

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

RAILROAD DEVELOPMENT CORPORATION

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB/07/23

SECOND STATEMENT OF JORGE SENN

JORGE SENN SAGASTUME, being duly sworn, deposes and says:

1. My name is Jorge Senn Sagastume. I am of legal age and a citizen of the Republic of Guatemala. I submit this statement based upon my personal knowledge and in response to certain witness statements and documents submitted by the Republic of Guatemala in support of its Memorial on Jurisdiction dated September 24, 2009 in connection with the ICSID arbitration proceeding *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, which has been brought pursuant to the Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA"). I previously submitted a sworn statement dated June 23, 2009 in this matter ("First Senn Statement") and I reaffirm the accuracy and truthfulness of my statements contained therein.

2. I am the General Manager of Compañía Desarrolladora Ferroviaria, S.A., which does business as Ferrovias Guatemala ("FVG"). 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. I have reviewed Guatemala's Memorial on Jurisdiction and all of the witness statements and documents it submitted in support. In reviewing these submissions my interest particularly focused on the sworn statements of Arturo Gramajo, Mario Rodolfo Marroquín Rivera and Susan Pineda Mendoza. These persons have testified to issues, meetings, communications, documents and events relating to the Usufruct Contracts, the national railway, and FVG's relationship and dealings with FEGUA and other Government agencies and officials, all of which I was intimately involved with and actively participated in.

4. In this statement, I will attempt to address what I consider to be several inaccurate and misleading statements and documents contained and referenced in the various witness statements submitted by Guatemala which Guatemala is relying upon to demonstrate that there was somehow an active legal dispute between FVG and Guatemala prior to CAFTA's entry into force on July 1, 2006 regarding the alleged *lesivo* nature of Deeds 143 and 158, the Usufruct Contracts for Railway Equipment. I have not, however, attempted in this statement to address every statement contained in Guatemala's supporting statements and documentation; my failure to address a certain statement or document should not be construed as admitting the accuracy or truthfulness of any such statement or document.

I. Dr. Gramajo's Revisionist View of Discussions With FEGUA in 2004 Regarding the Usufruct Contracts for Use and Enjoyment of the Railway Equipment

5. At paragraphs 11 and 12 of his statement, Dr. Gramajo describes correspondence between me and him in April 2004 regarding a request I made to FEGUA to allow FVG access and use of certain spare parts and workshop warehouse areas

(Exhibit R-7). Dr. Gramajo states that he sent a written response to my request on April 21, 2004, wherein he said FEGUA could not consent to FVG's request and that he attached to his letter an Opinion No. 47-2004 from his Legal Department (Exhibit R-8) which purportedly identified certain "legal defects" with Deed 143 "which affected its validity." A copy of Dr. Gramajo's April 21, 2004 letter is attached hereto as **Exhibit C-53**. (It is instructive that Dr. Gramajo did not provide a copy of this letter to the Tribunal.) Dr. Gramajo asserts that he informed me through this correspondence that one of the "legal defects" of Deed 143 was that the contract had been entered into, without the authorization to do so, by the former FEGUA Overseer. The reality is otherwise. Neither Dr. Gramajo's letter nor Opinion No. 47-2004 make any mention of this alleged "legal defect," nor do either of them question the validity of Deed 143 or assert that this contract is "*lesivo*." All Dr. Gramajo stated in his letter was his conclusion that "IT IS IMPOSSIBLE TO CONSENT TO YOUR REQUEST" with no mention of Deed 143. And the only thing Opinion No. 47-2004 mentions with regard to Deed 143 is that "it provides for the disposition of assets that are the property of the State of Guatemala without any authorization, as if those assets were owned by private legal entities." This statement was unexplained to me then, and remains so today.

