

Before the  
International Center for Settlement of  
Investment Disputes  
(ICSID)

Case No. ARB/07/23

Between  
**Railroad Development Corporation**  
*Claimant*

v.

**The Republic of Guatemala**  
*Respondent.*

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**EXPERT REPORT OF JUAN LUIS AGUILAR SALGUERO**

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1 October 2010

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## Section I. Introduction

1. The **Republic of Guatemala**, through the **Ministry of Economy**, in the context of the international arbitration<sup>1</sup> before the **International Centre for Settlement of Investment Disputes (ICSID)**, initiated by the company **Railroad Development Corporation (RDC)**, against the **Republic of Guatemala**, has asked me to render an **EXPERT REPORT** regarding the following:

- a. On the content, extent and support of the State Interests, in the context of the Constitution and the Laws of the Republic;
- b. On the content, extent and scope of the **Process of Declaration of *Lesividad***;
- c. On the content, extension and scope of the **Process of the *Contencioso Administrativo***;
- d. On the legality of the **Process of Declaration of *Lesividad*** followed by the Republic of Guatemala, particularly as to the contracts contained in public deeds number 143 of 28 August 2003 and 158 of 7 October 2003 both formalized at the offices of notary Mariela Marroquin Claudia Luther ("Contracts 143 and 158");<sup>2</sup> and
- e. On the **validity or invalidity** of Contracts 143 and 158, and the damage such Contracts have caused, if any, **to the Interests of the Republic of Guatemala**.

2. In accordance with the documents that respectively support them, the legal sources consulted, my professional experience as a university professor for over 29 years, legal counsel and litigator, I arrive to the following **MAIN CONCLUSIONS**, in accordance with the following report and the issues addressed in the same:

- a. **That the "state interests" that are damaged are fully defined in the Constitution and the laws of the Republic of Guatemala; in general, such interests, which are susceptible to damage, are those related to the purposes and duties of the Republic of Guatemala and, in particular, those that define the specific laws applicable to the subject case, in accordance with the type of injury caused.**
- b. **That the process of *lesividad* is not unique to the Guatemalan legal system, this process also exists in other legal systems, such as Spain, France, Mexico, Costa Rica, Ecuador and Argentina, among others.**
- c. **That the process of *lesividad* in the Guatemalan legal system, is not arbitrary; the procedure and its substance has to be supported by the Constitution of the Republic and the laws of the country;**

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<sup>1</sup> Case No. ARB/07/23.

<sup>2</sup> R-5, R-6.

- d. That the process of *lesividad*, according to the Guatemalan legal system, honors the fundamental rights, substantive and procedural, including the constitutional rights of those to whom it is applied, therefore, said process is not contrary to the Constitution of the Republic of Guatemala;
- e. That the Constitutional Court of the Republic of Guatemala, has not declared unconstitutional the process of *lesividad* and, by contrast, has affirmed the constitutionality of this process;
- f. That the process of *lesividad* in Guatemala is an internal government process that begins with the notice that a government organ of the Public Administration directs to the President of the Republic of Guatemala, and concludes with the issuance and publication of the *Acuerdo Gubernativo* issued by the President of the Republic, in a Council of Ministers.
- g. That, since the process of *lesividad* is an internal procedure, among government organs of the Administration, the individual, to whom the declaration relates, is not and should not be part in the process, so a previous hearing should not be granted.
- h. That the *Acuerdo Gubernativo* issued as a result of the process of *lesividad* contains a "declaration" that is lacking, *per se*, of executive effects against the individual; therefore, said *acuerdo* does not deprive it, limits or prevents from exercising its rights.
- i. That the declaration of *lesividad* is a burden that the legal system imposes on the Republic so it can sue, in the courts of justice, the nullity of the act or contract that harms its interests.
- j. That, in accordance with the Guatemalan legal system, the individual referred to in the declaration of *lesividad* has the right to be summoned and heard before a judge and may object, before that judge, the appropriateness of the declaration of *lesividad*. The responsible judge must examine, based on the Constitution and the laws of the country, the legitimacy (legality) of the declaration of *lesividad* and the objections of the defendant, in the ruling that ends the judicial process.
- k. That, in accordance with Guatemalan law, the individual has the right to resort to constitutional justice, in defense or claim of unconstitutionality, if their constitutional rights are violated or an unconstitutional provision is intended to be applied to them in the course of the process.
- l. That, in accordance with Guatemalan law, the individual defendant may raise, within the same judicial process where the *lesividad* is declared, a claim, in the form of a counterclaim against the State by which they seek, in the case of the invalidity of the act or contract, restitution of what each other have received or collected as a result of the business that is canceled, or they can demand, within the same process and by way of counterclaim, financial

compensation in the event that the declaration of *lesividad* is not based on law.

- m. The parties have the right to challenge the decision rendered by the *Contencioso Administrativo* court through resources and defenses granted upon them by the Constitution and the laws of the country.
- n. That the process for the declaration of *lesividad* of Contracts 143 and 158 was in compliance with the requirements that arise from the Constitution and other laws of the Republic of Guatemala, no rights of *Compañía Desarrolladora Ferroviaria, Sociedad Anónima* (“*Ferrovías*”) were violated nor any irregularity or violation of any express rule or statute of the Guatemalan legal system was committed.
- o. That Contracts 43 and 158 harm the interests of the Republic of Guatemala, because they have been formalized and implemented against specific laws of the Guatemalan legal system;
- p. That, as a result of the transgressions to the Guatemalan legal system, the President of the Republic of Guatemala was obliged to produce, in the Council of Ministers, the declaration of *lesividad* of Contracts 143 and 158 under penalty, in the event of failing to do so, of incurring in joint and several liability.
- q. That the declaration of *lesividad* of Contracts 143 and 158, by the President, in the Council of Ministers, had no effect by itself, on any right that *Ferrovías* may have under such contracts, since such declaration constitutes a requirement of prior compliance that the Republic of Guatemala must meet in order to request, before a judicial authority, the nullity of such contracts.
- r. That the publication of the *Acuerdo Gubernativo de Lesividad* constitutes an obligation for the Administration, imposed by the laws of the country.
- s. The publication of the *Acuerdo Gubernativo de Lesividad*, in accordance with the laws of the country, does not prejudice the rights of the individual referred to in the declaration.
- t. That the opinions and statements issued by Dr. Eduardo Mayora Alvarado, in his reports of 18 June and 16 October 2009 do not support or evidence:
  - i. That the State Interests are ample, subjective or changing;
  - ii. “That the process of *lesividad* is against the Constitution of the Republic of Guatemala;”
  - iii. That the republic of Guatemala is arbitrary;

- iv. **That a constitutional guarantee, in particular, any of the guarantees and principles that relate to the "rule of law," "legal certainty" and "due process" has been violated in this case; and**
- v. **That Contracts 143 and 158 Contracts are tailored to the law.**

3. In support of this opinion, I reviewed and read, among other things, the following documents and reports:

- a. The Memorial on the Merits of Railroad Development Corporation (the "Claimant"), dated 26 June 2009;
- b. The opinions issued by Dr. Eduardo Mayora Alvarado, dated 18 June and 16 October 2009;
- c. The opinions issued by Dr. Eduardo Mayora Alvarado, dated 18 June and 16 October 2009;
- d. The opinion issued by Marithza Ruiz de Vielman, Esq. dated 22 September 2009;
- e. The National and International Public Bidding Terms for the Onerous Usufruct of the Railway Transportation in the Republic of Guatemala, made in February 1997;
- f. The Railway Right-of-Way Onerous Usufruct formalized by public deed number 402 of 23 November 1997, before Notary Byron Díaz Orellana;
- g. The Railway Equipment Onerous Usufruct Public Bidding Terms, issued by the Government of the Republic of Guatemala in November 1997;
- h. The Railway Equipment Onerous Usufruct of Ferrocarriles de Guatemala, formalized by public deed number 41 of 23 March 1999 (the contract 41), before Notary Marco Antonio Cornejo Marroquín;
- i. Railway Equipment Onerous Usufruct number 143 of 28 August 2003 before notary Claudia Mariela Marroquín Luther and its modification, related in public deed number 158 of 7 October 2003 before notary Claudia Mariela Marroquín Luther;
- j. The opinions of the Attorney General's Office number 205-2005 dated 1 August 2005 and 749-2005 dated 12 September 2005;
- k. Letter dated 13 January 2006 from FEGUA's Overseer to the President of the Republic of Guatemala;
- l. FEGUA's Attorney General Opinion 05-2006 dated 13 January 2006;
- m. Joint Opinion number 181-2006 AJ from the Ministry of Economy dated 3 April 2006;
- n. General Secretariat of the Presidency Opinion dated 26 April 2006;

- o. *Acuerdo Gubernativo* number 433-2006 which declared the *lesividad* of Contracts 143 and 158;
- p. The complaint filed at Division One of the *Contencioso Administrativo* Court by the Attorney General's Office, dated 24 November 2006.

4. I have based my analysis and conclusions of law in all laws of the Republic of Guatemala and other legal sources cited in the various sections of this report, including the constitutional rights protection suit ruling (*Amparo*), in one instance, issued by the Constitutional Court under file number 618-2004, dated 15 July, two thousand four.

5. This Expert Report is divided in seven (7) sections: **Section I**, contains a brief introduction of the purpose and scope of the report. **Section II** relates to the State Interests; **Section III** describes the administrative process that should be followed in accordance with the laws of the Republic of Guatemala, for the Declaration of *Lesividad* of the acts or resolutions that harm the interests of the Republic of Guatemala. **Section IV** relates to the *Contencioso-Administrativo* Process in the Guatemalan legal system. **Section V** describes and analyzes the process of *lesividad* followed by the Administration, in the specific case of Contracts 143 and 158. **Section VI** has an independent legal analysis with regard to the validity or invalidity of Contracts 143 and 158. **Section VII** is related to the absolute invalidity of the legal transactions contrary to law; and **Section VIII** has the personal credentials of the undersigned and the sources consulted.

