

Before the

**INTERNATIONAL CENTER FOR SETTLEMENT OF
INVESTMENT DISPUTES**

Case No. ARB/07/23

Between

RAILWAY DEVELOPMENT CORPORATION

Claimant

v.

THE REPUBLIC OF GUATEMALA

Respondent

EXPERT REPORT BY MARITHZA RUIZ DE VIELMAN

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I. INTRODUCTION

1. The Ministry of Economy of the Republic of Guatemala (the “Republic”), in the context of the international arbitration before the International Centre for Settlement of Investment Disputes filed by *Railroad Development Corporation* against the Republic (ICSID Case No. ARB/07/23), has asked me to render an expert opinion on the grounds pursuant to Guatemalan law of the *lesividad* - declared by the President of Guatemala by means of Executive Resolution No. 433-2006 of 11 August 2006 - of the Onerous Usufruct Contract of Railway Equipment owned by Ferrocarriles de Guatemala (“FEGUA”) entered into by FEGUA and Compañía Desarrolladora Ferroviaria, Sociedad Anónima (“Ferrovías”), formalized by Deed No. 143 of 28 August 2003 (“Contract 143”)¹, and amendment of the Onerous Usufruct Contract of Railway Equipment owned by Ferrocarriles de Guatemala, formalized by Deed No. 158 of 7 October 2003 (“Contract 158”).² The Republic has also asked me to analyze the liabilities which could result for the President of the Republic in the context of a potential *lesividad* and, in particular, in the specific case of the *lesividad* of Contracts 143 and 158.
2. The conclusions of this opinion are: (a) the management of FEGUA, as a decentralized, autonomous and intervened State entity, corresponds to its Overseer. He is vested with the powers of ordinary management of the company, while the remaining powers, and those specifically provided in the Law of FEGUA, rest with the President, who is the Overseer’s hierarchical superior; (b) FEGUA has the power to enter into contracts regarding goods and services, and the instruments by virtue of which FEGUA grants special rights of use over its assets, including an onerous usufruct contract such as Contracts 143 and 158, are of the same nature as licenses, authorizations, permits, concessions and similar rights; c) FEGUA could enter into Contract 143 to confer a special right of use over state assets consisting of railway equipment. However, in order

¹ Contract No. 143, 3 March 1999 (Exhibit R-5).

² Contract No. 158, 7 October 2003 (Exhibit R-5).

to do so, FEGUA should have complied with the requirements established by Law, including the Public Contracting Act; such usufruct would share the nature of a license, authorization, permit, concession, or similar instrument; (d) that the process of *lesividad* is regulated by law in Guatemala, and it is based on the protection of the principles of legality, security and legal certainty. The declaration of *lesividad* is a mere procedural requirement, with no effects on the administered private party, and the process to give effect to the declaration meets all the guarantees of due process; (e) Contracts 143 and 158 suffered from serious legal defects that justified the declaration of *lesividad*, were not conferred pursuant to Guatemalan law, and did not create rights protected under Guatemalan law; (f) the President of the Republic, after receiving the request to declare the *lesividad*, and five legal opinions issued by independent entities confirming the legal defects in the contracts and recommending that the President declare them *lesivos*, could not ignore this situation without incurring in liability. The President's only options were to proceed with the declaration or to negotiate a settlement agreement under the terms established by Guatemalan law. After making the decision to declare Contracts 143 and 158 *lesivos* in April 2006, the President could not revert this decision without incurring in personal liability unless a settlement agreement with Ferrovías guaranteeing the Republic's best interests was reached, something that did not occur.

3. This Report is divided into nine sections: **Section I** is a brief introduction on the purpose and scope of the Report; **Section II** sets forth my academic and professional credentials; **Section III** describes FEGUA's legal framework as an autonomous, decentralized, state entity; **Section IV** explains the legitimacy of the State - and of FEGUA, as a public, autonomous and decentralized entity - to enter into contracts with private parties; **Section V** defines the nature of a concession and of an onerous usufruct contract, as well as the nature of an instrument that confers special rights of use over public assets; **Section VI** contains a legal analysis of the *lesividad* of administrative acts; Section VII sets out the basic grounds of the *lesividad* of Contracts 143 and 158; **Section VIII** details the liabilities of the President of the Republic in the context of a potential *lesividad*, and in

the specific case of the *lesividad* of Contracts 143 and 158; and, finally, **Section IX** contains the conclusions of this report.

4. To prepare my expert opinion herein, I had before me and reviewed the information outlined below, among other, supplied by the Republic:
 - (a) Memorial on the Merits by Railroad Development Corporation (the “Claimant”), dated 26 June 2009 and Opinion by Claimant’s Expert, Eduardo A. Mayora;³
 - (b) The Onerous Usufruct Contract for the Right of Way, formalized by Deed 402 of 23 November 1997 (“Contract 402”)⁴ and its bidding terms of 14 February 1997,⁵
 - (c) Onerous Usufruct Contract of Railway Equipment Owned by Ferrocarriles Guatemala, formalized by Deed No. 41 of 23 March 1999 (“Contract 41”)⁶, and Bidding Terms of November 1997;⁷
 - (d) Contracts 143 and 158;
 - (e) Opinion 205-2005 by Attorney General’s Office of 1 August 2005;⁸
 - (f) Opinion 749-2005 by Attorney General’s Office of 12 September 2005;⁹
 - (g) Letter from FEGUA’s Overseer to the President, dated 13 January 2006;¹⁰
 - (h) FEGUA’s Legal Department Opinion 05-2006, dated 13 January 2006;¹¹
 - (i) Joint Opinion No. 181-2006 AJ by the Ministry of Public Finance, dated 3 April 2006;¹²

³ Mayora Opinion. Exhibit XV of Claimant’s Memorial on the Merits

⁴ Exhibit C-22 of Claimant’s Memorial on the Merits.

⁵ Bidding Terms for Contract No. 402, 14 February 1997 (Exhibit R-1).

⁶ Contract No. 41, 23 March 1999 (Exhibit R-3)

⁷ Bidding Terms for Contract No. 41, November 1997 (Exhibit R-2).

⁸ Opinion 205-2005 by State Attorney’s Office, 1 August 2005 (Exhibit R-15).

⁹ Opinion 749-2005 by State Attorney’s Office, 12 September 2005 (Exhibit R-15).

¹⁰ Letter from A. Gramajo to President Óscar Berger, 13 January 2006 (Exhibit R-21)

¹¹ FEGUA’s Legal Department Opinion 05-2006, 13 January 2006 (Exhibit R-20).

- (j) Opinion No. 236-2006 by the General Secretariat of the Presidency of the Republic, of 26 April 2006;¹³
 - (k) Executive Resolution No. 433-2006, declaring the *lesividad* of Contracts 143 and 158;¹⁴
 - (l) Complaint submitted before the First Courtroom of the Contentious Administrative Court, File No. 389-2006, by means of which the Attorney General's Office submits the *Lesividad* law suit;¹⁵
5. Also, by means of this Report I solemnly declare upon my honor and conscience that my statements will be in accordance with my sincere beliefs.

II. EXPERT'S EDUCATION AND PROFESSIONAL EXPERIENCE

6. I am an Attorney and Notary, with a degree in Legal and Social Sciences obtained at Universidad Rafael Landívar in 1973, and a member of the Bar of Attorneys and Notaries of Guatemala since 1974.
7. My professional experience in public law began in 1974, when I started to practice as an independent litigation attorney, focusing on constitutional, administrative and tax law. In 1974, I opened the Vielman law firm to carry out my private practice, sometimes jointly with other attorneys who, like me, have an independent practice. I have participated in litigations before the Guatemalan courts, in particular before the Contentious Administrative Courts, as a representative of foreign and Guatemalan private sector companies, in appeals petition and constitutional protection (cassation and “*acción de amparo*”) filed against the State, particularly against the Ministry of Foreign Affairs, the Ministry of Economy, and the General Directorate of Civil Aviation. I have also served

Footnote continued from previous page

¹² Joint Opinion 181-2006-AJ by the Ministry of Public Finance, 3 April 2006 (Exhibit R-24).

¹³ Opinion 236-2006 by the General Secretariat of the Presidency of the Republic, 26 April 2006 (Exhibit R-25).

¹⁴ Executive Resolution No. 433-2006, declaring the *lesividad* of Usufruct Contract No. 143 and its amendment No. 158, 11 August 2006 (Exhibit R-35).

¹⁵ Exhibit C-11 of Claimant's Memorial on the Merits

as outside legal counsel to the General Directorate of Civil Aviation, with regard to an administrative contract which is the subject of proceedings, both civil and administrative, and I am advising on the declaration of *lesividad* of an administrative contract. Likewise, I have litigated before Dispute Settlement Panels established by the Dispute Settlement Body of the World Trade Organization. In addition, I have been legal counsel to foreign and national companies in several areas of the law and their business.