6. In paragraph 13, Dr. Gramajo states that, "a while later" after our April 2004 correspondence "conversations began between FEGUA and Ferrovias aimed at correcting the contractual deficiencies." This statement is misleading at best. While it is true that there were some discussions starting in late 2004 between FVG and FEGUA concerning entering into a revised or new rail equipment contract to address various concerns raised by FEGUA, at no point was it suggested during these discussions that Contracts 143 and 158 were so defective as to be invalid for any reason or that they were *lesivo*, *i.e.*, harmful to the interests of the State. And while FVG did not consider Contracts 143 and 158 to be legally defective in any material sense, we were willing to engage in discussions with FEGUA to resolve whatever reasonable issues that they may have had in order to protect our substantial investment. What was always of paramount importance to FVG was that the Government honor its contractual obligations and commitments that it made in awarding the Usufruct to FVG so FVG could successfully rehabilitate and operate the railway.

7. Dr. Gramajo stresses in paragraph 13 and elsewhere throughout his statement that one of the principal concerns he and others at FEGUA had regarding Deed 143 was whether FVG was sufficiently protecting railway equipment that had been deemed "cultural and historical patrimony of the Nation." FVG was specifically obligated in Deed 143 to "respect and abide by the legal dispositions and all those dispositions arising from the Office of Cultural Partimony, related to the assets that are deemed part of the Nation's historical and cultural patrimony by said Institution." The problem with Dr. Gramajo's and FEGUA's alleged concern is that, *at no time prior to the Lesivo Resolution did the Government ever officially declare or designate any of the FEGUA railway equipment or rolling stock to be part of the country's cultural and historical partimony* under the Law for the Protection of the Cultural Heritage of the Nation. Thus, their current argument is concocted entirely without any evidentiary or legal basis. Furthermore, for any asset to be considered cultural and historical patrimony, it must be at least fifty (50) years of age. Of all of the railway equipment that was

granted in usufruct to FVG, only the steam locomotives met this criteria at the time, and two of these had been repaired by FVG and were being operated; others had been delivered, not just at Dr. Gramajo's request and urging, but based on the insistence and with the support of FVG's Chairman, Henry Posner III, for display at Guatemala's Railroad Museum. In fact, as a result of FVG's own preservation efforts, a one-of-a-kind Edwards motor car thought scrapped long ago, was located in the Guatemala City station complex behind piles of scraps and weeds – effectively abandoned by FEGUA for decades – and restored by FVG. Additionally, in August 2003, Guatemala and FVG entered into a Cultural Cooperation Agreement,¹ in which FVG granted FEGUA the right to display several historical locomotives and rail cars that had been restored by FVG at the Guatemala City and Zacapa Railroad Museums.

8. Dr. Gramajo further asserts in paragraph 13 of his statement that FEGUA was also concerned about “the cannibalization of the equipment.” Cannibalization is well understood in the railroad industry as a practice where parts from one piece of railway equipment are removed to be used in a different piece of working equipment. This is a practice in which FEGUA engaged in regularly when it operated the national railway, and it was a necessary practice due to the unavailability of some specialized parts for narrow gauge rolling stock in the market and the age of some of the equipment. There is nothing in Deed 143 (or in its predecessor agreement, Deed 41) that prohibited FVG from removing parts from unused equipment to be used in working equipment just as FEGUA had done prior to granting FVG the Usufruct.

II. Dr. Gramajo's Misrepresentations and Mischaracterizations of Discussions Between FVG and FEGUA in 2005 Relating to Deeds 143 and 158 and his Failure to Disclose his Behind-the Scenes Manuevers to Have These Contracts Declared Lesivo

9. In paragraph 14 of his statement, Dr. Gramajo discusses an Opinion 204-2004 dated December 9, 2004 (Exhibit R-11) issued by FEGUA's Legal Department which states, among other things, that FVG and FEGUA were currently negotiating a new contract for the use of railroad equipment “that will not be *lesivo* to the State of Guatemala and specifically to FEGUA.” FVG never received a copy of Opinion 204-2004 nor was it ever disclosed to or shared with me or anyone else at FVG, nor was anyone at FVG ever aware of its substance until Guatemala filed its current objections on jurisdiction. I would also add that this Opinion does not state that Deeds 143 and 158 are *lesivo* or explain how or why Deeds 143 and 158 were harmful to the interests of Guatemala. It also makes no mention of any FEGUA or Government concerns about protecting any historical or cultural partimony. In paragraph 14, Dr. Gramajo also references a November 24, 2004 letter from FEGUA's Finance Department Director (Exhibit R-10). Likewise, this letter was never disclosed to or shared with FVG until Guatemala filed its current objections on jurisdiction.