## **Section II. The State Interests**

6. In accordance with the provisions of article 140 of the Constitution of the Republic, the Republic of Guatemala is a free, independent and sovereign nation, organized to guarantee its citizens the enjoyment of their rights and liberties. Its government system is republican, democratic and representative.

7. In accordance with the provisions of article 1 of the Constitution of the Republic of Guatemala, the supreme goal of the Republic of Guatemala is the realization of the **common good**.<sup>3</sup>

8. Article 2 of the Constitution of Guatemala provides that it is the duty of the Republic to guarantee its citizens life, liberty, justice, security, peace and the full development of the person.<sup>4</sup>

9. The interest of the Republic of Guatemala is defined, in general, by the goals and duties assigned by the Constitution of the Republic of Guatemala in its first two articles.

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<sup>3</sup> Article 1 of the Constitution of the Republic of Guatemala (RL-70).

<sup>4</sup> Article 2 of the Constitution of the Republic of Guatemala (RL-70).

10. In fact, as maker of the common good, everything that relates to life, liberty, justice, security, peace and development of the person is of interest to the Republic of Guatemala.

11. The interests of the Republic of Guatemala are defined in the Constitution and embodied in every one of the country's laws that refer or relate **to life, justice, security, peace and development of the individual**.

12. The interests of the Republic, as the protection that must be met, find material substance in the provisions contained, for example, in the Civil Code, the Commercial Code, the Labor Code, the Penal Code, the Tax Code, the Law on Government Procurement, the Income Tax Law and, in general, all of the Guatemalan legal provisions that relate to the purposes and duties of the Republic of Guatemala.

13. In particular, the substantive standard that supports the Republic of Guatemala's Interest is that one specific rule which is broken by any act or decision that harms the State interests in a particular case.

14. In this case the **general interest** of the Republic of Guatemala was to achieve **the common good of its citizens**, through the development and rehabilitation of **the country's railway transport** and use of rail equipment. To fulfill this purpose, the Republic of Guatemala began in 1997 a national competition and international public bidding for granting a right of onerous usufruct on property owned by the Republic of Guatemala.

15. The **general interest** of the Republic of Guatemala was defined in the public bidding terms issued in February 1997, with respect to the railway right-of-way usufruct on property owned by the Republic,<sup>5</sup> and in the terms issued in November 1997, regarding the railway equipment onerous usufruct.<sup>6</sup>

16. In regard to **"legal substance"** (material law) the general interest of the Republic of Guatemala was defined in the **"LEGAL FRAMEWORK"** of each public bidding respectively prepared in the months of February and November 1997, so that the public interest, contrary to the contention of Dr. Mayora Alvarado in his respective reports, is supported on the specific rules of the Guatemalan legal system.

17. In the case of the "railway equipment" onerous usufruct, the general interest of the Republic was defined in the legal framework of the bidding terms prepared in November.

18. The **specific interest** of the Republic of Guatemala in the case of **the railway equipment** onerous usufruct was **to respect and comply** with the provisions stated in the **legal framework** of the November 1997 bidding terms, which

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<sup>5</sup> C-22.

<sup>6</sup> C-17.

includes the processing, awarding and fulfillment of the purposes of the usufruct contract, according to the terms of the negotiation.

19. Given that the protection of the individual and the family, the common good, life, liberty, justice, security, peace and development of the whole individual are among the purposes and duties of the Republic, in this case, the SPECIFIC INTERESTS FROM THE REPUBLIC OF GUATEMALA are embodied in all the substantive rules of law of the country, that consistent with such purposes and duties, provide the legal basis in the public bidding process and awarding of the onerous usufructs on property and equipment owned by the Republic, that were awarded to Ferrovías.

20. In this case, the specific interest of the Republic of Guatemala that was damaged is supported on all the substantive rules of law in Guatemala that were broken with the formalization of Contracts 143 and 158.

21. Consequently, Dr. Eduardo Mayora Alvarado is incorrect when he indicates in his report of 18 June 2009 that the State interests are not defined or supported by any specific law of the Guatemalan legal system; nor is he correct when he makes reference to such interests and damages as a "vague idea," and much less, when he questions the pattern of damages caused to the interests of the Republic of Guatemala.<sup>7</sup>

### Section III

#### **The Administrative Process for the Declaration of *Lesividad* in the Guatemalan Legal System**

22. Title II of the Law of the *Contencioso Administrativo* (included in Decree 119-96 of Congress) regulates the **Process of the *Contencioso Administrativo***, which purpose is to settle differences arising (a) in case of disputes for the acts and decisions of the administration and the decentralized and autonomous governmental entities, and (b) in cases of disputes arising from contracts and administrative concessions.<sup>8</sup>

23. The injury caused to the State interests can only be rewarded, with executive powers, by the courts of justice, in a process of the *Contencioso Administrativo*, through a procedure that the Republic of Guatemala must necessarily begin, under the assumptions, terms and conditions provided by the laws of the country.

24. The court competent to hear the Process of the *Contencioso Administrativo* is the ***Contencioso Administrativo Court***, which is part of the Judiciary.<sup>9</sup>

25. **The Judiciary** is an organ of the Republic of Guatemala, whose sole function is to administer justice in accordance with the Constitution and laws of the Republic of Guatemala, its functions are exercised independently and not subject

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<sup>7</sup> Paragraph 8.3 from the First Expert Report of E. Mayora.

<sup>8</sup> Articles 221 of the Constitution (RL-70) and 19 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>9</sup> Articles 203 and 221 of the Constitution of the Republic (RL-70).

to any other governmental agency, including the Executive, and therefore, the Public Administration and/or any independent or decentralized authority (as Ferrocarriles de Guatemala, FEGUA is).<sup>10</sup>

26. The role of the *Contencioso Administrativo* Court is **to control the legality** of the acts and resolutions that come from the **Public Administration**.<sup>11</sup>

27. To be able to turn to the **Process of the Contencioso Administrativo**, the Law of the *Contencioso Administrativo* enforces different requirements to the claimant, depending on whether it is the **“private party”** or the “Public Administration.”

28. In the event that the claimant is the **private party**, the Law of the *Contencioso Administrativo* will require, as a condition to its claim, that the “administrative decision” that is challenged meets the following requirements: (a) that it is final, that is, that the resolution on the matter is no longer susceptible to be challenged in an administrative proceeding, for having exhausted all administrative remedies, and (b) that it violates a right of the claimant, recognized by law, regulation or a prior decision.<sup>12</sup>

29. In the event that the claimant is the **Administration**, the Law of the *Contencioso Administrativo* will require, as a condition of compliance prior to the filing of the complaint, that the act or resolution which revocation, cancellation or nullification is intended “...**has been found lesivo to the interests of the Republic**, by *Acuerdo Gubernativo* issued by the President of the Republic in Council of Ministers...”<sup>13</sup>

30. The process for the issuance of the **Acuerdos Gubernativos** issued by the President of the Republic of Guatemala, in Council of Ministers, is regulated by the Constitution of the Republic of Guatemala, the Law of the Executive and Decree 1816 of Congress, which refers, *inter alia*, to the Publication of the *Acuerdos Gubernativos*.

31. The process for the issuance of the **Acuerdos Gubernativos** issued by the President of the Republic, in Council of Ministers, is a special procedure and separate from the administrative procedure governing the Law of the *Contencioso Administrativo* for the handling and resolution of the claims filed by the citizens of the country.

32. The differences and characteristics between the administrative procedure, referred to in the Law of the *Contencioso Administrativo* and the administrative procedure for the issuance of the *Acuerdo Gubernativo* which declares the *lesividad* consist of the following:

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<sup>10</sup> Articles 141 and 203 of the Constitution of the Republic (RL-70).

<sup>11</sup> Article 221 of the Constitution of the Republic (RL-70).

<sup>12</sup> First paragraph of article 20 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>13</sup> Last paragraph of article 20 of the Law of the *Contencioso Administrativo* (RL-49).

- a. **As to its origins:** The administrative procedure referred to by the Law of the *Contencioso Administrativo* begins with a petition that **the private party** presents to the Administration, so that the Administration “**issues a binding resolution;**”<sup>14</sup> on the other hand, the Administrative procedure for the issuance of the *Acuerdo Gubernativo* declaring the *Lesividad* of the act or resolution, has begins with a petition **that an entity from the administration** formulates to another entity of the *Administration* (in this case, the President of the Republic, in Council of Ministers), to “**ISSUE a non-binding DECISION** for the private party, in connection with the *lesividad* that certain act or contract may cause to the State interests,<sup>15</sup> thus, the administrative procedure that originates in the request given to the administration is a procedure of an external **nature**, while the procedure that originates for the issuance of the *acuerdo gubernativo*, in the case of the *lesividad*, is of an internal nature, in which the private party is not involved.
- b. **As to its effects:** In the administrative procedure referred to in the Law of the *Contencioso Administrativo*, the private party presents a petition to the Administration to obtain an act or resolution **binding to the parties.**<sup>16</sup> In the administrative process for the issuance of the *Acuerdo Gubernativo* that declares the *lesividad* of the act or resolution, does not have any binding effects on the administred, as does not have executive or privative effects on the rights of the adminstrated since the *lesivo* declaration must be validated by the courts, of justice, in reviewing the legality of the declaration, as a result of the complaint that the legal representative of the Republic must raise in the Process of the *Contencioso Administrativo*.