8. I was a chaired professor at Universidad Rafael Landívar from 1975 to 1982, where I taught Civil Law, specifically General Obligations Law, and Contracts in particular. From 1998 to 2000, I worked in cooperation with Georgetown University in Washington, D.C. where I taught seminars on the dispute resolution system of the WTO. Finally, I have participated as speaker in conferences on international law at the Chamber of Commerce, Chamber of Industry, Universidad Rafael Landívar, Universidad Francisco Marroquín, and Universidad San Carlos de Guatemala, and in conferences at the *London School of Economics*, on Foreign Trade and Dispute Resolution, in 2002.
9. I was Minister of Foreign Affairs of Guatemala from 1994 to 1995. I was Ambassador of Guatemala to the United Kingdom of Great Britain and Northern Ireland from 2001 to 2003. During that period, I was Guatemala's permanent representative before the International Coffee Organization, the International Sugar Organization, and the International Maritime Organization. Also, I was President of the Administrative Committee of the International Sugar Organization. I was a member of the Board of Directors of the Advisory Centre of the World Trade Organization in Geneva, from 2000 to 2002.
10. My résumé is attached.¹⁶

¹⁶ Exhibit A

III. LEGAL FRAMEWORK OF EMPRESA DE LOS FERROCARRILES DE GUATEMALA, AS AN AUTONOMOUS, DECENTRALIZED PUBLIC LAW ENTITY

11. FEGUA is a decentralized and autonomous state entity, with legal personality, its own assets and full capacity to acquire rights and obligations.¹⁷ As any entity of the Guatemalan state, FEGUA is subject to the Political Constitution and all other laws of the Republic.
12. In the following paragraphs I explain the meaning of FEGUA's status as a decentralized and autonomous entity, as well as that of intervened entity, and the bodies that have decision power over the company's actions: the Overseer and the President. Finally, I detail how, by virtue of the aforementioned, the Overseer was not authorized to approve Contract 143, but only the President had the authority.
13. The principle of decentralization of the administration is established in Article 224 of the Constitution of the Republic.¹⁸ The supreme law of Guatemala provides that certain activities can be transferred from the Executive Branch to autonomous and decentralized entities, which will act by delegation of the State, by the favorable vote of two thirds of the Congress of the Republic.¹⁹ The Executive Branch is responsible for State administrative functions, and the functions established in the Constitution are developed in the Executive Branch Law. This Law also governs autonomous and decentralized entities, and it establishes in its Fifth Recital that: "According to Article 224 of the Constitution, the administration shall be decentralized. Decentralized means the process whereby central Government delegates the execution and administrative control of certain functions to entities other than central Government, or their autonomous and decentralized entities, retaining regulatory and financing functions, and control functions in a subsidiary and controlling capacity." In that context, Article 35 deals with the

¹⁷ Article 1 of Organic Law of Empresa de Ferrocarriles de Guatemala, Decree 60-72 of the Congress of the Republic of Guatemala, 28 December 1972 (Exhibit RAL-43).

¹⁸ "...Administration shall be decentralized. Development regions shall be defined, with economic, social and cultural criteria which shall consist in one or more departments in order to rationally promote the country's development"

¹⁹ Article 142 of the Constitution of the Republic in force when FEGUA was established, and Article 134 of the current Constitution of the Republic of Guatemala (Exhibit RAL-45)

Ministry of Public Finance, whose functions are, among others: “t) Coordinate the contracting and procurement system of the Central Government and its decentralized, autonomous entities.”

14. The Constitutional Court has identified some of the elements of decentralization, *inter alia*: decentralization is created by the constitutional legislator or the ordinary legislator; it entails a transfer of competence from direct to indirect State administration; and it involves the creation of legal entities in Public Law.²⁰ Considering that decentralization constitutes a delegation, the powers of decentralized entities are strictly limited to the powers that were delegated, while the remaining powers remain with the Executive Branch. Also, to the extent that delegation creates legal entities under Public Law, said legal entities may only exercise the powers strictly delimited by the corresponding law because, as opposed to a natural person, who has the power to do anything that is not forbidden by law, a legal entity only exists to do what the law provides.²¹
15. FEGUA was first intervened in 1982.²² In 1984, regulations regarding the intervention of FEGUA were amended, revoking the previous regulation by Executive Resolution No. 91-84,²³ currently in force. By virtue of the latter, an Inter-Institutional Commission was created in charge of structuring a National Plan to develop railway transportation, and its president would have capacity as Overseer. In addition, the Decree established that the Overseer would continue to be in charge of the intervention ordered by Executive Resolution 100-82, and the Overseer would be vested with the functions and prerogatives which, according to FEGUA’s Organic Law, belong to the Board, the Manager, and any other executive official, and he will also be vested with the legal representation of the company.

²⁰ Gazette 57, File 16-00, page No. 71, Sentence 05-09-00 (Exhibit R-46).

²¹ Author Roberto Dromí, in his book *Administrative Law*, 7th updated edition, page 347, Ciudad de Argentina 1998, referring to capacity: “As for self-sufficient entities and State companies, their respective statutory regulations establish contractual competence.” (Exhibit RAL-56).

²² Executive Resolution 100-82, 1 July 1982, ratified by Executive Resolution No. 162-83 (Exhibit RL-54).

²³ Decree 91-84, about the intervention of FEGUA, 6 September 1984 (Exhibit RAL-44).

16. The Overseer is the highest authority of FEGUA, and it is his duty to manage FEGUA's activities.²⁴ However, his powers are not unlimited; rather they are limited to the powers that have been delegated through FEGUA's Organic Law. Powers that were not delegated remain with the Executive Branch. For example, Article 19(n) of FEGUA's Organic Law expressly establishes that the approval of tariffs "must be submitted for consideration by the Executive Branch, and final approval through an Executive Resolution." Article 19(g), for its part, requires the company's income and expenditure budget to be submitted to the Executive Branch for approval. This is due to the fact the Overseer's powers are circumscribed to the powers necessary to manage the entity, that is, for the ordinary operation of the company, such as management policies, appointing specific officials, and creating or closing branches. Extraordinary decisions, however, are within the power of the President, as the Overseer's hierarchical superior, by virtue of Article 6 of the Executive Branch Law,²⁵ because such powers were not delegated to FEGUA by the Congress of the Republic. The Overseer only has power to act within the scope of the delegation made in FEGUA's Law, while power for any other action resides with the Executive, by virtue of the Constitution and the Executive Branch Law.
17. The above was recognized in a Decision rendered by the First Courtroom of the Contentious Administrative Court, dated 17 December 2001, File 168-95, in a case similar to that of Contract 143, where the FEGUA Overseer at the time granted a right of onerous use over a FEGUA estate property for a period of thirty years without presidential authorization. The Tribunal established that:

"One cannot speak of FEGUA's autonomy and the Overseer's power as Board of Directors and Manager, which were assigned to the Overseer, because the transaction is not within FEGUA's ordinary course of business and purposes under FEGUA's Organic Law; he, as Overseer and manager, could not use

²⁴ FEGUA's Organic Law, Decree No. 60-72, Article 9, 28 December 1972 (Exhibit RAL-43).

²⁵ Executive Branch Law, Decree No. 114-97, Article 6, 13 November 1997 (Exhibit RAL-50). "Superior Authority of the Executive Branch Law: The high administrative authority of the Executive Branch is the President of the Republic. The President of the Republic shall always act within the Council of Ministers, or separately with one or more Ministers, in all cases where his actions would result in legal relationships that are binding for public administration".

FEGUA's assets for operations that were not proper or legal in accordance with FEGUA's Organic Law. Thus, the Overseer surpassed the legal limits established for FEGUA and for FEGUA's manager."

18. In the same court decision, the following was pointed out:

"...Going into further detail in the analysis of the relevant contract, it is clear that the [FEGUA] Overseer at that time, Mr. Fernando Antonio Leal Estévez, was not legally competent to enter into that contract, given that the requisite authority [to do so] was at no point in time signaled in that instrument, notwithstanding the fact that he was entering into contracts concerning the State's own goods, which [capacity] corresponds to the President of the Republic alone, as mandated by article 183 section q) of the Constitution, which also defines article 667 of the Tax Code. Both laws agree that the administration of the treasury according to law is a function of the executive through the President."

19. Article 183, paragraph q) of the Constitution, as indicated by the aforementioned court decision, provides that "it is a function of the President of the Republic... [t]o manage Public Assets in accordance with the Law." Along the same lines, it is clear that the assets of FEGUA are still within the sphere of State assets, in spite of the intervention that had been decreed. Under Article 121 of the Constitution, state assets are those that belong to the state, including municipal assets, and assets belonging to decentralized or autonomous entities.

20. As a result of the above, the power to approve Contract 143, which entailed granting the use and enjoyment of State property to a private party, was a prerogative of the President. The purpose of Contract 143 was to grant Ferrovias "the use, enjoyment, repair and maintenance" of railway equipment owned by FEGUA,²⁶ for a period of forty-four years, eight months and twenty-five days from 28 August 2006.²⁷ Said railway equipment represents the totality of FEGUA's assets and, therefore, granting an *in rem* right of usufruct over a period of almost fifty years was an extraordinary action, not a

²⁶ Clause Three, Contract 143, 28 August 2003 (Exhibit R-5).

²⁷ Clause Six, Contract 143, 28 August 2003 (Exhibit R-5).

management action, that falls outside the scope of the Overseer's authority and required the approval of the President through an Executive Resolution.²⁸ In addition, it is a contract outside the ordinary course of business and purposes of FEGUA under its Organic Law and, therefore, the authority to execute it belongs to the Executive Branch, not to FEGUA's Overseer. Also, it is an act which affects the entity's income and expenditure budget, and therefore it requires the approval of the President through an Executive Resolution, as expressly required by Article 19(g) of FEGUA's Organic Law. In short, the signature of Contracts 143 and 145 by the Overseer was an *ultra vires* act.

