead of demonstrating that the Tribunal has failed to deal with a question submitted to it, Claimant devotes five pages of its Request to rehearsing its theories on damages in hopes of convincing the Tribunal why it should have awarded Claimant a higher compensation. In doing so, Claimant presents new evidence and proposes three distinct methodologies resulting in additional damages of \$14,199,805, \$5,894,578 or \$3,086,856.<sup>37</sup> In essence, Claimant is asking the Tribunal to revise its reasoning and increase the damages awarded. This is not, however, the process that Article 49(2) allows.

27. Claimant presents an Excel spreadsheet file which, according to Claimant, "sets forth calculations of the escalated value of Claimant's awarded sunk investment costs to the date of *Lesivo* using a range of proposed rates of return."<sup>38</sup> In these Excel spreadsheets, it can be seen how Claimant tries to force an NCC method. Claimant completely ignores the Tribunal's decision (*i.e.*, take the US\$15.1 million figure invested and deduct US\$8.5 million figure of accumulated losses). Instead, Claimants took the investments made in 1998, 1999 and 2000 only (a total of US\$7.5 million), made an *ad hoc* deduction of \$0.9 million, just to make it equal to the Tribunal's figure (US\$6.6 million), and then brought those US\$6.6 million forward from 1998-2000 to August 2006 at several interest rates,<sup>39</sup> at least one of which (LIBOR plus 2%) Claimant never proposed in the arbitral proceeding.

28. In other words, it seems that Claimant tries to establish that the US\$6.6 million figure the Tribunal found is equal to the investments made in 1998-2000 (through an *ad-hoc* adjustment) so it can update this figure to 2006.<sup>40</sup> However, that is not what the Tribunal decided in its Award

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<sup>37</sup> Claimant's Request ¶ 16.

<sup>38</sup> Claimant's Request ¶ 16.

<sup>39</sup> Claimant's Request, Annex 1.

<sup>40</sup> This arbitrary adjustment made by Claimant is detailed in Claimant's Request, Annex 1 (EAST\_57980854\_1.xls", tab "17.36% Version", cell E10, tab "9.34% Version", cell E10 and tab "LIBOR

Footnote continued on next page

and therefore there should not be any “rate of return” granted on the US\$ 6.6 MM figure computed by the Tribunal. Claimant is clearly trying to induce the Tribunal to revise its reasoning on damages. This is not the remedy offered by Art.49(2). Further, were the Tribunal to do so, it would manifestly exceed its powers because it would be ruling on matters not pleaded by the parties and material not in the record before it closed.

**D. The Tribunal Should Not Supplement Based on an Appeal to Its Discretion**

29. Guatemala agrees with Claimant that supplementation of an ICSID award is a discretionary remedy.<sup>41</sup> However, it disagrees on Claimant’s proposed application of Article 49(2). Arbitral tribunals have authority and discretion to interpret the evidence submitted by the parties—including their damages experts’ methodologies—in a manner that diverges from Claimants’ preferred interpretation. 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. In this case, none of Claimant’s arguments justifies a supplemental decision under Art. 49(2). Even if Claimant 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.

**E. Claimant’s Request for Rectification Exceeds the Scope of Article 49(2)**

30. Claimant identifies two purported arithmetical errors in the Award ostensibly requiring a rectification of the Award under Article 49(2). They relate to the award of 82% of the NPV of FVG’s existing real estate leases measured over their remaining life as of the date of *Lesivo*, less 82% of the actual rents received by FVG from the date of *Lesivo* until payment of the Award. First, Claimant alleges that the Tribunal miscalculated the NPV of FVG’s existing real estate

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Footnote continued from previous page

Version”, cell F10. The total investment for 1998 - 2000 in cells E7-E9 is \$7,522,246, so Claimant introduces an arbitrary adjustment of \$945,385 to reach the Tribunal’s \$6,576,861 figure (par 270 of the Award) --- Claimant explicitly calls each of these cells “2000 Investment *reduced to agree to Tribunal Award Amount.*”

<sup>41</sup> Claimant’s Request ¶ 4.

leases to be \$4,121,281.62, instead of \$6,818,865, when the Tribunal's 17.36% discount rate is applied. Second, Claimant argues that the Tribunal failed to apply the same 17.36% discount rate it utilized to determine the NPV of FVG's existing real estate leases to the actual rent amounts received by FVG since the date of *Lesivo*.