33. Since the administrative procedure for the issuance of the ***Acuerdo Gubernativo*** that finds the *lesividad* of an action or decision *does not originate by the petition of the private party, nor does the declaration includes constitutive effects binding to the private party that deprive them of their rights*, given that they are no part of the process for the issuance of the *acuerdo gubernativo*, a hearing prior to the issuance of the same is not granted, nor should it be granted, to them.

34. Therefore, the lack of a hearing in the government process declaring the *lesividad* does not violate the due process principle, because the private party is not part of the process, which is purely an internal process of the government, and the declaration to be issued will not prejudice or diminish the exercise of their rights.

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<sup>14</sup> Articles 28 of the Constitution of the Republic (RL-70) and 1-4 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>15</sup> Articles 9, subparagraph c), 16 and 17 subparagraph b) of the Law of the Executive Power (RL-50), 20, second paragraph, Law of the *Contencioso Administrativo* (RL-49).

<sup>16</sup> Article 4 of the Law of the *Contencioso Administrativo* (RL-49).

35. In summary, the process for the issuance of the *Acuerdo Gubernativo* declaring the *lesividad* of the action or decision of the Administration is a **legal burden** that the law imposes on the Public-Administration in order to allow it to initiate the *Contencioso-Administrativo* process and, in that way, challenge its own administrative acts that damage the State's interest. This, in turn, is necessary because the Republic cannot unilaterally revoke or challenge administrative actions that harm its interests, but have to first follow the internal process of *lesividad*, declare the *lesividad* of the action in question and wait to see if the Court of the *Contencioso Administrativo* confirms the *lesividad* of that act. Thus, the process of *lesividad* is a protection of the interests of the private party.

36. The **procedure** for the issuance of the *Acuerdo Gubernativo* by which the *lesividad* of an action or decision that harms the interests of the Republic of Guatemala is as follows:

- a. When the specific administrative authority<sup>17</sup> is aware of the existence of an action or decision that harms the State interests, as being contrary or fails to comply with the legal requirements governing the action or contract, **it has an obligation** to promote to the Presidency of the Republic of Guatemala, as the competent body, the Declaration of *Lesividad* of such action or decision;<sup>18</sup>
- b. The file with the corresponding legal opinions that support the causes on which the harm to the State interests are based is received by the General Secretariat of the Presidency, whose function is to handle the Government matters of the Office of the President<sup>19</sup>;
- c. The General Secretariat of the Presidency assigns the file to the advisory bodies of the presidency for technical and legal counseling;<sup>20</sup>
- d. Once the technical and legal opinions from the advisory bodies of the Presidency have been issued, the General Secretariat of the Presidency makes sure that the file is submitted to the President of the Republic in Council of Ministers for its review and approval;<sup>21</sup>
- e. The President of the Republic must convene the Council of Ministers for the review and resolution of the matter, involving the President of the Republic, as Chairman, the Vice-President, who participates with voice and vote, and the Ministers of State;<sup>22</sup>

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<sup>17</sup> "Specific administration" means that government body in whose jurisdiction the existence of the action or decision that harms the interests of the State is established or determined.

<sup>18</sup> Articles 153-154 of the Constitution of the Republic of Guatemala (RL-70), 20 of the Law of the *Contencioso Administrativo* (RL-49) and 17 paragraph b) of the Law of the Executive (RL-50).

<sup>19</sup> Article 9 of the Law of the Executive (RL-50).

<sup>20</sup> Paragraph b) of article 9 of the Law of the Executive (RL-50).

<sup>21</sup> Articles 9, paragraph c) and 16 of the Law of the Executive (RL-50).

<sup>22</sup> Articles 16 and 17, paragraph b), of the Law of the Executive (RL-50).

- f. Once the existence of the action or decision that harms the State interests is established, the President in Council of Ministers **must declare**, by *Acuerdo Gubernativo*, the *lesividad* of the action or decision that harms the State interests, instructing the Attorney General's Office to begin, on behalf of the Republic, the Process of the *Contencioso Administrativo*;
- g. The *Acuerdo Gubernativo* that declares the *Lesividad* of the action or decision must be published in the *Diario de Centroamérica* (Official Gazette) so that, from the date of publication, the Attorney General will have a period of three (3) months to commence the Process of the *Contencioso Administrativo*.<sup>23</sup>

37. The *Acuerdo Gubernativo* of *Lesividad* must be issued by the President, in Council of Ministers, where there is proof that the action or decision resulted in the violation of the laws of the legal system; in the event of non-issuance of such decision, the President of the Republic and his ministers shall incur in personal liability.<sup>24</sup>

38. The publication of the Agreement declaring the *Lesividad* is required under the provisions of Decree 1.816 of Congress and article 23 of the Law of the *Contencioso Administrativo*, for calculating the period in which the Government of Guatemala must file the judicial action to recognize the legality of the declaration of *lesividad*.

39. The obligated publication of the *Lesivo* Resolution is done in a specialized communication medium, the *Diario de Centroamérica*, and in particular in its "Legal" section, which by its technical-legal nature, does not have the interest and dissemination effects among the general public that other communications mediums and dailies have. .

40. The publication of the *Acuerdo* declaring the *lesividad* of Contracts 143 and 158 should have not resulted in the disruption of Ferrovías' business because the publication, required by law, refers to a declaration that has no proprietary effects, restricted or restrictive to the rights that Ferrovías might have on such contracts.

41. The process for issuing the Declaration of *Lesividad* does not violate any rule, principle or constitutional guarantee; the Constitutional Court has not issued a constitutional ruling specifically declaring unconstitutional the internal administrative process for issuing the Declaration of *Lesividad*, namely, in the case of the constitutional principles of legality, legal certainty and due process; on the contrary, the Constitutional Court has recognized the constitutionality of that process (see paragraph 47).

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<sup>23</sup> Decree 1,816 of Congress (RL-75) and article 23 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>24</sup> Articles 153 and 154 of the Constitution (RL-70) and 16 of the Law of the Executive (RL-50).

42. The process for issuing the Declaration of *Lesividad* is not an exclusive process of the Guatemalan law; this process also exists in Spain and in other jurisdictions such as France, Mexico, Costa Rica, Ecuador and Argentina.

43. The Declaration of *Lesividad* of administrative acts detrimental to the State interests, is based, broadly, in the work of one of the foremost authorities on Administrative Law, Professor Eduardo García de Enterría, **The Estoppel Doctrine and the Declaration of *Lesividad***, which holds that the process of *lesividad* "... does not confer any privilege to the government, but on the contrary, involves a real deprivation of an essential quality on its *status* and its reduction to a regime lower than the regime of the private party themselves, still less than the one that would correspond to them in the private law system to private individuals ...,"<sup>25</sup> which is consistent with Guatemalan law, since, while the private party can go directly to the Court of the *Contencioso Administrativo*, with a lawsuit, the burden of the process of *lesividad* is imposed on the State as a precondition to [the filing] of its complaint.

44. The rules underlying the process for the issuance of the Declaration of *Lesividad* are comprised in the Constitution of the Republic of Guatemala, the Law of the Executive, the Law of Administrative Litigation and Decree 1.816 of Congress.<sup>26</sup>

45. Any person in the country, under the principle of legal certainty, knows that the acts and contracts that contravene the laws of the nation, would be declared *lesivos*, as it is so provided in the laws of the country that will be applicable if they are violated or infringed.

46. As a result, the assertions made by Dr. Eduardo Mayora Alvarado, when he says that this process is not largely governed by the laws of the country, and that under the same the guarantees and principles of due process and legal certainty are violated, are incorrect.<sup>27</sup>

47. The Constitutional Court, the highest court in constitutional matters in the country, in a ruling dated July 15, 2004, file 618-2004, reaffirmed the nature and effects of the process of *lesividad* and stressed, very timely, that the rights of "legal certainty" and "due process," among other rights, of the private party are not violated in that process, as asserted by Dr. Mayora in his report.<sup>28</sup> In fact, that Constitutional Court stated in its ruling that:

- a. With respect as to whether any Constitutional right is violated or not in the process of *lesividad*, the Court stated: ***"In this regard, this***

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<sup>25</sup> THE ESTOPPEL DOCTRINE AND THE DECLARATION OF *LESIVIDAD*. Eduardo García de Enterría, Assistant Professor of the University of Madrid, page 70 (RL-174).

<sup>26</sup> Articles 153-154, 182-183 paragraph n- of the Constitution of the Republic (RL-70); 9-16-17 paragraph b) of the Law of the Executive (RL-50); 20 and 23 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>27</sup> See paragraphs 7 and 9 of the First Expert Report of E. Mayora.

<sup>28</sup> See paragraph 9 of the First Expert Report of E. Mayora.