21. The same conclusion is reached through an analysis of the Public Contracting Law.²⁹ Article 47 and 48 of said Law establishes that "contracts to be entered into with decentralized entities... shall be executed by the corresponding authority, in accordance with its Organic Law" and shall be approved by the same authority established by Article 9 of the Public Contracting Law. The application of these provisions to FEGUA, in light of the powers vested on the Overseer and on the President, results in that the President must approve all contracts entered into by FEGUA that are subject to the Public Contracting Law and, in particular, in the need for the President to approve Contract 143.
22. In conclusion, FEGUA is a decentralized, intervened entity, with autonomy for the ordinary course of its activities, which is managed by the Overseer, and under the control and supervision of the President, who is in charge of making extraordinary decisions for the company and, in general, of whatever decisions regarding matters that have not been delegated to FEGUA and its Overseer, all of which by virtue of FEGUA's Organic Law and the Executive Branch Law. In addition, in application of the Public Contracting Law, only the President has authority to approve contracts entered into under said Act. Consequently, the Overseer did not have the power to sign Contract 143, which required an approval through an Executive Resolution, as an essential requirement for the contract to come into force.

²⁸ Article 6, Executive Branch Law (Exhibit RAL-50).

²⁹ Public Contracting Law, Decree No. 57-92 of the Congress of the Republic, 21 October 1992 (Exhibit RAL-46).

IV. THE STATE’S LEGITIMACY -- AND FEGUA’S LEGITIMACY, AS AN AUTONOMOUS AND DECENTRALIZED PUBLIC LAW ENTITY -- TO ENTER INTO CONTRACTS WITH PRIVATE PARTIES

28. This section explains the legal and constitutional basis that legitimize the State, and FEGUA as an autonomous and decentralized public law entity, to enter into contracts with private parties. In particular, this section sets forth the legal basis that legitimize FEGUA to enter into a contract with Ferrovías, and the applicable legal framework for such contracting.
29. Under Article 182 of the Constitution of the Republic, the Executive Branch is made up of the President and Vice President of the Republic, Ministers and Vice Ministers, and dependent officials. As highlighted above, Article 224 of the Constitution of the Republic provides that the Administration be decentralized. Developing these constitutional precepts, the Executive Branch Law defines the prerogatives of the bodies that constitute the Executive Branch and, as relevant to this analysis, confers upon the Ministry of Public Finance the role of coordinating the contracting system for its autonomous, decentralized entities.³⁰ For its part, Article 1 of FEGUA’s Organic Law establishes that FEGUA shall have “legal personality, its own assets, and full capacity to acquire rights and obligations.”
30. The Public Contracting Law and its Regulations, in turn, establish the specific legal framework between the State and a private party, for the contracting of goods and services. Thus, said Law regulates everything regarding the purchase, sale and contracting over goods, supplies, works and services required by State bodies, their autonomous and decentralized entities, executive units, municipalities, and state and municipal companies.³¹
31. Thus, FEGUA, as an autonomous and decentralized state entity, under the Constitution and by virtue of its Organic Law, has the power to enter into contracts with private

³⁰ Article 35 of Executive Branch Law (Exhibit RAL-50).

³¹ Article 1 of the Public Contracting Law (Exhibit RAL-46).

parties, although only within the powers delegated by the Executive. Therefore, FEGUA could have entered into a usufruct contract for railway equipment with Ferrovías subject to the provisions of the applicable laws, including, as stated above, the requirement to obtain approval by the Executive Branch. The legal framework for contracts between the State and autonomous, decentralized entities, on one hand, and private parties, on the other, is regulated by the Public Contracting Law. A contract between FEGUA and Ferrovías regarding the railway equipment fell within the framework of said Law.

V. NATURE OF A CONCESSION, AND OF AN ONEROUS USUFRUCT CONTRACT, AND NATURE OF AN INSTRUMENT WHICH GRANTS RIGHTS OF SPECIAL USE OVER PUBLIC PROPERTY

32. This section defines the nature of a concession in accordance with Guatemalan Law. Later, it describes the nature of Onerous Usufruct and, subsequently, it describes the nature of an instrument which grants special rights of use over public assets. Subsequently, it explains how an Onerous Usufruct can be the appropriate contractual means of granting rights over public assets, provided that, in that case, it would be necessary to comply with the legal requirements for granting concessions, and the instrument shall have the same nature as a license, authorization, permit, concession or similar instrument. Finally, it explains that FEGUA could have entered into an Onerous Usufruct Contract, Contract 143, to grant special rights of use over national assets consisting in railway equipment, provided the requirements of the Public Contracting Law were fulfilled, which includes establishing bidding terms and obtaining approval through an Executive Resolution (not Congress approval, which applies to public service concession contracts). Such usufruct is of the same nature as a license, authorization, permit, concession, or similar instrument.

A. Nature of a Concession

33. According to Article 95 of the Public Contracting Law, approved by Decree No. 57-92 of the Congress of the Republic of Guatemala:

“It should be understood that concession is the power that the State grants to private parties to, at their own account and risk, build, produce, set-up, install, improve, maintain, restore and manage a public work, a public asset, or a public service, under the control of the granting public entity, with or without occupation

of public property, in exchange for a remuneration that the private party charges the users of said works, property or service”. (Emphasis added).

34. Concessions, therefore, may refer to public works, public assets or public services. In this opinion we shall concentrate exclusively on the analysis of concessions over public assets and public services:

(a) Public Assets Concessions. Public domain assets are those “owned by a state entity which, having been assigned to public use or service, are subject to a special regime.³² As part of the special regime, in general, the special use of public assets requires an authorizing instrument,³³ be it a license, authorization, permit, concession or similar instrument. That instrument is the concession, in the case of special enjoyment of public property for common use, as provided for under Article 461 of the Guatemalan Civil Code.³⁴

Concessions over public assets imply the granting of a special right of use of a state asset, and thus they constitute an administrative act that only the Administration can grant, exercising its inherent powers, and at all times retaining control and the power to supervise the conditions in which the property is maintained by the concessionaire.

(b) Public Service Concessions: In Public Service Concessions, the administration remains the owner of the public service, but it entrusts its exploitation to a private party, who assumes the economic risks of the enterprise, based on an agreement which is achieved through a concession contract.³⁵

³² Daniel I. Ripley, *La utilización privativa de los bienes de dominio público: Las concesiones demaniales en la nueva ley de patrimonio de las administraciones públicas*, Actualidad Jurídica Uría & Menéndez, No. 8/2004, page 25 (Exhibit RAL-32).

³³ *Id.*, page 28.

³⁴ “Common use property is inalienable and not subject to prescription”, and “all inhabitants can make use of it, subject to legal restrictions. However, for special enjoyment, a concession granted under the respective laws is required.” (Exhibit RAL-42).

³⁵ Castillo Gonzalez, Jorge Mario, *Administrative Law*, 298. Tenth edition, updated 1998 (Exhibit RAL-55).

B. Nature of a Usufruct

35. According to Aguilar Guerra: “the usufruct is an *in rem* right that allows for the use of somebody else’s property, and confers its holder an immediate and *erga omnes* power over the goods given under the usufruct. a) Consequently, it is an *in rem* right which limits domain; it restricts the powers of enjoyment by the owner; b) it is a temporary right, so that the scope granted by the usufruct to the holder is counteracted by the limited duration in time of the usufruct...; c) it is a transferable right, and Article 716 of the Civil Code gives the usufructuary the right to transfer the usufruct; d) the usufructuary is bound to preserve the form and substance of the goods received - more than an obligation *strictu sensu*, it is a limitation of the usufructuary’s powers, in the sense that the usufructuary can enjoy the fruits of an object owned by someone else, but cannot alter its properties, in form or essence.”³⁶
36. The onerous usufruct is regulated in Articles 731, 735 and 1590 of the Guatemalan Civil Code.³⁷

C. The Nature of an Instrument that Grants Special Rights of Use over Public Property

37. Contract 143 is an authentic Usufruct Contract, whose Clause 2 establishes the purpose of the Contract as: “the award by FEGUA to Ferrovías of the use, benefits, repair and maintenance of railroad equipment”. At the same time, Contract 143 expects to award a special right of use over a public asset (railroad equipment), that only the Administration can award, by means of an administrative act exercised through inherent powers. Thus, it shares the legal nature of public asset concessions, i.e., the legal nature of licenses, authorizations, permits and similar rights.
38. To conclude, an onerous usufruct can be the appropriate contractual means to grant rights over public assets, provided that, in such case, it will be necessary to comply with all

³⁶ Aguilar Guerra, Vladimir, *In Rem Rights*, 374 and 375. Colección de Monografías Hispalense 2007, Litografía Orión (Exhibit RAL-57).

³⁷ Guatemalan Civil Code, 14 September 1963 (Exhibit RAL-42).

legal requirements applicable to concessions, and the instrument shall be of the same nature as a license, authorization, permit, concession, or similar instrument. As a result of the above, FEGUA could enter into an onerous usufruct contract, Contract 143, to grant a right of special use over state assets consisting of railway equipment provided that the requirements established in the law were met, including those of the Public Contracting Law and FEGUA's Organic Law.

Among these requirements is the requirement of establishing bidding terms and having the approval of the Executive through an Executive Resolution.

VI. THE *LESIVIDAD* OF ADMINISTRATIVE ACTS OR DECISIONS

39. This section describes the legal framework, origins, concept, requirements, and basis for the concept of *lesividad* of administrative acts, proving that the concept has constitutionally roots in Guatemala and, in particular, on the constitutional principles of legality, legal certainty and legal security, and due process. Also, this section details the effects of a declaration of *lesividad*, and the relationship between the concept of *lesividad* and the doctrine of Estoppel (“*actos propios*”).