31. Article 49(2) requires that the error be of a "clerical, arithmetical or similar" nature.<sup>42</sup> Rectification is not the remedy for parties with concerns about an alleged methodological or substantive error, or an error in judgment. Contrary to Claimant's suggestions, the Tribunal itself did not make any clerical, arithmetical or similar error that is susceptible of rectification.

32. In a number of ICSID cases, tribunals have held that the purpose of a rectification does not include reconsideration of the issues already decided.<sup>43</sup> As noted in *Vivendi v. Argentina*

A review of pertinent arbitral awards illustrates that the availability of the rectification remedy afforded by Article 49(2) depends upon the existence of two factual conditions. First, a clerical, arithmetical or similar error in an award or decision must be found to exist. Second, the requested rectification must concern an aspect of the impugned award or decision that is purely accessory to its merits. Simply stated (...) Article 49(2) does not permit the "rectification" of substantive findings made by a tribunal or committee or of the weight or credence accorded by the tribunal or committee to the claims, arguments and evidence presented by the parties. The sole purpose of a rectification is to correct clerical, arithmetical or similar errors, not to reconsider the merits of issues already decided.<sup>44</sup>

33. Claimant's requests for rectification are not concerned with clerical, arithmetical or similar errors as required by Article 49(2). For instance, Claimant argues that the Tribunal's

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<sup>42</sup> ICSID Convention, Art. 49(2).

<sup>43</sup> **RL-199**, *Compania Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Supplementation and Rectification of Annulment Decision (28 May 2003), ¶ 19; **RL-200**, *Alex Genin Eastern Credit Limited, Inc. and A.S Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Decision on Claimants' Request For Supplementary Decisions and Rectification ¶ 16 (4 April, 2002).

<sup>44</sup> **RL-199**, *Compania Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Supplementation and Rectification of Annulment Decision (28 May 2003), ¶ 25, citing *AMCO v. Indonesia*, at 638, *Emilio Agustín Maffezini v. Kingdom of Spain*, Rectification of the Award of January 31, 2001, ICSID Rev., vol. 16, 2001, at 279, and *CDSE v. Republic of Costa Rica*, Decision of June 8, 2000, ICSID Rev., vol. 15, 2000, at 169.

NPV calculation is erroneous,<sup>45</sup> and asks the Tribunal to use Claimant damages expert's model to obtain its desired result.<sup>46</sup> This plainly cannot meet the rectification standard under Art. 49(2).

**1. Calculating the NPV of FVG's Existing Real Estate Leases Involves More Than the Discount Rate**

34. In its effort to persuade the Tribunal to rectify its NPV calculation with respect to future real estate rents, Claimant would have the Tribunal believe that because changing one number in one cell of an Excel file produces an intermediate result that is different from the final figure determined by the Tribunal, it then follows that the Tribunal's figure is erroneous. This argument is rather disingenuous because the cells mentioned by Claimant in the Excel file ("Real Estate" spreadsheet, columns C to G and I) are inputs to other sections of the damages model designed by Claimant's expert Louis Thompson, which the Claimants invited the Tribunal to use. In that model, the real estate and right of way revenues appear in the "FVG Operations" sheet (line 22). Those revenues, however, are then subject to adjustment for costs associated with the revenue, such as the 10% "other economic activities" fee, income tax and a portion of administrative expenses (*see, e.g.*, line 28, 41-46). Claimant invited the Tribunal to use the model.<sup>47</sup> Claimant can hardly complain now that the Tribunal made an erroneous calculation. A reasonable estimate of such costs 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. Further discussion on the point also quickly runs afoul of the notion that awards are final and the purpose of rectification proceedings is not to produce new evidence or new models of damages.