*Court finds it appropriate to reiterate the opinion expressed in the decision dated July twenty-second of one thousand nine hundred ninety-nine, in the sense that the declaration of lesividad has no purpose or effect other than to enable the Public Administration Body to submit their own actions to judicial review through the process of the contencioso administrativo, to by administrative proceedings to which the parties with a legitimate interest in enforcing their rights may appear, therefore it is argued that the declaration of lesividad has no immediate material effects that may impair the rights of the people involved in the case and pursued only through a process followed with all the formalities of law, the legality of the matters and contracts declared lesivos. In this case, the President of the Republic, by issuing the Acuerdo Gubernativo which constitutes the first action claimed, acted on the basis of the authority that the administration has to declare their own acts lesivos, if subsequently to its issuance, it appears that the State interests are violated, as regulated under Article 20 paragraph b) of the Law of the Contencioso Administrativo. Such power does not constitute, per se, the unilateral annulment of the administrative decision to which it refers but the judgment of its legality, which must be demanded by the administration itself before the Court of the Contencioso Administrativo, as the guardian of due process, being this Court the one responsible to learn, under the provisions of Article 221 of the Constitution of the Republic of Guatemala, of the adversary proceeding that arises between the State and the individual defendant, whose final decision may be given both on the allegation of the complaint and the defenses proposed. "*

- b. As to the "preliminary hearing" in the process of *Lesividad*, the Court very timely indicated: *Hence, contrary to what was argued by the claimant, the agreement being challenged will not cause the alleged injuries,<sup>29</sup> since it has the real possibility of appearing and raise defenses before the competent court that, in cases arising from statements of the administration, is the Court of the Contencioso Administrativo, judicial authority that handles the process to examine, through due process, the sustainability and eventual declaration requested by the State, as well as the by management, as well as the arguments and possible adoption of the defenses that the private party may raise.*<sup>30</sup>

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<sup>29</sup> The victim in this case alleged violation to the Constitutional guarantee of "due process" by not being heard, in advance, in the process of *lesividad* that led to the *Acuerdo Gubernativo* which validity it challenged before the constitutional court.

<sup>30</sup> Judgment of 15 July 2004, issued by the Constitutional Court, File 618-2004, in the case filed by Equipos del Puerto, Sociedad Anónima, against the President of the Republic of Guatemala, defense raised by Port Equipment, Incorporated, against the President of the

48. The jurisprudence from Spain cited by Dr. Eduardo Mayora Alvarado, in his first report,<sup>31</sup> far from providing further evidence of a deficiency of the Guatemalan legal system, highlights its strength, since, while in Spain the government can declare the nullity of their own actions, in Guatemala, as recognized by the Constitutional Court, the Administration is unable to do it; that power will be reserved, exclusively, to the courts, which, after the proper and due hearing to the private party, will examine the legality of the declaration of *lesividad*, providing the revocation effects prescribed by law; that is why in Spain the administration grants the private party a pre-hearing conference, which does not occur in Guatemala because, as noted, the process of *lesividad* is an internal government process, among government entities, which produces a declaration that does not prejudice the contractual rights of the private party.

#### **Section IV. The Judicial Process of the *Contencioso Administrativo***

49. The process of the *Contencioso Administrativo* is regulated by the **Law of the *Contencioso Administrativo***, provided in Decree 119-96 of Congress.

50. This is a **judicial process** by which the parties resolve their differences arising out of acts or decisions of the administration and the decentralized and autonomous government entities, as well as in cases of disputes arising from contracts and administrative concessions. The tribunal hearing the Process of the *Contencioso Administrativo* is the Court of the *Contencioso Administrativo*, which is part of the judiciary, and its main function is to be controller of the legality of the public administration.<sup>32</sup>

51. As in any legal proceedings, and pursuant to the constitutional principle of due process, in the Process of the *Contencioso Administrativo* the defendant is guaranteed (in this case the private party) to have an adequate hearing to claim every defense available to him, to oppose to the fundamentals of the *lesividad*, and enjoying the right to prove the facts on which he bases his defense, prior to the issuance by the court of its ruling.

52. As indicated above, for the Republic of Guatemala to be able to present a complaint to the Process of the *Contencioso Administrativo*, it must follow an internal administrative process for which it declares the *lesividad* of the action or resolution.<sup>33</sup> Such burden is not imposed upon the private party, however, in order to be able to file a complaint with the Court of the *Contencioso Administrativo* it is required that the resolution being challenged by the private party be final, thus

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Republic of Guatemala, in Council of Ministers and the Board of Directors of the Empresa Portuaria Nacional Santo Tomás de Castilla (RL-172).

<sup>31</sup> See paragraph 5 of the First Expert Report of E. Mayora.

<sup>32</sup> Articles 203 and 221 of the Constitution of the Republic of Guatemala (RL-70).

<sup>33</sup> Articles 20 and 23 of the Law of the *Contencioso Administrativo* (RL-49).

not being subject to any administrative appeal, and that the act or the decision will violate the claimant's rights recognized in law, regulation or prior resolution.<sup>34</sup>

53. The process of the *contencioso administrativo* begins with the complaint presented by the claimant before the Court of the *Contencioso Administrativo*; in the event that the claimant is the State, in cases of injury to its interests, the claim must be submitted within three months following the date of publication of the resolution declaring the *lesividad*. The court, after ascertaining that the application meets the requirements as to form, requests from the administrative authority the remission of the supporting documents and will process the claim *having as parties the plaintiff, the defendant and the Attorney General's Office*.<sup>35</sup>

54. The claim cannot be rejected for non-formal requirements; by admitting it for examination, the court grants opportunity to be heard to the parties (including the private party) for a period of 15 days, so the parties to the process enforce the defenses which they believe they are entitled and provide evidence supporting such defenses.

55. The defendant has the right to file a **counterclaim**, which is a claim against the claimant that the defendant initiates in the same process against the plaintiff (i.e., the State), with respect to whom it intends to obtain a specific statement from the court.<sup>36</sup> In the process of *lesividad* this means that the defendant can file, in the same judicial process, a counterclaim against the Republic of Guatemala seeking, in the case of the nullity of the act or contract, restitution of what each other have received or gotten as a result of the business that is canceled or he can request, within the same process and by way of a counterclaim, financial compensation in the event that the declaration of *lesividad* is not supported by law.<sup>37</sup>

56. In the process of the *Contencioso Administrativo* a discovery period of 30 days is granted so the parties can prove the facts supporting their claims.<sup>38</sup>

57. Upon the conclusion of the discovery period, the court brings the process to the attention of the parties and sets the date and time for them to submit their final arguments. The court may, as an exception, issue a decree, so that within a period not to exceed 10 days, the parties carry out all the formalities necessary to determine their rights, stating which ones will be granted, with the citation of the parties.<sup>39</sup>

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<sup>34</sup> Paragraphs a) and b) of article 20 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>35</sup> Articles 18,19,20,23,28,29,31,32,33,35, of the Law of the *Contencioso Administrativo* (RL-49).

<sup>36</sup> Article 40 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>37</sup> Articles 40 of the Law of the *Contencioso Administrativo* (RL-49) and 1,314-1,645 of the Civil Code (RL-42, RL-68).

<sup>38</sup> Article 41 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>39</sup> Articles 43 and 44 of the Law of the *Contencioso Administrativo* (RL-49).

58. The Court of the *Contencioso Administrativo* must issue a decision, which will review the legality of the act or resolution in question, and it could revoke, confirm or modify the same. The court, in its decision, has the obligation to issue an opinion on all the disputed facts in the process, including the ones raised by the defendant in its counterclaim.<sup>40</sup>

59. The ruling issued by the court must consider the legality of any act or resolution in question, and it may revoke, confirm or modify the same; in the event it confirms the declaration of *lesividad*, it must relate the provisions that are consistent with that *lesividad*, as requested by the State, be it that it rules on the invalidity of the act or decision or because it rules on its invalidity; in case there is a counterclaim, the court would vote on each of the claims made by the defendant in the counterclaim.<sup>41</sup>

60. Against the ruling of the Court of the *Contencioso Administrativo*, an Appeal for Reversal can be filed before the Supreme Court.<sup>42</sup> This implies that the losing party in the process, including the private party, that disagrees with the ruling, has the possibility of going before the court of highest rank of Guatemala to review the decision of the Court of the *Contencioso Administrativo*, provided the grounds for an appeal for reversal under the Act are met.

61. In addition to all the guarantees and resources mentioned above, the parties have the right to sue before the Constitutional Court, by filing a suit for legal protection (injunction) or an action of unconstitutionality, if in the course of the process their constitutional rights were violated or if a rule of an unconstitutional nature is intended to be applied.<sup>43</sup>

62. Consequently, it is not true, as alleged by Dr. Eduardo Mayora Alvarado<sup>44</sup>, that the private party has no defense resources to challenge the legality of the declaration of *lesividad*, as there is a legal process which grants them full defense opportunities and appeals to constitutional and judicial authorities that can be enforced, even against a specific standard intended to be applied that restrict their rights and violate the Constitution of the Republic of Guatemala.

63. Ferrovías has exercised and continues to exercise its right of defense in the process of the *Contencioso Administrativo* No. 389-2006 that the Republic of Guatemala started against it before the Court of the *Contencioso Administrativo*, on the occasion of the declaration of *lesividad* of Contracts 143 and 158, and submitted the defenses that are recognized by the Court of the *Contencioso*

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<sup>40</sup> Articles 45 of the Law of the *Contencioso Administrativo* (RL-49), 147 of the Law of the Judicial Power.

<sup>41</sup> Articles 28 Roman Numeral VIII, 40 and 43 of the Law of the *Contencioso Administrativo* (RL-49).

<sup>42</sup> Article 221 of the Constitution of the Republic of Guatemala (RL-70).

<sup>43</sup> Articles 1-10 subparagraph h)- 116 of the Injunction, Habeas Corpus and Constitutional Act (RL-173).

<sup>44</sup> Paragraphs 5 and 9 of the First Expert Report of E. Mayora.

*Administrativo*.<sup>45</sup> In fact, within that process, the Attorney General's Office, on behalf of the State, filed an injunction with the Court asking for the temporary suspension of Contracts 143 and 158. However, the Court of the *Contencioso Administrativo*, by decision of 23 February 2007, rejected the request for the temporary suspension of Contract 402<sup>46</sup>. As a result, the Attorney General's Office submitted an application for reconsideration insisting that the provisional suspension be decreed. The Court by Decision of 10 March 2008 addressed this issue again and dismissed the appeal for reconsideration, rejecting the request for temporary suspension.<sup>47</sup> The Court found that given the circumstances, it was not necessary to suspend the contract and noted that the temporary suspension as a precautionary measure is applicable in emergency circumstances or if it is indispensable, which according to the Court in this case was not verified. This shows that Contracts 143 and 158 remain valid until it is decided otherwise by judicial decision.