A. Legal Framework

40. In Guatemala, the concept of *lesividad* is found in Article 20, last paragraph, of the Contentious Administrative Law, passed by Decree No. 119-96 of the Congress of the Republic.³⁸ The Article establishes as follows:

“To initiate this [contentious administrative judicial] proceeding, the decision that exhausted administrative remedies must meet the following requirements:

(a) To be administrative res judicata. Decisions of the administration deciding the issue are administrative res judicata when they are not susceptible of further challenge before the administration because all relevant administrative recourse has been exhausted.

(b) To violate a right of the claimant which is recognized under a law, regulation or prior decision.-

³⁸ Contentious Administrative Law, Decree of Congress No. 119-96, 21 November 1996, (Exhibit RAL-49).

If the proceeding is initiated by the administration regarding its actions or decisions, it will not be necessary to meet all the aforementioned requirements, provided that the act or decision has been declared *lesivo* for State interests through an Executive Resolution issued by the President of the Republic with his Council of Ministers. This declaration can only be made within the three years following the date of the decision or act which originates it. (Emphasis added).

41. *Lesividad* has traditionally been regulated in Spain, whose legislation inspired the legislation of other Latin American countries, including Argentina, Mexico and Guatemala. Spanish Law No. 30/1992, currently in force, establishes in Article 103.1 as follows:

“Public Administrations may declare *lesivo* to public interests any act favorable to an interested party, which is subject to annulment under to the provisions of Article 63 of this Law, in order to proceed to its further challenge before a Contentious Administrative Court.”³⁹

42. Article 63 of the cited law, for its part, provides that “voidable acts are Administrative acts which incur in any violation of the legal system, including abuse of power.”⁴⁰

B. The Meaning of Lesividad and its Requirements

43. A declaration of *lesividad* constitutes an exception to the traditional principles of administrative law. In particular, it is an exception to the power of the Administration to implement its own claims, and to the irrevocable nature of the administrative acts which have declared rights, as will be explained later.
44. *Lesividad* originated in the fiscal field, as a means of invalidating acts that were contrary to the law and were causing, at the same time, damages to the public treasury.⁴¹ The concept evolved beyond the field of taxation, and became a mechanism whereby the

³⁹ Law 30/1991, 26 November 1992, on Legal Regime of the Public Administration and the Common Administrative Procedure, as amended (Exhibit RAL-47).

⁴⁰ *Id.*, Article 63.

⁴¹ RICARDO HUESCA BOBADILLA, *PROCEDIMIENTOS TRIBUTARIOS*, 349 (1st Ed., June 2001) (Exhibit RAL-27)

Administration may challenge its own acts,⁴² when said acts declare rights but are harmful to the interests of the State. A challenge by the Administration must meet two requirements. First, the act must be *lesivo*. Vivancos defines *lesividad* as the quality which renders an act by the Administration, which is harmful to public interests, of an economic or any other nature, voidable by the Contentious Administrative Court.⁴³ In light of to the origins and the purpose of *lesividad*, and the treatment given by Guatemalan jurisprudence, one can conclude that there are grounds for *lesividad* when an irregularity or violation of the legal system is present and results in damage to State interests. The principle is captured in the aforementioned Spanish law (“incur in any violation of the legal system...”⁴⁴), and represents the essence of administrative and judicial practice in Guatemala.

45. As shown below, in the case of the *lesividad* of Contracts 148 and 153, the facts identified in the Legal Opinions issued in their regard by various State bodies indicated the existence both of illegalities and facts that were harmful to interests which are unquestionably of a public nature (among them, very specifically, the protection of historical patrimony). Thus, the doctrinal distinction between legality and State interests, which Eduardo A. Mayora,⁴⁵ Claimant’s expert in this arbitration, tries to make, is irrelevant.
46. The second requirement for the Administration to be able to challenge its own acts by means of a declaration of *lesividad* is that said declaration be made within three years following the date of the decision or act being challenged. The declaration of *lesividad* is made in two steps: (1) the Executive Resolution is signed, first by the Ministers and then

⁴² As observed by Eduardo A. Mayora in his Opinion, the term “acts” used in Article 20 technically encompasses entering into a contract, among others. Exhibit XV, Claimant’s Memorial on the Merits, footnote v.

⁴³ Cited by CABANELLAS, GUILLERMO, DICCIONARIO ENCICLOPÉDICO DE DERECHO USUAL, 130 (14th Ed. 1979) (Exhibit RAL-58)

⁴⁴ Article 63, Law 30/1002, on Legal Regime of the Public Administration and the Common Administrative Procedure, as amended (Exhibit RAL-47).

⁴⁵ Mayora Opinion, Exhibit XV, Claimant’s Memorial on the Merits, ¶¶ 8.2.4, 8.3.1, 8.3.2

by the President, Vice President and Secretary General; and (2) it is published in the Official Gazette.

C. Legal Guarantees in the Process of Lesividad

47. *Lesividad* is based on fundamental principles and guarantees of the law. Specifically, the regulation of *lesividad* is based on the principles of legality, security and legal certainty, and on the constitutional guarantees of due process;

(a) The principle of legality. The declaration of *lesividad* is a mechanism to challenge certain acts which are contrary to the legal order and that cannot be voided by the Administration *sua sponte*. By opening the door to irregular acts being challenged by the Administration, the principle of legality is safeguarded by preventing that an action that is contrary to legal order not be the subject of legal review. Therefore, *lesividad* not only does not violate the principle of legality, as stated by Claimant's Expert, Eduardo A. Mayora⁴⁶, but it actually upholds it:

- The right to legality is based on the provisions of Articles 152, 154 and 155 of the Constitution, and it consists in a guarantee that the exercise of power by any official is subject to the limitations established by the Constitution and the law, that no official is ever above the law, and that all officials are liable under the law.
- Provided that authorities are subject to the limitations established by the Constitution and the law, do not take on the power to act against the law or lawlessly, and are prepared to be accountable for their conduct, the principle of legality will be guaranteed for the people they govern.
- The right to file a complaint because a contract is not in accordance with the law, whether the action is filed by the State or by a private party, does not violate the principle of legality in any manner whatsoever. On the contrary, to close the door on the possibility to review legal compliance of acts and

⁴⁶ Mayora Opinion, Exhibit XV, Claimant's Memorial on the Merits, ¶¶ 5.6.

contracts could result in a violation of the right to legality, and infringe the rule of law, because it would render ineffective fundamental guarantees such as the right to make petitions, and free access to courts established by Articles 28 and 29 of the Political Constitution of Guatemala.

- An Executive Resolution that states the Executive's will to request that the Contentious Administrative Court hear and finally declare whether the act or contract is *lesivo*, guarantees the right to legality because the Executive will not be both a judge and a party to the procedures, and although purely administrative remedies would not apply, the decision would be in the hands of a court that is independent from the Executive, and the private party participating in the procedures may use all applicable recourses provided in the contentious administrative judicial proceeding.
 - In a contentious administrative judicial procedure, all due process guarantees are observed, because the private procedural party has the possibility of refuting the *lesividad* claim. In fact, according to the Contentious Administrative Law, a judgment passed by the tribunal can be the subject of an appeal in the high court.⁴⁷
- (b) The principle of security and legal certainty. The concept of *lesividad* is contained in a law that was passed and published in compliance with all legal requirements. *Lesividad* can only be declared within three years after the date of the decision or act giving rise to *lesividad*, and it requires that an Executive Resolution be issued. Jurisprudence has established that the declaration of *lesividad* is a mere procedural requirement that allows the Administration to access a court, for the court to decide on the claimed *lesividad* of the challenged act, confirming that an annulment is appropriate or, on the contrary, confirming

⁴⁷ Article 27, Administrative Law, 21 November 1996 (Exhibit RAL-49).

the act.⁴⁸ As established in the next section, *lesividad* has no legal effects on the administered, unless it is legally confirmed through a Contentious Administrative Judicial Proceeding.

Under Article 23 of the Contentious Administrative Law, an action before the courts must be initiated within a period of three months from the date of publication of the declaration of *lesividad*. Consequently, the administered is guaranteed that the annulment or confirmation of the act, whatever the case may be, shall be conducted in accordance with the law, under the authority of the courts, and with all procedural guarantees. Thus, the Administration cannot revoke its own acts arbitrarily, the administered is not left in a pending situation for an unlimited period of time, and the constitutional principles of legal certainty and legal security are guaranteed.

- (c) The principle of due hearing and due process. This principle is established in Article 12 of the Constitution of the Republic, and also in Articles 203 and 221 of the Constitution. The provisions establish the right of the administered to be heard in court in defense of his interests, within the framework of a contentious administrative judicial proceeding, where the matter is heard by an impartial third party, the Contentious Administrative Court, that is in charge of controlling legality of the public administration. Similarly, Article 26 of the Contentious Administrative Law, incorporates into that proceeding all applicable procedural rules of both the Law of the Judicial Organism and the Code of Civil and Commercial Procedures. The integration of all procedural rules to the contentious administrative judicial proceeding guarantees that the private party shall be heard in a legal proceeding, before a competent and pre-established tribunal, where all procedural guarantees shall be observed.

⁴⁸ Judgment dated 17 December 2001, passed by the First Courtroom of the Contentious Administrative Court, Contentious Administrative Judicial Proceeding No. 168-95, initiated by the Attorney General's Office against the contract named "Onerous Use" dated 28 April 1995 entered into by FEGUA's Overseer and Poliductos del Pacífico, Sociedad Anónima, ruled in favor of the claimant. (Exhibit R-48).