10. In paragraph 18 of his statement, Dr. Gramajo describes a June 2005 legal opinion FEGUA obtained from the Palacios y Asociados Law Firm regarding the

¹ Claimant's Memorial on Merits, Ex. C-29.

Railway Equipment Usufruct Contracts. This opinion was never disclosed to or shared with anyone at FVG until Guatemala filed its current objections on jurisdiction.

11. In paragraph 20, Dr. Gramajo attempts to explain why FEGUA and FVG were unable to resolve their issues with regard to Deeds 143 and 158. His explanation is false and utter nonsense. First of all, Dr. Gramajo asserts that, during 2004 and 2005, FEGUA “put forward several possible solutions, and exchanged several new possible draft contracts.” This is false. There were never any proposals from FEGUA and certainly there were no “new possible draft contracts” from FEGUA. Only FVG ever presented any proposals, and these were offered solely at the request of FEGUA. In fact, on numerous occasions it was agreed that both parties would present a proposal for the next meeting, and FEGUA representatives would then show up at the meeting without any proposal, choosing instead just to criticize and balk at FVG’s proposals. Second, the notion that these discussions with FEGUA broke down because of unresolvable disagreements over whether FVG was properly protecting certain rail equipment or because FVG’s Chairman, Henry Posner III was unwilling to cede custody of certain rail equipment due to his fondness of old railways is ludicrous. Mr. Posner is well known for his activities in the field of railway preservation but, first and foremost, he is a businessman who recognizes that, in order for railway preservation to succeed, the underlying railway must be healthy. (In fact, if anyone could be fairly characterized as someone who is fond of old railways, it is Dr. Gramajo, who is a physician and surgeon by profession and has no experience owning or operating a railway other than perhaps his hobby of collecting and playing with scale train toys.) The issues of protection of the equipment and its cultural and historical patrimony value were never a significant part of these more important discussions and, in any event, there was no contractual or legal basis for FEGUA or the Government to claim control over any of the equipment.

12. Furthermore, even if there were any concerns on the part of FEGUA regarding FVG’s use or treatment of any of the equipment, the proper cause of action for FEGUA to take would have been to initiate arbitration proceedings against FVG as provided for in Deed 143. Indeed, FEGUA had every opportunity to raise these issues in defense of, or as counterclaims to, the arbitrations FVG brought against FEGUA alleging breaches of contract in connection with FEGUA’s failure to remove squatters and to pay contractually required monies into the Trust Fund, but did not do so.

13. Indeed, FVG always was more than willing to have the Government resolve whatever legal formalities or Government acts it believed still needed to be satisfied or performed for Deeds 143 and 158. But no one from FEGUA or the Government ever offered to resolve these relatively minor issues, which were almost entirely within the Government’s control and could have been easily accomplished without any effort or action on the part of FVG. By way of example, Dr. Gramajo mentions in paragraph 11 of his statement that one of the defects FEGUA identified with Deed 143 was that it was never approved by the Executive. There was nothing that FVG did or could have done to prevent this alleged defect from being resolved by the Government; it was the Government’s fault that this alleged necessary approval had not been accomplished, and it was entirely within the Government’s control to resolve this issue. In other words, for almost every issue raised by the Government regarding Deeds

143 and 158, there was little to nothing for the parties to “negotiate” and there certainly was nothing in “dispute,” because FVG at all times was more than willing to allow the Government to take whatever actions it deemed necessary to correct whatever technical legal deficiencies it believed existed with regard to Deeds 143 and 158.

14. At no point in 2005 did Dr. Gramajo or anyone else from FEGUA ever inform FVG that it considered the parties at an unresolvable impasse with regard to any issues surrounding Deeds 143 or 158. And it is important to note that at no point during these discussions, did Dr. Gramajo or anyone from FEGUA or the Government assert or suggest to me or anyone else at FVG that Deeds 143 and 158 were *lesivo* or harmful to the interests of the State.