**2. Claimant Plead Mitigation Without Any Discounting**

35. Claimant also claims that the Tribunal erred by not discounting the actual rents received by FVG since the *Lesivo*.<sup>48</sup> Claimant's argument appears to be based on the premise that this

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<sup>45</sup> Claimant's Request ¶¶ 17-18

<sup>46</sup> Claimant's Request ¶ 18.

<sup>47</sup> **RL-206**, Claimant's closing argument, slide 130.

<sup>48</sup> Claimant's Request § III(B).

failure is a “computational error” by the Tribunal.<sup>49</sup> To the contrary, the record demonstrates that the alleged “lack of discounting of rental income received post *Lesivo*” is Claimant’s own failure, not the Tribunal’s. Claimant’s own legal theory was that rents collected post-*Lesivo* constituted “mitigation” of damages “applying to everything,”<sup>50</sup> and not just as an offset in the calculation of lost profits. Mr. Thompson himself, in his second report, did not discount the rental income received between 2007 and 2010.<sup>51</sup> Mr. Thompson simply added the rents collected and deducted the sum from the total damages claimed, which were computed as of December 2006. Counsel for Claimant maintained this position in closing argument.<sup>52</sup> It seems that by not mentioning the “NPV” concept with respect to the deduction for post-*Lesivo* rents received, the Tribunal was in fact following what Claimant’s expert did<sup>53</sup> and what its counsel proposed. In this regard, the words of the Tribunal in *Gennin v. Republic of Estonia* seem apt: “In its Award, the Tribunal addressed all of the questions raised by Claimants with at least as much seriousness and care as did Claimants themselves in their written and oral submissions.”<sup>54</sup>

36. In any event, even if an NPV is applied to the post-*Lesivo* rents, the NPV that Claimant now puts forward (US\$ 2,146,502) is not correct.<sup>55</sup> Significantly, the very fact that arguments about these new calculations exist should put an end to any rectification request. As the Tribunal in *LG&E Energy Corp. v. Republic of Argentina* stated, “Claimants misconceive the function of

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<sup>49</sup> Claimant’s Request ¶ 22

<sup>50</sup> Tr. 2149-2150.

<sup>51</sup> Claimant only provided mitigation information through 2010, so the Tribunal’s statement that “there will need to be a final calculation of this amount” (Award ¶ 277) is entirely understandable. Rather than seeking a rectification, Claimant should provide the data on rents collected and sit with Respondent to sort out the mitigation credit. Prompt discussion will also avoid the Claimant’s “absurd result” scenario.

<sup>52</sup> **RL-201 to RL-206**, Claimant’s closing argument, slides 93,123-126, showing mitigation in box four as an item to be deducted at the end of the damage calculation process. Being consistent, the Claimant also did not discount the “shutdown expenses” which were incurred in 2007, back to December 2006. The Tribunal also accepted Claimant’s figure for this element of damages.

<sup>53</sup> Second Report of L. Thompson, Ex. 1.

<sup>54</sup> **RL-200**, *Alex Genin Eastern Credit Limited, Inc. and A.S Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Decision on Claimants’ Request For Supplementary Decisions and Rectification ¶ 13 (4 April, 2002).

<sup>55</sup> For instance, when computing the \$2,146,502 figure, Claimant is discounting post-*Lesivo* rents up to December 2005, instead of 2006. Correcting this mistake would increase the NPV of the post-*Lesivo* rents to \$2,533,905, using Claimant’s approach. Annex 3 to Claimant’s Request, “Lease Income Received” spreadsheet.

the recourse to a supplementary decision by asserting that it allows Argentina to respond to their new arguments and evidence.”<sup>56</sup>

### III. REQUEST FOR RELIEF

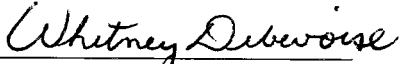
37. For the reasons articulated above, the Republic of Guatemala respectfully requests that the Tribunal:

- (A) deny Claimants’ Request in its entirety; and
- (B) order the Claimants to assume all fees and costs of this Proceeding before the reconstituted Tribunal, including the costs of the Republic’s legal representation and other costs incurred by the Republic in connection with such proceeding.

Respectfully submitted,

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<sup>56</sup> CL-189, *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, ¶ 16 (8 July 2008).