48. In view of the above, the conclusions reached by Eduardo Mayora in his Opinion, that the *lesividad* may be unconstitutional,⁴⁹ are wrong. Not only are there no insurmountable obstacles preventing *lesividad* from being coherent with the principles of legality and due process, but these very principles are the foundation of the *lesividad*.

D. The Declaration of Lesividad and Legal Effects against Third Parties

49. The declaration of *lesividad* through an Executive Resolution is an act devoid of any effect until the Attorney General files a complaint, in due course, regarding a judicial declaration of *lesividad*, wherein the interested party is to be heard. As a result of the corresponding trial, the Contentious Administrative Court shall pass a judgment on the validity, or absence thereof, of the act that was declared *lesivo*.

50. Consequently, the Public Administration must appear before the judiciary and request that a contentious administrative judicial proceeding declare that the act or contract that is *lesivo* is ineffective. Before a final judicial resolution is passed, the declaration of *lesividad* has no effect for the Administered. As previously pointed out, the jurisprudence has established that *lesividad* is a mere procedural prerequisite for the Administration to be able to challenge its own acts.⁵⁰

51. By virtue of the above, today Ferrovías continues to have the same rights and obligations resulting from Contracts 143 and 158. That legal situation will remain until the Contentious Administrative Court declares, if the case may be, the *lesividad* of the contracts and their nullity in a judgment that may be subject to an extraordinary cassation appeal.

⁴⁹ Mayora Opinion, Exhibit XV, Claimant's Memorial on the Merits, ¶¶ 9.2

⁵⁰ Judgment dated 17 December 2001, passed by the First Courtroom of the Contentious Administrative Court, Contentious Administrative Judicial Proceeding No. 168-95, initiated by the Attorney General's Office against the contract named "Onerous Use" dated 28 April 1995 entered into by FEGUA's Overseer and Poliductos del Pacífico, Sociedad Anónima, ruled in favor of the claimant. (Exhibit R-48).

E. Relationship between the Concept of Lesividad and the Doctrine of Estoppel (“actos propios”)

52. In the administrative legislation of Guatemala there are two exceptions to the doctrine of Estoppel (“*actos propios*”), whereby people are bound by their own acts. In the first exception, the Administration can unilaterally revoke its own acts. In the second exception, the intervention of a judicial body is required. Thus, the Administration may unilaterally declare that its own acts are void in situations where there has been a violation of the law, or there is damage to the public interest, provided such revocation does not entail damages to third parties, or an encumbrance. On the other hand, when the revocation has such effects, the Administration must appear before a court of law, after an Executive Resolution, declaring that the act or contract is *lesivo*, has been issued.

53. The aforementioned Judgment by the First Courtroom of the Contentious Administrative Court dated 17 December 2001, File No. 168-95, cited above, indicated that:

“Scholars coincide that in the declaration of *lesividad*, pursuant to the doctrine of ‘*actos propios*,’ a person is bound by its own acts, not being allowed from a legal point of view to retract from them; however, the State has the authority to annul or declare the nullity of its own acts when the law has been violated or the public interest is damaged [...] to proceed with their annulment and revocation must appear before a court of law, after having declared that the act is contrary and prejudicial to the general interest (*lesivo*).

54. As a conclusion to this section, the concept of *lesividad* of administrative acts is rooted in the Constitution of the Republic of Guatemala and, in particular, in the constitutional principles of legality, legal certainty and legal security, and due process. The purpose of the *lesividad* is to open the door for the Administration to challenge its own acts before a tribunal, as an exception to the Estoppel (“*actos propios*”) doctrine. As mentioned above, the declaration of *lesividad* is a mere procedural requirement, with no effects until it is confirmed, if the case may be, by the Contentious Administrative Court.

VII. THE LESIVIDAD OF CONTRACTS 143 AND 158

55. This section deals with the facts leading to the Declaration of *Lesividad* of Contracts 143 and 158, and the basis that justified the decision made at the administrative level. The

facts of the case show that the State conducted a rigorous analysis of the circumstances of the aforementioned contracts, and that through said process the State identified legal defects which made Contracts 143 and 158 *lesivo* to the interests of the State of Guatemala.

56. The Declaration of *Lesividad* was approved by Executive Resolution No. 433-2006.
57. The Declaration was promoted through a petition of the Overseer of FEGUA's to the President on 13 January 2006.⁵¹ Said letter attached Opinion 205-2005 of the Attorney General's Office of 1 August 2005,⁵² Opinion 749-2005 of the Attorney General's Office of 12 September 2005,⁵³ and Opinion 05-2006 of FEGUA's Legal Department of 13 January 2006.
58. On 26 April 2006, as a result of the request made by the Overseer of FEGUA, the General Secretariat of the Presidency issued Opinion No. 236-2006 recommending that Contracts 143 and 158 be declared *lesivo* by the President.⁵⁴ At the same time, Opinion 205-2005 rendered by the Attorney General's Office on 1 August 2005⁵⁵, Opinion 749-2005 rendered by the Attorney General's Office on 12 September 2005⁵⁶, Opinion 05-2006 rendered by FEGUA's Legal Department on 13 January 2006⁵⁷, and Joint Opinion No. 181-2006-AJ rendered by the Ministry of Public Finance on 3 April 2006⁵⁸ were attached to the Opinion.
59. The opinions issued by FEGUA, the Attorney General's Office, the Ministry of Public Finance and, finally the General Secretariat of the Presidency, coincided in identifying

⁵¹ Letter from A. Gramajo to President Óscar Berger, 13 January 2006 (Exhibit R-21).

⁵² Opinion 205-2005 by the Attorney General's Office of 1 August 2005 (Exhibit R-15).

⁵³ Opinion 749-2005 by Attorney General's Office of 12 September 2005 (Exhibit R-17).

⁵⁴ Opinion 236-2006 by the General Secretariat of the Presidency, 26 April 2006 (Exhibit R-25).

⁵⁵ Opinion 205-2005 by the Attorney General's Office of 1 August 2005 (Exhibit R-15).

⁵⁶ Opinion 749-2005 by Attorney General's Office of 12 September 2005 (Exhibit R-17).

⁵⁷ Opinion 05-2006 by FEGUA's Legal Department, 13 January 2006 (Exhibit R-20).

⁵⁸ Joint Opinion 181-2006-AJ by Ministry of Public Finance, 3 April 2006 (Exhibit R-24).

serious legal defects in Contracts 143 and 158, which determined that the contracts were *lesivos*. In my opinion, the conclusions reached in said Opinions are correct. The Opinions identify substantial irregularities in the Contracts, which are the basis of the *lesividad* and ground the contentious administrative judicial proceeding that is pending before the First Courtroom, pursuant to the claim submitted by the Attorney General's Office⁵⁹, file No. 389-2006. Among said irregularities, the following are worth emphasizing:

- (a) The absence of bidding terms for the signature of Contract 143.
- (b) Contracts 143 and 158 were not approved by Executive Resolution.
- (c) Lack of adequate protection for goods of historical value which are considered cultural heritage.

60. Steaming from the aforementioned irregularities, it results, in particular, that Contracts 143 and 158 were not conferred pursuant to Guatemalan law. Therefore, Contracts 143 and 158 do not create any rights protected under Guatemalan law. Each one of these irregularities is analyzed in the following sections.

A. *The Absence of Bidding Terms for the Signature of Contract 143*

61. The Public Contracting Law was violated when Contracts 143 and 158 were entered into, and usufruct rights were granted on railway equipment, without a proper bid process or bidding terms. The parties attempted to use the bidding terms of a contract that was entered into four years before (Contract 41), which had not been approved, when they should have drafted new bidding terms for the contract. This requirement cannot be disregarded by the parties when contracting with the State regarding state goods and state services, because that would infringe the Public Contracting Law and the guarantees of transparency and certainty for the citizens in the management of public patrimony. Only under exceptional circumstances, set out in a closed list in Article 44 of the Public Contracting Law, may the requirement for a bid process be omitted for this type of

⁵⁹ Exhibit C-11, Claimant's Memorial on the Merits.

contracts. One of the exceptions provided under the aforementioned Article 44 is, among others:

“Purchasing of, and contracting over, goods, supplies, works and services that are necessary and urgent to resolve a situation of national interest or social benefit, provided it is thus declared, by means of a resolution signed by the president of each of the State branches:

1.3.1 Executive Branch, with the Council of Ministers;

1.3.2 Legislative Branch, with the Board of Directors;

1.3.3. Judicial Branch, with its superior administrative Body...”

62. Therefore, it is possible to omit the bidding terms, if the government declares, through the corresponding administrative resolution, the need and urgency to resolve a situation of national or social interest.

63. None of the requirements that would have allowed the contracting over railway equipment without having to go through a new bidding process, with its corresponding bidding terms, were present in the execution of Contract 143. Also, contrary to what is argued, the Claimant had no right to obtain the railway equipment by virtue of Contract 402.⁶⁰ This contract only mentioned that the Claimant would have the opportunity to participate in the corresponding bidding process, adding that the Claimant could use its own equipment to provide railway services.

64. Clause Ten of Contract 402 establishes that:

“the usufruct holder will have, in addition to the referred rights, the following: e) the right to obtain the rolling stock and other equipment owned by FEGUA that the usufruct holder deems convenient for its activities, in accordance with what is established in the bidding terms giving rise to this contract.” (Emphasis added).

⁶⁰ Claimant’s Memorial on the Merits, ¶ 82.