15. In paragraph 22 of his statement, Dr. Gramajo references a request he made to the Office of Attorney General on June 22, 2005 to provide its opinion regarding the legality and validity of the Railway Equipment Usufruct Contract. This request was never disclosed to FVG and neither I nor anyone else at FVG was ever made aware of it by FEGUA. Similarly, no one from FVG ever saw or was aware of the Attorney General Office’s Opinion No. 205-2005 dated August 1, 2005 (Exhibit R-15) described in paragraph 23 of Dr. Gramajo’s statement until a few months after the Lesivo Resolution issued in August 2006. Likewise, no one from FVG, including myself, ever saw or was aware of Attorney General Opinion 749-2005 Exhibit R-17) and FEGUA Legal Counsel Opinion 05-2006 (Exhibit R-20) described in paragraph 24 of Dr. Gramajo’s statement until after the Lesivo Resolution issued.

16. Prior to the issuance of the Lesivo Resolution, neither I nor anyone else at FVG saw or was made aware of Dr. Gramajo’s January 13, 2006 letter to President Berger (Exhibit R-21) requesting invalidation of Deeds 143 and 158 on *lesivo* grounds (described in paragraph 25 of Dr. Gramajo’s statement). Furthermore, prior to the Lesivo Resolution, no one from FVG saw or was made aware of Joint Opinion No. 181-2006-AJ (Exhibit R-24) issued by the Department of Public Finance, or Opinion No. 236-2006 (Exhibit R-25) issued by the Office of the President, both of which are referenced in paragraph 26 of Dr. Gramajo’s statement.

17. In paragraphs 27-30, Dr. Gramajo describes investigations of FVG’s use and conservation of the railroad equipment that were apparently conducted by FEGUA in 2005. To whatever extent there were actual investigations, the results of these investigations were never disclosed to or shared with FVG. Dr. Gramajo again asserts that the railway equipment was of “huge cultural and historical value for Guatemala” but again neglects to mention the fact that none of this equipment was ever officially designated by the Government as cultural and historical patrimony as is required under the Law for the Protection of the Cultural Heritage of the Nation. Dr. Gramajo does mention that some locomotives and a box car had been registered as historical assets by the Institute of Anthropology and History (“IDEAH”), but IDEAH registration, by itself, does not constitute an official, enforceable declaration of cultural patrimony under the law. It is only the first step in the process. Article 25 of The Law for the Protection of the Cultural Heritage of the Nation (Decree Number 26-97, Ch. IV) requires that, in order for an item to be officially designated as part of the Nation’s cultural heritage, a

declaration must be issued through Ministerial Resolution and published in the Official Gazette. No such resolution and publication was ever issued for any of the railway equipment granted in usufruct to FVG.

18. In paragraph 31, Dr. Gramajo describes a criminal complaint he initiated against FVG in October 2005, purportedly to safeguard some of the railway equipment in Zacapa. FVG was never legally notified of this action until March 2008, long after RDC filed its claim under CAFTA. The protective measure that was ordered by the court in May 2006 was based entirely on Dr. Gramajo's misrepresentations and, because FVG had never been legally notified of the suit, it was not given an opportunity to respond. As of this date, the court has yet to issue a final ruling in this case.

19. It is also important to note that all of the steam locomotives and rail cars that were delivered in usufruct to FVG were, as FEGUA itself stated in the Usufruct Contracts, in a condition of "obsolescence" and "deterioration."² In fact, the Krupp locomotives, which are the subject of the criminal complaint which Dr. Gramajo initiated, had not been operated since 1973. These locomotives had been abandoned by the Government for over 25 years before FVG received them.

20. I would also point out and emphasize that, notwithstanding Dr. Gramajo's repeated assertions that one of the principal reasons Deeds 143 and 158 were, in his opinion, harmful to the interests of the State – because it did not adequately protect rail equipment that he deems historical and cultural patrimony – the President's Explanatory Statement that was appended to the Lesivo Resolution³ does not even list this as a reason for declaring these contracts *lesivo*.