64. Similar to the above, I have reviewed the decision of 13 May 2008 from the First Instance Criminal Court of Amatitlán, in the criminal case identified as MP3438-2003, filed by Ferrovías against EEGSA.<sup>48</sup> In that case the District Attorney in charge of the case requested the dismissal and termination of the procedure arguing, among others, that Ferrovías did not have standing to start a criminal action because the President of the Republic had declared *lesivo* Contracts 143 and 158.<sup>49</sup> However, the presiding judge dismissed the arguments of the District Attorney and rejected his petition twice. The Criminal Judge determined that the contract that had been declared *lesivo* was the one related to the equipment (Contracts 143 and 158) and that the contract related to the criminal procedure was the right-of-way usufruct (Contract 402),<sup>50</sup> recognizing that such declaration had no bearing on the rights and standing of Ferrovías to file the criminal action.

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<sup>45</sup> For example, on 21 May 2007 Ferrovías filed its memorial on previous exceptions arguing, among others, lack of jurisdiction of the tribunal, defective complaint and requested the dismissal of the case (R-76). Similarly, on 12 May 2008, Ferrovías filed its counterclaim denying the allegations of the complaint (R-292).

<sup>46</sup> Decision of Division One of the *Contencioso Administrativo* Court dated 23 February 2007, record 389-2006 (RL-73).

<sup>47</sup> Decision from Division One of the *Contencioso Administrativo* Court dated 10 March 2008, record 389-2006 (RL-74).

<sup>48</sup> Decision dated 13 May 2008 from the First Instance Criminal Court of Amatitlán, record MP3438-2003 (R-200).

<sup>49</sup> C-51.

<sup>50</sup> Decision dated 13 May 2008 from the First Instance Criminal Court of Amatitlán, record MP3438-2003 (R-200).

**Section V.**  
**The Administrative Process Followed for the Declaration of**  
***Lesividad* of Contracts 143 and 158**

65. On 13 January 2006 FEGUA's Overseer, in his specific capacity as administrative authority, requested the President of the Republic of Guatemala to proceed with the legal requirements to obtain, through *Acuerdo Gubernativo* of the President, in Council of Ministers, the Declaration of *Lesividad* of Contracts 143 and 158, by reason that such contracts harm the interests of the Republic of Guatemala.<sup>51</sup>

66. The request was prepared by FEGUA's Overseer based on opinions issued by the Attorney General's Office (numbers 205-2005 from 1 August 2005 and 749-2005 from 12 September 2005)<sup>52</sup> and the Legal Department of FEGUA (number 05-2006 from 13 January 2006)<sup>53</sup>.

67. On 26 April 2006 the General Secretariat of the Presidency of the Republic issued an opinion (number 236-2006), by which it recommended to the President of the Republic declare *lesivo* Contracts 143 and 158.<sup>54</sup>

68. The opinion was issued by the General Secretariat of the Presidency, after considering the opinions stated in the technical and legal reports from the advisory boards of the Presidency, consisting of: (a) Opinions from the General Secretariat of the Presidency, numbers 205-2005 from 1 August 2005 and 749-2005 from 12 September 2005;<sup>55</sup> (b) from the Legal Department of FEGUA number 05-2006 from 13 January 2006;<sup>56</sup> and (c) Joint opinion number 181-2006 AJ of the Ministry of Finance from 3 April 2006<sup>57</sup>; all the opinions agreed on that Contracts 143 and 158 were harmful to the interests of the Republic of Guatemala on that they confront and violate the laws of the Guatemalan legal system.

69. The President of the Republic of Guatemala, acting in Council of Ministers, on 11 August 2006 issued the *Acuerdo Gubernativo* number four hundred thirty-three dash two thousand six (433-2006) by virtue of which he **declared *lesivo*** to the interests of the State, Contracts 143 and 158 and, *in turn, instructed the Attorney General to begin the corresponding claim for the Process of the Contencioso Administrativo*.<sup>58</sup>

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<sup>51</sup> R-21.

<sup>52</sup> R-15, R-17.

<sup>53</sup> R-20.

<sup>54</sup> R-25.

<sup>55</sup> R-15, R-17.

<sup>56</sup> R-20.

<sup>57</sup> R-24.

<sup>58</sup> R-35.

70. The *Acuerdo Gubernativo* that declares the *lesividad* of Contracts 143 and 158 was published in the *Diario de Centroamérica* on 25 August 2006.

71. The process for the Declaration of *Lesividad* of Contracts 143 and 158 that ended with the issuance and publication of the *Acuerdo Gubernativo* number 433-2006,<sup>59</sup> complied with the legal provisions that, to the effect, comprise the Constitution of the Republic of Guatemala, the Law of the Executive, the Law of the *Contencioso Administrativo* and Decree 1816 from Congress, so that thus it was in compliance with the principle of legality and legal certainty recognized and guaranteed by the Constitution of the Republic of Guatemala.

72. The President of the Republic **was obliged** to issue, in Council of Ministers, the Declaration of *Lesividad* of Contracts 143 and 158, because if he had failed to do so, there being reasonable grounds to do so, he would have incurred **in joint and several liability**;<sup>60</sup> a declaration of *lesividad* cannot be issued in a discretionary manner, which includes the declaration of *lesividad* of Contracts 143 and 158.

73. The government internal process by which the Declaration of *Lesividad* of Contracts 143 and 158 was issued **complied with all the requirements set forth in the Constitution and the Laws of the Republic**; Ferrovías had the right to question the unconstitutionality of the process of *lesivo* and, in effect, did it, but the Court denied its petition by decision dated 11 January 2008, file number 2498-2006.<sup>61</sup>

74. The decision of 11 January 2008 issued by the Honorable Constitutional Court ended the Petition, in first instance, that Ferrovías raised against the President of the Republic, as a result of having declared Contracts 143 and 158 *lesivo* for the interests of the Republic of Guatemala; in that petition Ferrovías pointed out that the process of *lesividad* had caused it the following violations:<sup>62</sup>

- a. The principle of unrestricted observance to the rule of law in the exercise of public authority and autonomy of a decentralized and autonomous entity;
- b. The right to legal certainty; and
- c. The principle of due process.

75. The Constitutional Court, in decision dated 11 January 2008, stated, while dismissing the argument raised by Ferrovías, that it was inadmissible because the **Process of the *Contencioso Administrativo***, whereby it would get an eventual ruling on the legality or illegality of that contract (Contracts 143 and 158), had not been exhausted; at which time Ferrovías could submit the arguments and bases

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<sup>59</sup> R-35.

<sup>60</sup> Articles 153 and 154 of the Constitution (RL-70) and 16 of the Law of the Executive (RL-50).

<sup>61</sup> RL-71.

<sup>62</sup> RL-71.

that it have sought to justify the validity of its claims. In connection with the alleged violations it stated: “...**The mere declaration of *lesividad*, which is the reason of this claim, would not cause the alleged grievances by itself, corresponding to the Court of the *Contencioso Administrativo* to comment on this.**”<sup>63</sup>

76. The Constitutional Court has not declared unconstitutional, in general or in particular, the process for the declaration of *lesividad* which was followed in the case of the declaration of *lesividad* of Contracts 143 and 158.

77. Therefore, it is not true what Dr. Eduardo Mayora Alvarado affirms in his respective reports,<sup>64</sup> as to that by virtue of that process, the rights of Ferrovías to legal certainty and due process were violated, which, if it considered that the violation occurred, had a constitutional right to challenge the unconstitutionality of that process, which it did, inasmuch as no right of the private party was violated, since it has upheld its right to be heard in the judicial process that the State presented before the judicial body.<sup>65</sup>

## **Section VI. Independent Judicial Review as to the Validity or Invalidity of Contracts 143 and 158**

78. Contracts 143 and 158, which were declared *lesivo* by the President of the Republic, in Council of Ministers, refer to the **disposition**, through usufruct, of movable property (railway equipment) property of FEGUA.

79. In accordance with the provisions of article 1 of Decree 60-72 of Congress, FEGUA is a governmental entity, decentralized autonomous, with legal standing, its own assets and full capacity to acquire and execute contracts; FEGUA is governed by the legal provisions contained in Decree 60-72 of Congress, the **Ferrocarriles de Guatemala Organic Act**.

80. Pursuant to article 3 of FEGUA Organic Act, its purpose is: “**to provide public railway transportation, auxiliary services, wharfage and other port operations for which it is responsible.**”

81. I have highlighted in bold, the **object** that FEGUA Organic Act comprises for FEGUA, in the aforementioned article 3, to support the following propositions which are fundamental to the analysis of the validity or invalidity of Contracts 143 and 158:

- a. That the functions and powers that FEGUA’s authorities can perform under its organic law, **are limited** to those relating to the **object** expressly provided in FEGUA Organic Act; that is, **the delivery of**

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<sup>63</sup> See Section III (RL-71).

<sup>64</sup> Paragraph 5, 8 and 9 of the First Expert Report of E. Mayora and paragraphs 2.4, 2.5 of the Second Expert Report of E. Mayora.

<sup>65</sup> The Republic of Guatemala filed a judicial complaint against Ferrovías by memorial dated 24 November 2006.

**railway transportation public services, auxiliary services, wharfage and other port operations;**

- b. That the **disposition**, by any means, of its property, movable or immovable, that comprise FEGUA's estate assets, **is not included** in FEGUA Organic Act as one of its **purposes**.