65. The bidding terms for Contract 402 establish, in Section 4.1.6, “ON THE RAILWAY EQUIPMENT”, that: “offerors will be able to inspect the rolling stock and other equipment owned by Ferrocarriles de Guatemala. Such equipment will be the object of a bidding process in due course after the awarding of the Onerous Usufruct Contract, and the contracting party will have the opportunity to acquire those that it deems convenient for its activities [...]”. (Emphasis added).
66. Exhibit 5.2 of the bidding terms (Onerous Usufruct Contract Draft), for its part, established in Clause Four III:
- “the contractor may acquire, through purchase in a public auction, the engines, railway cars, and workshop equipment, owned by FEGUA. The public auction shall take place after the present contract comes into force. Also, the contractor may incorporate equipment he owns, both railway and workshop equipment, or another type of equipment, to his business operations [...]”.
67. Consequently, Contract 402 only referred to the bidding process (“public auction”) which would have to take place later to grant the usufruct of railway equipment, and to the “*opportunity*” that Claimant had to participate in it. At no time can that provision be understood as establishing the possibility of excluding the need of holding a bidding process. Quite the opposite. Claimant should have been aware of the situation because Claimant participated in the bidding processes conducted for Contracts 402 and 41, and signed the corresponding contracts.
68. Opinion 205-2005 by the Attorney General’s office, of 1 August 2005,⁶¹ points out that Contract 143 “could not be based on the previous bidding process...”. Similarly, FEGUA’s Legal Department opined, in their analysis of Contract 143 contained in Opinion 05-2006,⁶² that “to use the same bidding process to enter into contracts which are four years and five months apart is not feasible”. For their part, Opinion No. 236-

⁶¹ Opinion 205-2005, Attorney General’s Office, 1 August 2005 (Exhibit R-15).

⁶² Opinion 05-2006, FEGUA’s Legal Department, 13 January 2006 (Exhibit R-20).

2006, by the General Secretariat of the Presidency of 26 April 2006,⁶³ rendered concerning the *lesividad* of Contract 143, highlights that “the parties used the basis of a contract which they had terminated by mutual agreement, when the adequate procedure would have been to elaborate new bidding terms and convene a new event...” The absence of bidding terms was the basis for the recommendation to declare the *lesividad* of Contract 143.

69. Claimant should have known that bidding terms were required, given that it is a requirement established in regulations that are published in accordance with Guatemalan law. In any event, Claimant should have had knowledge about it because Claimant participated in the bid process for Contracts 402 and 41.

B. Contracts 143 and 158 were not approved by Executive Resolution

70. Contracts 143 and 158 should have been authorized by Executive Resolution of the President of the Republic, as explained in Section III *supra*. The existence of this defect was one of the reasons that led the Ministry of Public Finance of Guatemala⁶⁴ and the General Secretariat of the Presidency⁶⁵ to conclude that Contract 143 was *lesivo*, because Contract 143 “should have been approved by Executive Resolution,” which determines that “FEGUA’s Overseer did not comply with the provisions of the Public Contracting Law nor its Regulations.”
71. The requirement of an authorization granted by Executive Resolution should have been known by Claimant, given that it is a requirement established by published regulations under Guatemalan law and, in any case, Claimant should have known about it as a result of having participated in the bid processes with regard to Contracts 402 and 41.

⁶³ Opinion 236-2006, General Secretariat of the Presidency, 26 April 2006 (Exhibit R-25).

⁶⁴ Joint Opinion 181-2006-AJ, 3 April 2006 (Exhibit R-24).

⁶⁵ Opinion 236-2006, General Secretariat of the Presidency, 26 April 2006 (Exhibit R-25).

C. *Lack of adequate protection for assets of historical value which are considered cultural heritage.*

72. This section lists the regulations for the protection of historical heritage, summarizing the spirit and purpose of same. At the same time, the section explains the reasons why Contract 143 did not provide adequate protection to the assets of the historical patrimony.
73. Under Article 60 of the Constitution, the cultural patrimony of the Nation includes assets and values of the country and is under the protection of the State. Article 61 of the Constitution provides that historical assets that are part of cultural heritage shall receive special attention by the State. The cited constitutional provisions are developed in Decree 26-97 of the Congress of the Republic, Law for the Protection of the Cultural Heritage,⁶⁶ which governs the state's functions concerning the protection, defense, investigation, conservation and restoration of assets which form the Nation's cultural heritage, and establishes that historical assets - whether movable or immovable - are part of the cultural heritage as provided by the law, or by a declaration of the authorities.
74. The railway is part of Guatemala's history, and it played an important role in the development of its economy. Thus, a significant part of FEGUA's railway equipment is part of the cultural heritage, has been declared cultural heritage and is registered in the inventory of the History and Anthropology Institute ("*Instituto de Antropología e Historia*"). Contract 143 does not contain adequate provisions to guarantee the protection of the state's cultural heritage because it only states, in a general manner, that the usufructuary shall respect and obey the legal provisions on the subject, but does not specify any concrete measures that shall be taken during the life of the contract to avoid deterioration of the cultural heritage.
75. Public interest in the protection of the Nation's cultural heritage is not contested, and neither is the fact that the inadequate protection of this heritage causes damages to the State. The file contains well supported opinions in accordance with Guatemalan legislation, which regulate the Protection of Cultural Heritage. Legal Counsel to the

⁶⁶ Decree 26-97, Congress of the Republic, Law for the Protection of the Cultural Heritage (Exhibit RAL-59).

Attorney General's Office and to FEGUA are of the opinion that Clause Ten, subsection 1), of Contract 143 is unfavorable to the interests of the Nation, because it states that the usufructuary shall respect and obey the legal provisions, and all other provisions issued by the Directorate of Cultural Heritage regarding all assets that said Institution considers to be part of the Historical and Cultural Heritage, but without losing the possession and, as a consequence, the use and enjoyment of said assets.

D. Conclusions

76. As a result of the above, one concludes that Contract 143 suffered from substantial defects that determined the *lesividad* of such contract. Contracting rules established in the Public Contracting Law are public order rules, and thus are not subject to the discretion of the parties. Therefore, the parties could not enter into a contract without complying with the requirement of having prior auction and contracting in accordance with the corresponding bidding terms. Nor could they disregard the requirement of approval by Executive Resolution, which is an essential condition for the contract to come into force. Thus, Contracts 143 and 158 never conferred any rights pursuant to Guatemalan Law. The defects are fundamental, and may be identified through minimum due diligence. In any case, Ferrovías should have had knowledge thereof, given its participation in prior bidding processes in the Republic of Guatemala.
77. On the other hand, the relationship created with Ferrovías had created a situation of deterioration of the Nation's historical heritage, due to the inadequate protections that were offered by the provisions of Contract 143.
78. These reasons, as reflected in the record which led to the Declaration of *Lesividad*, including the Opinions by the Attorney General's Office, FEGUA's Legal Department, the Ministry of Public Finance and the General Secretariat of the Presidency, render the contract *lesivo* under Guatemalan Law.

VIII. LEGAL LIABILITY THAT THE PRESIDENT OF THE REPUBLIC WOULD HAVE INCURRED IF HE HAD NOT DECLARED THE *LESIVIDAD* OF CONTRACTS 143 AND 158

79. This section discusses the liability that the President of the Republic is subject to in the performance of his duties, as depository of the public interest under his protection. From the analysis of the regulations governing said liability, as will be shown, it follows that the President of the Republic would have incurred in personal liability if he had not declared that Contracts 143 and 158 were *lesivos*. This owing to the fact that the rigorous analysis conducted by several independent legal advisors made the President aware of that irregular situation and the prejudice to public assets that he was bound to remedy.
80. In Guatemala's legal system, sovereignty resides with the people, who delegate it, to be exercised, in the three State branches.⁶⁷ The President of the Republic is Head of the State of Guatemala, and by mandate of the people he performs the functions of the Executive Branch.⁶⁸ It is not difficult to understand that the President is the main official on whose shoulders rests the duty to defend the interests of the Nation. Therefore, analyzing the scope of his powers and duties, as well as his liabilities, is important.
81. The obligation to promote the interests of the nation, and the consequent defense of said interests, in a diligent and responsible manner, is an obligation that has been established in a number of provisions of different laws and, therefore, discretion plays no part in the conduct of such duties. In the context of the subject matter of the present Opinion, the action of *lesividad* is in accordance with the applicable law and, once the President becomes aware of facts or circumstances that indicate that an action or decision is *lesivo*, it is his duty to act in the defense of public interests, promoting the *lesividad* of the act, or removing the causes which gave rise to it.

⁶⁷ Article 141, 1985 Constitution of the Republic (Exhibit RAL-45).

⁶⁸ Article 182, 1985 Constitution of the Republic (Exhibit RAL-45).

A. *The Liability of the President of the Republic in the Context of a Potential Lesividad*

82. The President of the Republic performs his functions subject to the responsibilities derived from the Political Constitution and the Law.⁶⁹ The Probity and Liability of Public Servants Law, passed by Decree No. 89-2002 of the Congress of the Republic, establishes in Article 4⁷⁰ the liability of public officials, including the President.
83. The liabilities that can derive from said law are of an administrative, civil and criminal nature, stemming from offenses, omissions, actions, decisions and resolutions in which the acting official incurs, as established by Articles 8 to 10 of the aforementioned Law.⁷¹ Said responsibility stems from negligence, recklessness, lack of skill or violation of the law, and when the obligations undertaken with, or functions inherent to, the position are not performed diligently, or when public interests are damaged due to an action or omission.