III. The May 11, 2006 Meeting of the High-Level Railroad Commission

21. In paragraph 37 of his statement, Dr. Gramajo attempts to describe what took place at the May 11, 2006 meeting of the High Level Railroad Commission that President Berger had ordered to be established. Dr. Gramajo asserts that "the matter of the 'Lesivo Resolution' . . . was brought up" at the meeting and that "Ferrovias stated their displeasure at finding out that the process to declare the *lesividad* had begun." Susan Pineda Mendoza and Mario Marroquín Rivera have also attempted in their statements (paragraphs 20-26 and paragraphs 11-13, respectively) to describe what transpired at this May 11 meeting. Their descriptions are, at best, highly misleading and, in my opinion, an attempt to concoct conversations that never occurred.

22. While driving on my way to the High-Level Commission meeting on May 11, 2006 with FVG's President, Bill Duggan, I unexpectedly received a call on my cell phone from Mario Fuentes, the Presidential sub-Commissioner for Megaprojects and also the husband of the Minister of Education, María del Carmen Aceña de Fuentes. Mr. Fuentes had called to warn me about a document that was currently being passed along for signature amongst the Ministers that he described as a *lesividad* declaration that was intended to "cancel our contract." Mr. Fuentes did not tell me during this very brief

² Deed 402, clause 1, Claimant's Memorial on Merits, Ex. C-22.

³ Claimant's Memorial on Merits, Ex. C-10.

conversation what the Government was basing this planned declaration on nor the contract they were planning on applying it to. He said he was not aware of the details nor did we have much time to discuss it.

23. After my call with Mr. Fuentes concluded, I told Mr. Duggan what Mr. Fuentes had said. In describing my conversation with Mr. Fuentes, I did not use the word "lesivo" or "lesividad."

24. Furthermore, although I used the term "lesivo" when I described my conversation with Mr. Fuentes to FVG's legal counsel, Juan Pablo Carrasco, just prior to our going into the High-Level Commission meeting on May 11, 2006, it is important to note that, at this time, my understanding of the term "lesivo" and the "lesividad" process was solely limited to the common, everyday usage of these terms rather than their formal legal meaning. "Lesivo" is a general term that is commonly used and understood in Guatemala to refer to a situation where the Government is going to move against someone's contract or concession with the Government.

25. What transpired at the May 11, 2006 High-Level Commission meeting was that Bill Duggan, in response to statements made by FEGUA and other Government representatives that FVG should trust them to do the right thing, questioned how he could trust them, having just heard a rumor earlier that day that some sort of document was being circulated around the Ministers' offices to support the President in taking away FVG's railway concession. At no point did Mr. Duggan use the word "lesivo" or express any knowledge of the details behind this rumor he had just heard about through me. This fact is hardly surprising because Mr. Duggan at the time would not have had any reason or basis to be familiar with this esoteric Guatemalan legal term or process. As mentioned above, I was also completely unfamiliar with the "lesivo" legal process at the time and certainly did not know anything about any process underway within the Government to declare Deeds 143 and 158 "harmful to the interests of the State."

26. In response to Mr. Duggan's question, Ms. Pineda and Mr. Marroquín looked somewhat surprised. They quickly excused themselves from the meeting for a private conference. After a few minutes, they returned; they did not say with whom they had spoken to or what they had discussed. Upon their return, they just said that they would further investigate the issue Mr. Duggan had raised and, as a show of good faith, they would see if they could do anything to stop it. They said they would let FVG know about this at the next meeting. Neither of them either confirmed or denied that the rumor we had heard was true. Based upon the statements and representations of Ms. Pineda and Mr. Marroquín, we left the meeting assuming this was a false rumor and nothing more. I thought so little of this rumor at the time that I did not even bother to report it to FVG's Chairman, Henry Posner III.

27. Contrary to what they state in their respective statements, neither Mr. Marroquín nor Ms. Pineda stated after they returned from their closed-door conference that the President had decided to declare Deeds 143 and 158 (or, for that matter, any of the Usufruct Contracts) *lesivo* and that the process to finalize the Declaration of Lesivo was in process. And neither of them made any representation that the Government was

going to stop this unnamed ongoing process as a gesture of “good will” on the part of the Government. All they stated was that they would look further into what Bill Duggan said and get back to us at the next Commission meeting which had already been scheduled for later in the month. They never did get back to us.