82. As to the powers of FEGUA's authorities (Board of Directors and Management), the same are expressly set forth in Articles 19 and 26 of FEGUA Organic Act. None of these provisions empowers the authorities (Board of Directors and Management) **to transfer or negotiate with third parties, the domain or the possession and use, through concession or licensing agreements**, of the movable or immovable property, which are FEGUA's goods.

83. In fact, as to FEGUA's Board of Directors, it provides that the Board's powers include the management of the company's main policies and to outline the necessary provisions *for the effective conduct of business* of the company<sup>66</sup>. FEGUA's objectives, pursuant to its purposes and what has been previously noted, consist of the provision of public railway transportation services and specific ancillary services listed in Article 3 of the Act. **None of the powers** FEGUA Organic Act assigns to its Board of Directors, under Article 19 of the Act, **empowers or authorizes members of the Board of FEGUA to dispose, under any title, movable or immovable property of the company.**

84. As to the powers of Management, Article 21 of the Organic Act provides that Management is FEGUA's executive body, and therefore, is responsible for the administration and government of FEGUA in accordance with its laws; this means that its executive function is limited to meeting the goals provided by law in Article 3 mentioned above, and which relate to the provision of public railway transportation services, ancillary services, wharfage and port operations. Similarly, article 26 of FEGUA Organic Act expressly provides the powers of FEGUA Management **FEGUA and none of its provisions empowers such Management so they may dispose, in any form, of the property, movable or immovable, of FEGUA.**

85. As a result of FEGUA receivership, ordered by *Acuerdo Gubernativo* number 100-82 dated 1 July 1982, ratified by Decree Law number 162-83, and both repealed by Decree Law number 91-84, the duties of FEGUA Board of Directors and Management were assigned to the **Overseer** to be appointed by the Head of State.

86. In accordance with Articles 4 and 5 of Decree Law 91-84 of the Head of State, it was provided that the Receivership of FEGUA, established in *Acuerdo Gubernativo* 100-82 and ratified by Decree Law 162-83, would be continued by the Overseer, whose functions and powers under the Organic Law of the Company, **would be the same that apply to the Board of Directors, the Manager, or any other existing executive officer.**

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<sup>66</sup> Paragraph a) of article 19 of the Organic Act of Ferrocarriles de Guatemala (RL-43).

87. Pursuant to the above, it is clear that FEGUA's Overseer met by itself the functions and powers of the Board of Directors and Management of FEGUA under its Organic Law, however, could not take on other duties or powers as those of the Board Directors or Management; therefore, **the Overseer, as the Board of Directors or Management of FEGUA, had no power or authority to dispose, by itself, of the real or personal property of FEGUA**, for it was not part of the object that the law assigned to that entity.

88. In accordance with the provisions of article 27 of FEGUA Organic Law, FEGUA's assets consist of: (a) all movable and real estate property, rights and stock belonging to it under the provisions of Decree No. 22-69 of Congress, (b) other property which the State will transfer for the development of their activities and the ones the company itself would acquire for that purpose, and (c) the revenue and profits it obtains for its services.

89. Although the movable and land property referred to in paragraph a) of article 27 of FEGUA Organic Act are part of FEGUA's assets, this does not mean that FEGUA may freely dispose of such movables or land, for the same, as FEGUA's goods, are intended to fulfill its purposes that, as stated, consist in the provision of public railway transportation services.

90. In accordance with the above, paragraph c) of article 21 of the Constitution states that **assets which are the property of the State**, including those of the municipality **and decentralized or autonomous entities, such as FEGUA**, are State assets.

91. Consequently, it is clearly shown that:

- a. FEGUA's **Overseer** (who combines the functions and powers of the Board of Directors and Management of the company) **has no power to sell or negotiate with third parties the domain or the possession and use, through concession or licensing agreements, of movable or real estate property forming part of FEGUA's assets**, because the authorities it represents, according to the FEGUA Organic Law (i.e., the Board of Directors and Management), have no such power. That is, those powers were never delegated. The disposition and use of FEGUA's assets are reserved for its own use and for the purposes allocated to it by law.
- b. **Because it does not own those assets, which are the property of the State of Guatemala** (Article 121 subsection c) of the Constitution), **FEGUA's Overseer** needed special authorization from the State of Guatemala to dispose of them, in any capacity, pursuant to the special laws governing this matter.

92. The **onerous usufruct** on FEGUA's movable or real estate property that have special authorization from the State for its disposition **is governed by**

**special laws** relating to ownership and disposition of State property, and secondarily by the provisions of the Civil Code.<sup>67</sup>

93. The special laws governing the matters relating to the goods property of the State are: (a) The Constitution of the Republic of Guatemala; (b) The Tax Code, stated in Decree 261 of President Justo Rufino Barrios; (c) The Law on Government Procurement; and (d) FEGUA Organic Act.

94. The secondary law, as to the onerous usufruct stated in Contracts 143 and 158, would be the Civil Code.

95. If and only if, the State of Guatemala has granted special permission for the disposal of assets belonging to it, in the case of property that belong to FEGUA's estate assets (which did not happen in the case of Contracts 143 and 158), and if and only if, there would have been in compliance with the requirements referred to in the special laws that apply to the disposition of assets that belong to the State of Guatemala (which did not happen in the case of Contracts 143 and 158), then FEGUA's **Overseer** would have been able to execute the onerous usufruct with Ferrovías.

96. Assuming the onerous usufruct signed by FEGUA's Overseer (Contracts 143 and 158) had received **special authorization** from the State of Guatemala and **had complied with the requirements of the special laws**,<sup>68</sup> that contract can never be regarded as being of a private nature which is governed by the provisions of the Civil Code, since the implementation of these provisions, as indicated by Article 462 of the Civil Code, are the subsidiary. In fact, Article 462 of the Civil Code reads: "The goods that are the assets of the state, municipalities and decentralized government entities are subject to special laws and secondarily to the provisions of this Code."

97. Consequently, Contracts 143 and 158, which are alternatively governed by the Civil Code, had to be approved, necessarily, by the President, in Council of Ministers, because such Contracts are governed by *special laws*, in this case, the Law of the *Contencioso Administrativo* and the bidding terms issued by the Government of the Republic, which required the approval of contracts by *Acuerdo Gubernativo*.

98. Consistent with what has been indicated, the Government of the Republic of Guatemala, in November 1997 promoted the **public bidding** process for the receipt of bids for the negotiation and conclusion of an **onerous usufruct** on the use of **railway equipment** (movable property) which is part of FEGUA's estate assets and owned by the State of Guatemala.

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<sup>67</sup> Article 462 of the Civil Code provides: "The goods that are the assets of the State, municipalities and decentralized entities, are subject to special laws and secondarily to the provisions of this Code." (RL-42, RL-68).

<sup>68</sup> Constitution, Tax Code and Law on Government Procurement.

99. The process for negotiating the use (onerous usufruct), of the movable property that is part of FEGUA's estate assets and owned by the State of Guatemala, was initiated through a public bidding because, as noted above, any provision or bargaining as it relates to State property should be governed, among other special laws, by the Law on Government Procurement.

100. **In the Bidding Terms for the Railway Equipment Onerous Usufruct,**<sup>69</sup> specifically in paragraph 1.2 of the same, the legal framework of the negotiations was defined, and it was clearly indicated that said legal framework consists of: **the Constitution of the Republic of Guatemala, the Law on Government Procurement, the Civil Code, FEGUA Organic Law and Decree Law 91-84 which refers to FEGUA's Receivership.**

101. The legal framework of the procedure is consistent with what has been indicated, **since this is not a negotiation of property under private law**, but this is a negotiation involving state property and that, under the Constitution of the Republic of Guatemala and the Government Procurement Act, among other provisions, **require the approval of the State** of Guatemala as the owner of the property on which the onerous usufruct would be constituted.

102. The Bidding Terms discussed herein, specifically paragraph 6.4, provide that the contract (i.e., the onerous usufruct) will be approved by *Acuerdo Gubernativo*, which shall be published in the Official Gazette. This means, in accordance with the provisions of article 16 of the Law of the Executive, that the negotiation **was subject**, for its validity, to the approval by the President of the Republic, in Council of Ministers.

103. The Negotiation, as a result of competitive bidding process, was awarded to the entity Ferrovías, and as a result of the negotiation process, the onerous usufruct was formalized, contained in deed number 41 of 23 March 1999, before Notary Marco Antonio Cornejo Marroquín.

104. Deed 41, which contains the onerous usufruct, provided that the negotiations were formalized, among other documents, based on the Bidding Terms that for such purposes were issued by the Government of Guatemala in November 1997; it was expressly agreed in clause twelfth (12) of Deed number 41, as follows: **"They are part of this agreement and are incorporated herein: A) The document containing the bidding terms and in general all documents that comprise the "Public Tender for the use of railroad equipment owned by FEGUA;"**"

105. Furthermore, Clause Six of Contract 41 (railway equipment onerous usufruct), provides: "The contract term is FIFTY YEARS (50) which shall start thirty days after the publication of the *Acuerdo Gubernativo*, by which the Contract was approved, in the Official Gazette of Guatemala."

106. As a result of incorporating the Bidding Terms to the onerous usufruct, which form part of it, and the language of Clause Sixth of Contract 41, it is clear

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<sup>69</sup> C-17.

that such negotiations **had to be approved by *Acuerdo Gubernativo***, as required by paragraph 6.4 of the Bidding Terms and Clause Six of Contract 41.

107. Contract 41, although approved by FEGUA's Overseer, **was never approved**, by *Acuerdo Gubernativo*, by the President of Republic, in Council of Ministers, so the same, legally, never acquired legal standing.

108. Ferrovías knowingly, without the authorization of the President of the Republic, in Council of Ministers, entered into possession and use of movable property owned by FEGUA, without a valid contract.