⁶⁹ “Officials are depositaries of authority, legally liable for their official conduct, subject to law and never above it...” 1985 Political Constitution of the Republic of Guatemala, Article 154. Public function; subject to the law (Exhibit RAL-45).

⁷⁰ “Anyone vested with permanent or temporary public functions, remunerated or unpaid, particularly: a) dignitaries, authorities, officials and public employees who, by popular election, nomination, contract or any other connection, may be serving the State, its entities, municipalities, companies and decentralized and autonomous entities, are liable, in accordance with the regulations contained in this Law, and shall be punished for noncompliance or inobservance of the same, according to the provisions of the country’s current legal system, (Emphasis added). (Exhibit RAL-52).

⁷¹ “Article 8. Administrative liability. Liability is administrative when by action or omission, the administrative legal system and the norms that regulate the conduct of a public official are contravened. Also, when a person behaves with negligence, recklessness, lack of skill, or non observance of the law, regulations, contracts and other legal provisions of the state entity to which they are committed or serve; likewise, through failure to fulfill a commitment or function inherent to a position with the required diligence, as well as when damage is caused to public interests that the person has been entrusted with, or to public assets, or a misdemeanor or a crime is committed (Exhibit RAL-52)

ARTICLE 9. Civil liability. There is civil liability when, by action or omission that is willful or negligent, reckless, or entails lack of skill or abuse of power, harm or damages are caused to the public patrimony. Civil liability is independent from applicable criminal liability. Damages and harm arising from the civil liability will be made effective pursuant to the provisions of the Civil Code and other applicable provisions on the matter, except when the civil action is ruled jointly with the criminal procedure.

ARTICLE 20. Criminal liability. The decision, resolution, action, or omission performed by those persons to whom Article 4 of this law refers generates criminal liability and, according to current criminal liability law, all those are defined as misdemeanors or felonies. (Emphasis added)

84. Particularly, public officials are liable for “negligence or carelessness in the custody, use or destination, of any assets which are part of public patrimony,”⁷² under Article 17, subsection f) of the aforementioned Law.
85. According to Article 182 of the Political Constitution of the Republic of Guatemala,⁷³ “The President of the Republic is the Head of the State, he represents national unity and the interests of the people of Guatemala. The Executive Branch is made up of the President and Vice President of the Republic, State ministers and vice ministers, and dependent officials.” Article 183, for its part, includes among the functions of the President of the Republic,⁷⁴ that of obeying and enforcing the Constitution and the Law....”
86. By virtue of the provisions in the Constitution and in Article 17 of the Executive Branch Law (Decree 114-97 of the Congress of the Republic of Guatemala), it is the duty of the President, in Council of Ministers, to declare the *lesividad* of an administrative contract, and order the Attorney General’s Office to initiate contentious administrative judicial proceedings.⁷⁵
87. In fulfilling the specific function of issuing resolutions and orders for the strict enforcement of the law, the President has the duty to issue the Executive Resolution of *Lesividad* when he becomes aware of facts or circumstances indicating that an administrative act is *lesivo*. Once the *lesividad* is thus declared, the matter is outside the administrative sphere because the declaration of *lesividad* is subject to an contentious administrative judicial proceeding initiated by the Attorney General to be tried before a court of law.

⁷² Decree 89-2002, Probity and Liability of Public Servants Law (6 December 2002) (Exhibit RAL-52)

⁷³ Article 182, 1985 Political Constitution of the Republic of Guatemala (Exhibit RAL-45).

⁷⁴ Article 183, 1985 Political Constitution of the Republic of Guatemala (Exhibit RAL-45).

⁷⁵ Article 17. Functions of the Council of Ministers. In addition to the functions assigned by the Political Constitution and the Law, the Council of Ministers has the following functions: b) Agree with the President of the Republic in declaring the *lesividad* of acts or administrative contracts, for the purpose of initiating a contentious administrative judicial proceeding. See (Exhibit RAL-45).

88. In conclusion, the President represents the interests of the people of Guatemala, and is entrusted with defending the interests of the State and enforcement of the law. In logic coherence with the above, it is the President's duty to declare the *lesividad* of an administrative contract when events indicate that there are irregularities or facts that are *lesivos* to public interest that he protects, so that law courts may determine whether the act in question is to be voided or confirmed.
89. From the above results that once the President becomes aware of facts and circumstances which indicate there is *lesividad* in an act or decision, it is his duty to act in defense of public interests. In order to do so, he has two options:
- (a) Promote the declaration of *lesividad* of the act or resolution, to be tried later before the courts;
 - (b) Rectify the facts or circumstances that were identified as the cause of the *lesividad*. Depending on the specific circumstances of each case, rectification can be done in different ways, for example, by means of the correction of a legal irregularity, or by means of a settlement agreement where, balancing the interests at stake, a solution that satisfies the general interests that the President is entrusted with can be reached.
90. The settlement is even envisaged in Articles 2159 to 2169 of the Civil Code. Under Article 2161 of said legal body, anyone who manages national assets needs the authorization or approval by the Executive to grant a settlement. The authorization to award settlement agreements must be given by the President of the Republic, according to the provisions in Article 183, paragraphs e) and m), Article 195 of the Constitution of the Republic, and Articles 2, 6, 7 and 16 of the Executive Branch Law, Decree No. 114-97 of the Congress of the Republic.
91. If the President did not proceed in accordance with subsections (a) or (b) of the aforementioned paragraph 89, he would not be fulfilling the commitments undertaken, and functions inherent to his office, with the required diligence. Also, it could result in damages to the public interests that are entrusted to him, and consist of a negligent

omission, reckless omission, or non observance of the law, committed to the detriment and causing damage to public assets. All of the aforementioned would generate liabilities for the President under the aforementioned Articles 8 to 10 of the Probity and Liability of Public Servants Law previously transcribed. In particular, the President could incur in liability under Article 17 of this Law due to “negligence in the custody, use, or application of assets which are part of public heritage”.

92. The President’s liability is not limited to the timely and diligent defense of the Nation’s interests. On the contrary, the importance that the law attributes to the defense of public interests entrusted to State officials is confirmed and expanded in a clear and express procedural provision, by virtue of which, anyone who represents State interests cannot desist from the proceedings nor from an appeal or exception that may affect the merits of the case⁷⁶ and, contrary to a settlement, which can be granted by way of an authorization, this prohibition included in the Procedural Code is absolute and unconditional. Moreover, this procedural provision confirms that the Executive could not ignore the legal decisions issued with respect to the illegality and *lesividad* affecting the contract contained in Deeds 143 and 158, and that he was obliged to proceed with the declaration of *lesividad* (or with a settlement favorable to the interests of the Republic) and, having declared the *lesividad* of the contracts, submit the issue to the Attorney General’s Office for it to initiate the trial on *lesividad* and substantiate it at every jurisdictional level.
93. Since April 2006, the President was aware of the existence of a series of irregularities in Contracts 143 and 158. In April 2006, at least five legal opinions had been rendered and sent to the President, from independent entities, including the President’s own General Secretariat and the Attorney General’s Office, highlighting these defects and recommending the declaration of *lesividad* (see Section VII).

⁷⁶ Article 584 of the Civil and Commercial Procedural Code, Decree Law 107, applicable to contentious administrative judicial proceedings pursuant to the provisions of Article 29 of the Contentious Administrative Law (Exhibit RAL-60).

94. The President could not remain passive in the face of these opinions without incurring liability. In light of the thoroughness, breadth, and consensus among the legal analyses concerning the gravity of the defects addressed as well as the advisability of a declaration of *lesividad*, his only options were to issue the *lesivo* declaration in order to permit the issue to be addressed before the courts, or reach a settlement agreement in the interests of the Republic. An agreement of this nature required the approval of the Council of Ministers, and diligent negotiations to ensure the adequate protection of the general interests and assets of public heritage, particularly assets with a historical value and considered cultural heritage. In the framework of any such settlement, the President could have reached whatever agreements he considered appropriate and conceded certain positions, pondering and balancing the interests at stake.
95. The President made the decision to declare the *lesividad* of the contracts in April 2006, when he received the Opinion by the General Secretariat of the Presidency, as the last step in the evaluation of the circumstances affecting Contracts 143 and 158 with FEGUA. At that time, the President knew that he had to proceed with the declaration of *lesividad* of Contracts 143 and 158. Given the personal liability that he could incur, the President could not revert his decision, unless a settlement agreement was reached, which would rectify all the fundamental motives of the *lesividad* and, after pondering the interests at stake, would result in an agreement protective of the interests of the Republic of Guatemala.

IX. CONCLUSIONS

96. As a decentralized, autonomous and intervened state entity, the management of FEGUA belongs to the Overseer. He has the ordinary management powers of the entity, within the framework of the delegation carried out through FEGUA's Organic Law, while any other powers, which are of an extraordinary nature or were not delegated to FEGUA or to its Overseer, including those expressly established in FEGUA's Law, belong to the President, as the Overseer's hierarchical superior. Therefore, any action that is not within the functions and authority of the Overseer requires the authorization by the Executive.

The signature of Contracts 143 and 158 by the Overseer, absent authorization of the Executive, constitutes an *ultra vires* act.