28. Furthermore, none of the Government representatives at the May 11, 2006 meeting, including Dr. Gramajo (who stayed silent when all of this discussion was going on), provided any substantive information about any *lesivo* process that might be ongoing within the Government and what it might be all about or specifically concerned. No one from the Government represented or explained that the on-going process concerned alleged deficiencies in Deeds 143 and 158 and none of them asserted that Deeds 143 and 158 were considered invalid or harmful to the interests of the State. In fact, at none of the High-Level Commission meetings was there any substantive discussion between the parties regarding resolving any particular deficiencies or “illegalities” in Deeds 143 and 158. The focus of all of these meetings were discussions relating to how the parties could resolve the issues relating to the breach of contract arbitrations FVG had filed against FEGUA concerning Deeds 402 and 820, and issues the Government had raised regarding FVG’s compliance with its alleged obligations to complete additional phases of the railway rehabilitation under Deed 402 and adjusting the terms of this contract.

29. The Minutes to the May 11, 2006 High-Level Commission meeting (Exhibit R-29) confirm the vagueness of what was discussed at this meeting regarding *lesividad* and the Government’s non-committal nature towards doing anything to stop it this rumored ongoing process. The Minutes cryptically state that one of the three issues that are yet to be resolved in order to hold further negotiations was “*Lesividad of the contract*” (emphasis added) and that Mr. Fernandez – who was not at the May 11 meeting – had offered [but had not yet agreed] to “stop the *lesividad* procedure as a token of good intention from the government.” The Minutes do not disclose (nor did anyone else) at which FVG contract or contracts the rumored *lesividad* procedure was being directed at, nor do they describe what was the basis or reasons behind it. There was no such discussion at the meeting.


30. The next High-Level Commission meeting which had been scheduled for later in the month of May 2006 was subsequently canceled by the Government. No meetings of the High-Level Commission took place after May 11, 2006. The next face-to-face meetings and discussions between FVG and the Government did not take place until late August 2006, days before the Lesivo Resolution issued. These meetings and discussions are described in detail in paragraphs 38-42 of the First Senn Statement.

31. It was not until August 2006 when I and others at FVG first learned about the Government’s plan to issue the Lesivo Resolution, what that exactly meant in connection with FVG’s contracts and what the *lesividad* process entailed. It was not until August 24, 2006 that I was informed verbally by Government officials that the Lesivo Resolution specifically pertained to the usufruct equipment contracts, Deeds 143 and 158. Prior to the issuance of the Lesivo Resolution on August 25, 2006, there were never any substantive negotiations with the Government concerning how to fix or resolve any of the alleged deficiencies with Deeds 143 and 158 in order to avoid or prevent the issuance of

the Lesivo Resolution. To the contrary, all of the negotiations with the Government leading up to the Lesivo Resolution focused on changes the Government wanted to make to the Right-of-Way Usufruct Contract, Deed 402, and FVG's arbitration disputes with the Government over the performance of its obligations under Deeds 402 and Deed 820 (the Trust Fund contract).

32. In fact, when the Government finally presented FVG with its "take it or leave it" settlement offer on August 24, 2006⁴ under the threat of declaring *lesividad* the next day, modification of the terms of the usufruct equipment contracts was just one of several demands the Government made, and it was, at most, a minor demand. The Government's principal demands all concerned issues relating to Deeds 402 and 820, and the Government made clear that it intended to issue the Lesivo Resolution with regard to the equipment contracts the next day unless FVG agreed to its demands concerning Deeds 402 and 820 and regardless if we were willing to agree to the Government's requested modifications to the equipment contracts. Furthermore, prior to this date, the Government had never raised modifications to the equipment contracts as a point of negotiation between the parties.

FURTHER THIS AFFIANT SAITH NOT.



Jorge Senn Sagastume

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



Notary Public

María C. Alvarado
Vice Consul of the United States

Republic of Guatemala
City and Department of Guatemala
Embassy of the United States
of America
1999

⁴ Claimant's Memorial on Merits, Ex. C-44.