109. Ferrovías acknowledged that Contract 41 of onerous usufruct was not in full force and effect, by not having received approval from the President of the Republic of Guatemala, in Council of Ministers, notwithstanding which, it made use, illegally, of the movable property from FEGUA's estate assets, owned by the State of Guatemala.

110. To cover up the illegality in the use of estate assets of FEGUA, owned by the State, Ferrovías and the then FEGUA's Overseer, Hugo René Sarceño Orellana, without new bidding terms, and without the authorization of the President, in Council of Ministers, executed contract 143, by which, Ferrovías was awarded, again, the onerous usufruct of the movable property from FEGUA's estate assets, owned by the State of Guatemala, which had been granted in Contract 41, which had never entered into force.

111. Ferrovías acknowledged that Contract 41 had not entered into force, on the grounds that it had not been approved by the President, in Council of Ministers. Indeed, in the *first clause* of Contract 143, which refers to its background, the parties, in paragraphs IV and V of that first clause, stated: *"IV. That by deed number forty-one (41), authorized in this city on 23 March 1999, by Notary Marco Antonio Cornejo Marroquín, THE ONEROUS USUFRUCT ON RAILWAY EQUIPMENT OWNED BY FERROCARRILES DE GUATEMALA was executed between the company Ferrocarriles de Guatemala and the entity Compañía Desarrolladora Ferroviaria, Sociedad Anónima. V. Although said agreement was executed by such parties, namely Compañía Desarrolladora Ferroviaria, Sociedad Anónima y Ferrocarriles de Guatemala, and therefore was in effect, it never come into force by virtue of not having been approved by the President of the Republic, despite being an unnecessary requirement for the Overseer of Ferrocarriles de Guatemala has the powers necessary for the execution of this contract."*

112. Clearly Ferrovías *knew* that **Contract 41** had not been approved by the President and it also *knew* that it **did not come into force**, by having expressly recognized it, notwithstanding which, it took, unlawfully, possession and made use of the equipments, personal property and the assets of FEGUA owned by the State of Guatemala.

113. To cover up this illegality, the parties to the contract, that is, the entity Ferrovías and FEGUA's Overseer, Hugo René Sarceño Orellana, made in the above paragraphs, the following statements: a) That although the contract did not enter into force, it *"was in full effect;"* and b) That although the contract was never

approved by the President of the Republic, that was “...an unnecessary requirement since the Overseer of Ferrocarriles de Guatemala has the necessary powers to execute this contract.”

114. The “declarations” issued by Ferrovías and FEGUA’s Overseer are, simply, declarations from the parties that:

- a. Have no basis in law; and
- a. Are contrary to the Bidding Terms that were part of Contract 41 where the authorization of the President of the Republic was expressly required.<sup>70</sup>

115. As a basis for the negotiation of Contracts 143 and 158, Ferrovías used the same terms as the bidding terms for the onerous usufruct issued by the Government of the Republic of Guatemala in November 1997.

116. **Using the same bidding terms** for a usufruct contract that had been negotiated previously, **is completely illegal**, as their terms and conditions **expired** with the negotiation of the contract (in this case, Contract 41), for which those bases were issued. In accordance with the Law on Government Procurement and due to the property and nature of the goods, the negotiation of a new usufruct contract, in which some of the essential conditions of the contract negotiated earlier were changed, required a new bidding which establish new bidding terms.<sup>71</sup> The parties to Contracts 143 and 153, however, used the Bidding Terms already expired, for a new negotiation, which included agreements other than those contained in said Bidding Terms.

117. The bases drawn up by the Government of the Republic in February 1997 for the National and International Bidding Terms on the Railway Transport Onerous Usufruct in Guatemala, **did not authorize or grant any option** to Ferrovías for the use of FEGUA’s equipment, since the said contract referred only to the railway transport onerous usufruct and, with respect to the equipment, the intention of the State of Guatemala was to transfer them, **at auction**, as clearly stated in paragraph 4.1.6 of the bidding terms of February 1997, which read *ad verbatim*:<sup>72</sup> *“4.1.6 ON THE RAILWAY EQUIPMENT. Bidders may inspect the railway and non-railway equipment, owned by Ferrocarriles de Guatemala. Such equipment **will be auctioned** at an appropriate time after the contract award and the contractor shall have **the opportunity** to purchase those which it deems appropriate to its operations.”*

118. It is clear, then, that Ferrovías did not acquire any rights of use, not even an option to use, such equipment, based on the onerous usufruct agreement on the Guatemala railway transport, which was awarded to it under the bidding terms of February 1997.

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<sup>70</sup> See paragraph 6.4 of the Bidding Terms that form part of Contract (C-17).

<sup>71</sup> Article 121 of the Constitution (RL-70), 17 and 18 of the Law on Government Procurement (RL-46).

<sup>72</sup> R-1.

119. The State of Guatemala is unable to be bound or "**implicitly**" accept no obligation, nor can the State of Guatemala, grant rights or concessions by implication, thus any obligation in excess of three hundred Quetzales must be in writing; <sup>73</sup> the fact that the State of Guatemala has accepted the offer made by Ferrovías to provide railway transportation services in Guatemala, pursuant to the public bidding in February 1997, in no way altered the bidding terms of the month of February 1997 that, as stated, regulated its intention to transfer the railway equipment through public auction.

120. The fact that Ferrovías had submitted conditions other than those contained in the Bidding Terms, in no way changes the nature, content and extent of the terms, which were incorporated as part of Contract 402,<sup>74</sup> and in Contracts, 41, 143 and 158 as indicated above.

121. The railway transport onerous usufruct contract, Contract 402, never gave a right, option or any relation with respect to the use of the rail equipment of FEGUA. The declaration of *lesividad* of Contracts 143 and 158 did not cause any loss of rights acquired by Ferrovías under Contract 402, neither prevented it from fulfilling its obligations acquired under Contract 402.

122. No condition given by Ferrovías in the public bidding process for the onerous usufruct on the right to transport, varied or changed the bidding TERMS or the terms of Contract 402. In accordance with the provisions of article 1593 of the Civil Code, the intent and the terms of the contract is construed in accordance with the **literal** tone of the contracts.

123. Since the State of Guatemala is unable to be bound "implicitly", any right that Ferrovías may be seeking regarding the use or option to use, or in relation to changes in conditions or provisions of the rights acquired and/or compliance, must be in writing, in the respective contracts, and the intention of the parties will be the one that was written, literally, in the respective **contracts**.<sup>75</sup>

124. No assertion or assumption of ownership or acquisition of rights or obligations based on a bid, particularly in the offer presented by Ferrovías, is considered acceptable nor does it bind the State of Guatemala, if it is not expressly regulated by law or in the respective contracts. In this regard article 1.594 of the Civil Code, as to the "**interpretation of contracts,**" states: "**Notwithstanding how very general the terms are written in a contract, it should not be understood to include different things and different matters from those originally intended by the interested parties.**"

125. Contract 402, and the bidding terms that are a part to it, clearly state the purpose of the negotiation, nothing outside of it can be considered as part of the same or related to other contracts, much less, in the case of Contracts 41, 143 and 158.

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<sup>73</sup> Article 1575 of the Civil Code (RL-42, RL-68).

<sup>74</sup> Clause Fifteen.

<sup>75</sup> Articles 1517-1519-1574-1593-1594 of the Civil Code (RL-42, RL-68).

126. Singularly, upon making illegal use of the same Bidding Terms of Contract 41 for Contracts 143 and 158, it failed again to comply with these Terms, as Contracts 143 and 158 were never approved by the President, in the Council of Ministers, as required by paragraph 6.4 that states that the usufruct document must be approved by *Acuerdo Gubernativo* issued by the President, in Council of Ministers. Contracts 143 and 158, as stated, were never approved by *Acuerdo Gubernativo*.

127. In accordance with the provisions of article 1.301 of the Civil Code, there is absolute invalidity of a legal transaction if its purpose is contrary to public policy or contrary to express prohibition laws, and by the absence and non-concurrence of the conditions essential to its validity.

128. Contracts 143 and 158 are absolutely invalid because they were executed against expressed prohibitory law, and without having met the essential requirements for its validity, as indicated in the preceding paragraphs.

129. Notwithstanding the absolute invalidity of Contracts 143 and 158, the Executive cannot unilaterally declare such invalidity and take possession of the railway equipment since, in accordance with the principles of legal certainty and due process of law, the Republic of Guatemala has to promote a lawsuit before the Court of the *Contencioso Administrativo*, for the court to declare and acknowledge the absolute invalidity of the contract and repossess the equipment, for which, as stated, the Administration had to obtain, prior to filing of the complaint, the declaration of *lesividad* of Contracts 143 and 158.

130. The parties to Contracts 143 and 158 have personal liability, resulting from the formalization and execution of Contracts 143 and 158.<sup>76</sup>

131. There are glaring errors and inconsistencies in the reports rendered by Dr. Eduardo Mayora Alvarado, since it is not true that Contracts 143 and 158 have been entered into with adherence to the applicable legal standards;<sup>77</sup> these contracts are not of a civil nature, considered to be estate assets of FEGUA, imperatively, a new bidding process was required pursuant to the Law on Government Procurement, especially when several of the negotiated clauses of Contract 41 were changed.<sup>78</sup> FEGUA's Overseer had no legal authority to negotiate Contracts 143 and 158, in the terms he did, and even under the bidding terms that founded the negotiation of Contracts 143 and 158, such contracts had to undergo the approval of the President, in Council of Ministers, which, in addition to the other damages to the State interests provided in the decisions that support the *lesividad* of Contracts 143 and 158, fully supports the Declaration of *Lesividad* that the President of the Republic urgently issued so as to avoid incurring in liability.