97. FEGUA has the power to enter into contracts over goods and services within the framework delimited by the Law. The acts whereby FEGUA grants a special right of use over its assets, including an onerous usufruct contract such as Contracts 143 and 158, share the same nature as licenses, authorizations, permits, concessions and similar rights.
98. FEGUA could have entered into Contract 143 to confer a right of special use over the national assets consisting of railway equipment. In order to do so, FEGUA had to meet the requirements established in the law, including the requirements of FEGUA's Organic Law and the Public Contracting Law. Said usufruct has the same nature as a license, authorization, permit, concession, or similar instrument.
99. The process of *lesividad* is regulated by law in Guatemala, and it is based on safeguarding the principles of legality, security and legal certainty. The declaration of *lesividad* is a mere procedural requirement, devoid of effects for the administered. The procedures whereby the declaration becomes effective meets all guarantees of due process.
100. Contracts 143 and 158 contained serious legal defects, which justified the declaration of *lesividad*. Contracts 143 and 158 were not conferred pursuant to Guatemalan law, and do not create any rights protected under the same.
101. The President of the Republic, after having received a request to declare the *lesividad* and five legal opinions rendered by independent entities confirming the legal defects of the contracts and recommending that the President declared them *lesivos*, could not ignore this situation without incurring liability. The only options available to the President were to proceed with the declaration, or to negotiate a settlement agreement in the terms established by Guatemalan law.
102. After having made the decision in April 2006 to declare that Contracts 143 and 158 are *lesivos*, the President could not revert such decision without incurring in personal

liability, unless he reached a settlement with Ferrovías guaranteeing the best interests of the Republic, something that did not occur.

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[Translation]

I submit this Expert Report to the best of my knowledge within the aforementioned Arbitral Proceedings. I solemnly declare upon my honor and conscience that what I have stated and will state during the proceedings is in accordance with my sincere belief.

(Signed)

Marithza Ruiz de Vielman

22 September 2009

Guatemala City, Guatemala

EXHIBIT A

EDUCATION:

Higher Lawyer and Notary, Degree in Legal and Social Sciences,
University Rafael Landívar, Guatemala, 1973

Native language: Spanish

Other languages English - litigation, negotiation and contract drafting
French and Portuguese, fluent

EXPERIENCE AS AN INDEPENDENT PROFESSIONAL

Trial attorney at National Tribunals, from 1974 to date:

- Outside legal counsel in pending proceedings before the Contentious Administrative Court and Civil tribunals, to annul an administrative contract awarded by the General Directorate of Civil Aviation.
- Outside legal counsel in pending proceedings to declare the *lesividad* of a contract related with real estate property at International Airport La Aurora and some other areas.
- Outside legal counsel for State entities, at the administrative phase of repeal and reversal, and at the judicial phase before the Contentious Administrative Court, cassation appeals and constitutional protection petitions filed against the State, particularly the Ministry of Foreign Affairs, Ministry of the Economy and General Directorate of Civil Aviation.
- Trial attorney, in charge of repeal and reversal recourse, filed by private sector Guatemalan and foreign companies.
- Trial attorney before the Contentious Administrative Court, exceptional cassation appeals in proceedings initiated by private sector national and foreign companies.
- Trial attorney in matters of Civil Law, Commercial Law, Constitutional Law, Constitutional Protection Petitions and Unconstitutionality Appeals, filed by private sector companies.

Outside Counsel for Government Sector

- 1994-2009: Member of the Belize Commission, independent professionals who advise the Ministry of Foreign Affairs in the territorial dispute with Belize.
- 2009: Coordinator of the National Legal Group, independent professionals who advise the Foreign Ministry regarding the claim by Guatemala against Belize before the International Court of Justice in The Hague.

Trial attorney before GATT and WTO, 1992 to date:

- Legal counsel on claims initiated by Guatemala before GATT, Banano-I and Banano-II, regarding banana access to the European Union, and a claim for tobacco access against the United States.
- Legal counsel to the Government of Guatemala and the Government of Honduras on the claim before the WTO, against the import regime for bananas into the European Union, Banano-III and related procedures.
- Legal counsel in two anti-dumping cases between Mexico and Guatemala, Cemento-I in two instances and Cemento-II in one instance, before the WTO.

Private Sector support to Government Entities:

- 1988-1993: Advisor to the Ministry of Economy and Ministry of Foreign Affairs of Guatemala in the area of International Trade Law.
- 1988-1993: Advisor to the Asociación Guatemalteca de Productores de Banano, in lobbying activities before the European Community before the opening of the single market, for the purpose of requesting equal access opportunities for bananas.
- 1996-1999: Legal counsel, private sector delegate, at the WTO Ministerial Conferences held in Singapore, Geneva and Seattle.

Participation in Multilateral Fora

- Delegate and representative of Guatemala before the United Nations Commission for Trade Law.
- Prequalified for high level missions assigned to women by the Secretary of the United Nations (Focal Point for Women in the Secretariat OSAGI, DESA).
- 2001-2003: Member of the Board of Directors, as representative of developing countries, at the Legal Advisory Centre for WTO matters, with head office in Geneva.
- 2002-2003: President of the Anglo-Central American Society in London, United Kingdom.
- 2002-2003: President, Administrative Committee of the International Sugar Organization.
- 2002: Negotiator for the Government of Guatemala in the proceedings conducted under Article XXVIII of GATT to obtain compensation from Chile for amendments to their Schedule of concessions for sugar.
- 2003: Sole Negotiator who, representing Central America, negotiated the "Political and Cooperation Agreement between the European Union and Central America," signed on 15 December 2003.

Areas of Economic and Social Development

- 1987-1989: Legal counsel to the Berhorst Foundation, for programming and implementing support projects in the health sector for rural communities.
- 1987-1989: Consultant for a program sponsored by the World Bank on the creation of the Social Investment Fund (FIS), and legal counsel for their Pilot Plan to implement production and infrastructure projects.
- 1989: Member of a group of legal counsel who drafted several Bills for the Social Investment Fund, and the draft bill that was approved by the Congress of the Republic of Guatemala, as well as its Regulations.
- 1990: Member of a group of legal counsel who drafted the bill for the Social Emergency Fund (FES) for the Ministry of Development, sponsored by PNUD.
- 1989-1990: Legal counsel to the Ministry of Public Finance in the negotiation of loans with the World Bank, Inter-American Development Bank and foreign foundations, to finance development projects.

Professional Practice - Business Consultant in the Private Sector - 1974 to date

- Consultant to trade companies in the areas of business contracts, intellectual property, legal and financial, taxation, contracts with government entities.
- Members of the Administration Counsel of several commercial companies, with responsibility on legal matters.
- As Notary Public, consultancy, negotiation and drafting of contracts, agreements, transactions, mergers and acquisitions, in Spanish and in English.

UNIVERSITY CHAIRS:

- 1975-1980: Civil Law I, Persons and Family Law, Universidad Rafael Landívar.
- 1980: Civil Law IV, of Obligations in General, Universidad Rafael Landívar.
- 1980-1982: Civil Law V, on Contracts in Particular, Universidad Rafael Landívar.
- 1998 - 1999: Seminars on the Dispute Settlement System of the World Trade Organization, Georgetown University, to Latin-American negotiators.
- 2000: Seminars on the Dispute Settlement System of the World Trade Organization and FTAA, Georgetown University, to Caribbean negotiators.
- 2000: Seminars on the Dispute Settlement System of the World Trade Organization and FTAA, Georgetown University, for private sector negotiators and delegates, in Ecuador.
- Conferences on International Law, at the Chamber of Commerce, Chamber of Industry, Universidad Rafael Landívar, Universidad Francisco Marroquín, Universidad San Carlos de Guatemala.

- Guest speaker at the American Bar Association, Washington, United States, on the subject of the Dispute Settlement System of the World Trade Organization in general and the case of Bananas, in particular.
- Member of the "Federal Fund for Education" work group, London, United Kingdom. On the modifications of the Understanding for the Resolution of Disputes of the World Trade Organization. November 2002.
- Speaker at the London School of Economics, London, United Kingdom. "Foreign Trade from the Point of View of Developing Countries" and "System for the Resolution of Disputes, opportunities for developing countries. First Semester 2002.

PUBLIC OFFICIAL IN FOREIGN AFFAIRS

- 1994-1995: Minister of Foreign Affairs of Guatemala.
- 1994-1995: Member of the Counsel for Coffee Policy of Guatemala.
- 1994-1995: Representative of Central America before the Rio Group.
- 1994-1995: Vice President of the Non-Aligned Movement.
- 1996-2009: Member of the Belize Council, Ministry of Foreign Affairs.
- 2000-2003: Ambassador of Guatemala to the United Kingdom of Great Britain and Northern Ireland.
- 2000-2003: Permanent Representative of Guatemala before the Coffee International Organization.
- 2000-2003: Permanent Representative of Guatemala before the Sugar International Organization.
- 2000-2003: Permanent Representative of Guatemala before the International Maritime Organization.

PROFESSIONAL MEMBERSHIPS

- 1979-1980: President of the Association of Women Lawyers and Notaries AGAN.
- 1984: Member of the Press Tribunal, Colegio de Abogados y Notarios (Bar Association) of Guatemala.
- 1986: Pro-Secretary of the Board of Directors of the Colegio de Abogados y Notarios de Guatemala.
- 1989-1993: Member of the multidisciplinary group for the analysis of national problems.
- 1990-1993: Member of the Board of Directors of the Centre for Political Studies (CEDEP).
- 1991: Member of the Board of Directors of the Instituto Guatemalteco Americano (IGA).

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- 1992: Member of the Board of Directors of the Centro de Defensa de la Constitución CEDECON.
- 1995: President of the Guatemalan subsidiary of Asociación de Derecho Internacional.
- 1996-2009: Member of FUNDESA (Foundation for the Development of Guatemala).
- 1996-1997: Member of COSOSCO (Comité de Apoyo a las Exportaciones), in charge of the WTO section.

September 2009