## Section VII.

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<sup>76</sup> Articles 155 of the Constitution of the Republic (RL-70); 1645-1646-1647-1664-of the Civil Code (RL-42, RL-68).

<sup>77</sup> Paragraph 3.4. of the Second Expert Report of E. Mayora.

<sup>78</sup> Paragraph 3.5 of the Second Expert Report of E. Mayora.

## **Absolute Invalidity of Legal Transactions Contrary to Law and Estoppel**

132. In accordance with the provisions of article 1.301 of the Civil Code, a legal transaction is **absolutely invalid** when its purpose is contrary to public policy or its object expressly banned by law, and by the absence or non-existence of the legal requirements for its existence. A transaction that is absolutely invalid has no effect and cannot be cured by confirmation.

133. None of the letters that were crossed between Ferrovías and FEGUA's Overseer at the time<sup>79</sup>, lead to legally enforceable rights or obligations between Ferrovías, FEGUA and the Republic of Guatemala, on the contrary, these are **absolutely invalid** statements and negotiations with no effect since they are expressly banned by the laws of the Guatemalan legal system.<sup>80</sup>

134. FEGUA's Overseer lacked the legal authority to dispose, in favor of others, of FEGUA's estate assets, owned by the Republic of Guatemala. The above-mentioned letters violate laws of the legal system that force promoting PUBLIC BIDDING when the use and enjoyment of property of the State is given to a third party.<sup>81</sup>

135. The leases contained in deeds number 3 and 5 of 13 August 2003, executed before notary Javier Antonio Sandoval Ruiz,<sup>82</sup> are **absolutely invalid**, because, like the letters that were crossed between the parties to the contract, they make reference to negotiations between Ferrovías and FEGUA's Overseer at the time, Mr. Sarceño, that contradict specific laws of the Guatemalan legal system, which required the parties to the lease of movable property of the Republic of Guatemala that are FEGUA's estate assets, to obtain authorization from the President of the Republic, by *Acuerdo Gubernativo*, prior to the bidding process governed by the Law on Government Procurement.

136. Ferrovías acknowledged that Contract 41 was not in force, that Contract 41 was not approved by the President of the Republic by *Acuerdo Gubernativo*; acknowledged that the bidding terms of November 1997, that required the contract to be approved by the President of the Republic, govern Contracts 143 and 148, so that it acknowledged and knew that Contracts 41, 143 and 158 were in violation of the applicable laws of the legal system, which it try to correct with the letters and leases that, as previously stated, are absolutely invalid.

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<sup>79</sup> Letters dated 9 and 12 April 1999 (R-196, R-197); 16 and 25 February 2000 (R-41, R-195) and 22 August and 9 October 2002 (R-198, R-42).

<sup>80</sup> Articles 121 of the Constitution of the Republic of Guatemala (RL-70); 1-17-18-19-20-21-22-23-33 of the Law on Government Procurement (RL-46); 3<sup>o</sup>-7<sup>o</sup>-19-21-26 of FEGUA's Organic Act (RL-43); 5<sup>o</sup> of the Decree Law 91-84 (RL-44).

<sup>81</sup> Articles 121 of the Constitution of the Republic of Guatemala (RL-70); 1-17-18-19-20-21-22-23-33 of the Law on Government Procurement (RL-46); 3<sup>o</sup>-7<sup>o</sup>-19-21-26 of FEGUA's Organic Act (RL-43); 5<sup>o</sup> of the Decree Law 91-84 (RL-44).

<sup>82</sup> Leases included in public deeds number 3 and number 5, both dated 13 August 2003 (R-199, R-66).

137. The letters that were crossed between Ferrovías and FEGUA's Overseer, as well as leases 3 and 5, which are illegal actions of FEGUA's Overseer, besides containing declarations and agreements that are absolutely invalid, with no legal effects, evidence, also, the absolute invalid nature of Contracts 143 and 158, which absolute invalidity was not remedied by such letters and leases.

138. Since Ferrovías knew that Contract 41 had not entered into force, there is no doubt that Ferrovías was also aware that those letters of authorization of use of equipment between Ferrovías and FEGUA,<sup>83</sup> as well as leases 3 and 5<sup>84</sup> were invalid and contrary to Law, because such acts were trying to fill up precisely the same subject of Contract 41, which again, was not in force. However, since Ferrovías was fully aware of the illegality of such letters and leases, the theory of estoppel under Guatemalan law, does not allow Ferrovías to argue now that, under these letters and lease agreements, the defects of Contracts 41, 143 and 158 were, somehow, repaired or corrected. Moreover, these letters and contracts do not prevent or slow the process of *lesividad*, or the declaration of *lesividad*, against the State interests, of Contracts 143 and 158.

139. Under Guatemalan law, although FEGUA had acted contrary to law (*ultra vires*) by issuing letters of authorization for use of the equipment<sup>85</sup> and executing leases 3 and 5,<sup>86</sup> that, as previously stated, are null, it does not in any way mean that the government is unable or limited, according to the doctrine of estoppel or otherwise, to declare the *lesividad* of Contracts 143 and 158 and file the corresponding claim, so that later the Court of the *Contencioso Administrativo* rules on the legality of the contract by court decision. In fact, the declaration of *lesividad* of the acts and contracts of the Administration is precisely based on the power granted upon the Administration to, in the first place, declare that an action or contract it has issued or executed is *lesivo*, so that, secondly, it is able to submit to the courts of justice, a request for declaration of absolute invalidity of its own acts and contracts, when they are contrary to the Law.

140. So, in accordance with the Doctrine of Estoppel that affects the State Interests,<sup>87</sup> caused in this case by the Overseer of FEGUA and Ferrovías, the Administration has the right to declare the *lesividad* of Contracts 143 and 158 and then request, before the jurisdiction of the *Contencioso Administrativo*, a declaration of absolute invalidity of such contracts, as they are adverse to the Guatemalan legal system.

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<sup>83</sup> Letters dated 9 and 12 April 1999 (R-196, R-197); 16 and 25 February 2000 (R-41, R-195) and 22 August and 9 October 2002 (R-198, R-42).

<sup>84</sup> Lease Agreements contained in public deeds number 3 and number 5, both from 13 August 2003 (R-199, R-66).

<sup>85</sup> Letters dated 9 and 12 April 1999 (R-196, R-197); 16 and 25 February 2000 (R-41, R-195) and 22 August and 9 October 2002 (R-198, R-42).

<sup>86</sup> Lease Agreements contained in public deeds number 3 and number 5, both from 13 August 2003 (R-199, R-66).

<sup>87</sup> The laws of the Guatemalan legal system that support the doctrine of Estoppel that Affects the State Interests are: the Civil Code Article 1301 (RL-42, RL-68) and Article 20 of the Law on Administrative Disputes ( RL-49).

## **Section VIII. Expert Credentials**

141. I am a lawyer and notary and have a Bachelor of Law and Social Sciences from the University of San Carlos of Guatemala and a member of the College of Lawyers and Notaries since 1981.

142. As a university professor I have taught classes from 1982 to 2000 in the University of San Carlos of Guatemala, Universidad Francisco Marroquín, and Mariano Gálvez University in the Republic of Guatemala.

143. The courses I have taught are: (a) Labor Law, Individual and Collective, University of San Carlos of Guatemala, 1982-1986, (b) Banking Law (Commercial Law IV) at Universidad Francisco Marroquín, 1986-1995 (c) Civil and Commercial Law at Universidad Francisco Marroquín, 1995-2000, (d) Banking and Commercial Law in the Master of Commercial Law at the Universidad Mariano Gálvez, in the years 2001-2002.

144. From 1981 through date, I established my independent work office as a lawyer and litigator.

145. My professional office is organized and incorporated under the name “Aguilar & Aguilar;” any information relating to the firm and myself is available in our web site [www.legal.com.gt](http://www.legal.com.gt).

146. Through my professional office and under my direction, we collect, store and electronically provide legal information on the laws of the country and the main rules and regulations on authority. The entity providing such services, in my professional office, is the entity “Lex-Global, Sociedad Anónima,” and we have a backup of over 17,000 legal documents. It is available at the site [www.lexglobal.com.gt](http://www.lexglobal.com.gt).

147. As legal counsel, I have given advice and through this date continue providing advice to: (a) Banking and Financing Institutions; (b) Commercial and Industrial Entities, (c) Institutions and entities of the State; and (d) Entities and private persons, in different areas and issues including issues of tributary nature, Taxes, Administrative, Labor, Commercial, and Electric, among others.

148. In 1995 I participated as an advisor in the creation and issuance of the General Electricity Law contained in Decree 93-96 of Congress; in 1996 I worked as a consultant for the creation and issuance of the Housing and Settlements Act.

149. As a trial lawyer I have been involved in various national and international disputes, including issues of Conciliation and Arbitration in London, England and Washington, D.C, in the United States of America, as well family disputes, disputes with and on behalf of the State, and industrial property disputes, among others.

150. I was Vice President of the Guatemalan Institute of Notarial Law.

151. I have been a lecturer in various national and international Conferences and Academic Symposiums conducted in Guatemala and in various countries, among which are Germany, Holland, Spain, Honduras, El Salvador, Nicaragua, Costa Rica, Dominican Republic, Chile and Guatemala.

152. I have represented several banks in the country in joint activities before the supervisory and monetary authorities of the country.

153. Overall, as of today, I have been practicing the profession of lawyer and notary, for over 29 years.

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I render this expert report under my best knowledge and understanding, in the abovementioned case. I solemnly declare, by my honor and conscience, that what I have held and will hold in the present case is consistent to what I honestly believe.

[Signed]

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Juan Luis Aguilar Salguero

1 October 2010

City of Guatemala