MAYORA & MAYORA, S.C.
ABOGADOS Y NOTARIOS

15 Calle 1-04 Zona 10
Edificio Céntrica Plaza, 3er. Nivel, Of. 301
Ciudad de Guatemala, 01010 Guatemala, C. A.
Tel. PBX: (502) 236-625-31
Faxes: (502) 236-625-40 y 41

Gral.: info@mayora-mayora.com
Propiedad Intelectual: ip@mayora-mayora.com
Corporativo: emayora@mayora-mayora.com
www.mayora-mayora.com

This opinion follows up on my previous opinion of June 18th, 2009 ("the Mayora Report") in the matter of "Railroad Development Corporation" (Claimant) v. "The Republic of Guatemala" (Respondent), ICSID Case No. ARB/07/23. The principal object of the present is to address some of the views expressed by Maritza Ruiz de Vielman in her expert report of September 22, 2009 ("the Ruiz Report").

1. Main points in the Ruiz Report.

The Ruiz Report argues that the declaration of *lesividad* made by the President and his Cabinet:

1.1. Constitutionality:

Does not operate against the constitutional fundamental principles of the rule of law and of legal certainty guaranteed by the Guatemalan Constitution (Articles 2 and 12) but that, to the contrary, it is consistent with those principles and also the principle "of legality" (namely, that governmental officials have to act in accordance with the law, as prescribed by Article 154 of the Constitution);

1.2. Legal bases:

Was issued on the basis of solid grounds because there are several legal technical defects concerning the execution of Contracts 143 and 158, as well as a failure to provide for the protection of the cultural patrimony of the Republic, pursuant to constitutional and statutory regulations.

1.3. Compelling action:

Had to be made, lest the President would incur serious legal liabilities.

1.4. Interests of the state:

Rests not only on grounds of illegality but also on factual bases, such that it is irrelevant to distinguish mere "illegality" from the notion of "harmfulness" to the interests of the state.

2. Constitutionality.

2.1. In my opinion, "*...there are insurmountable obstacles at a general or systematic level, that prevent the power to issue a declaration of lesividad from being made*

consistent with and subject to the constitutional principles of legality, the rule of law, and the due process of law..." (The Mayora Report at 9.2)

2.2. The Ruiz Report (at 47.) contends *inter alia* that:

2.2.1. "*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*"; and

2.2.2. "*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 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.*"

2.3. The principle of legality.

2.3.1. The first proposition above states a mere tautology, namely, that the principle of legality is to act legally. But that misses the point completely because the problem with a declaration of *lesividad* is that "legality" is not enough, that an innocent third party may find itself in a situation where, three years minus one day later, the President and his Cabinet find that a **legal** transaction was not entered into in the best interests of the state. Put in other words: a declaration of *lesividad* causes the vague notion of "the interests of the state" to supersede legality as the standard of validity of a concession, a license, or a usufruct contract, as in the present case.

2.3.2. The problem with this from a constitutional point of view, however, is that the principle of legality is expressly and fairly clearly defined in the Constitution, while the power to make a declaration of *lesividad* is barely regulated by ordinary statutes.

2.3.3. Therefore, in my opinion, it is impossible to reconcile the constitutional principle of legality, as a standard on the basis of which it is possible to

determine the validity of the actions of governmental officials, on the one hand, and the possibility to revoke them on the basis that, although legal, their actions are not in line with the interests of the state, on the other.

2.3.4. It is important to clarify that the Guatemalan Constitution provides in Article 267 for the review of the constitutionality of ordinary statutory law "in the abstract". Namely, whether the propositions contained in any general legal or statutory rule are, in abstract terms, compatible with the propositions contained in the rules of the Constitution. And, from this perspective, I am firmly convinced that the proposition that the "legal" actions of governmental officials that have "legal" consequences in respect of third parties, can be nevertheless revoked on the basis of a finding that those actions or their legal consequences are harmful to the interests of the state, is not compatible with the constitutional principle of legality.

2.3.5. Before I go on to consider the problems related with the principles of the rule of law and of legal certainty, it is important to make here one more distinction. This has to do with the rather obvious notion that governmental officials must seek, in the performance of their functions and the adoption of their decisions, the "common good" (as the declared supreme end of the state of Guatemala, according to Article 1 of the Constitution), just as they must conform their actions and decisions to the principles of solidarity, subsidiarity, transparency, probity, efficacy, efficiency, decentralization, and of participation of the citizenry (according with Article 4 of the Executive Branch Act). Put in simpler terms, their actions cannot be "legal" only in form but not in substance. Moreover, Article 4 of the Judiciary Act denies enforceability to acts that purport to be founded on a specific legal rule, but that are contrary to the legal order in general.

2.3.6. It is to the effect that laws of the Republic be observed, and not only in appearance or formally, that the Office of the Attorney General has been instituted by Article 252 of the Constitution in order to advise and give legal counsel to the state and its agencies, and that the Office of the Prosecutor General is charged by Article 251 of the Constitution with the obligation and endowed with the necessary powers to act against illegal actions.

2.3.7. But it is one thing for the Attorney General to advise the Receiver of FEGUA (who must and did consult with the Office of the Attorney General on the legality of Contracts 143 and 158) that any specific approvals are required for the validity of a usufruct contract, or for the Prosecutor General to institute a civil action seeking a declaration that a usufruct contract is null and void, and quite another thing to make a unilateral declaration that a usufruct contract that the state itself or one of its agencies or entities has executed, is "harmful to the interests of the state". The former are proceedings compatible with the principle of legality, the latter operate against it. The second proposition of The Ruiz Report cited above fails to recognize the fundamental distinction made here.

2.4. The principle of the rule of law.

2.4.1. In addition to basic legality, the principle of the rule of law extends to the fundamental rights to due process and to be heard. Thus, I have expressed my opinion that *"...the mere declaration of* lesividad *affects the rights and can be very disruptive of the business of the affected party..."* and that *"...This constitutes, in and of itself, a violation of the rights to the due process of law and to be heard guaranteed by Article 12 of the Constitution"* (The Mayora Report at 8.2.1)

2.4.2. In The Ruiz Report (at 47 a., *in fine*), Ms. Ruiz contends that the rights to due process and to be heard are not violated by a declaration of *lesividad* because in it *"...An Executive Resolution states the Executive's will to request that the Contentious Administrative Court hear and finally declare whether the act or contract is lesivo..."* and because *"...in a contentious administrative judicial procedure, all due process guarantees are observed..."*

2.4.3. It is true that the several proceedings that might lead to a final revocation of a contract for being harmful to the interests of the state include two distinctly different parts or stages: the administrative proceedings, one; and the judicial proceedings, the other.

2.4.4. I have not discussed whether the fundamental rights to due process and to be heard are absent or become violated within the judicial proceedings or on occasion of their substantiation. I think that there are some important issues

to be reckoned with concerning this question, but the object of my remarks has not been this stage of the proceedings leading to the revocation of an act or a contract for being *lesivos*.

2.4.5. To the contrary, my focus has been the first stage of those proceedings: **the administrative proceedings.**

2.4.6. Concerning this first stage, I should have stressed in my first Report that the Constitutional Court of Guatemala has repeatedly ruled that the fundamental elements of the rights to due process and a fair hearing are not the exclusive province of judicial proceedings, but that administrative proceedings must conform to those constitutional rights as well.[i] So, as a matter of general rule, there is no doubt that, under Guatemalan Constitutional law, the rights to be heard and to due process should be observed in any kind of proceeding, including administrative proceedings.

2.4.7. In the particular case of a declaration of *lesividad,* it is quite clear that the observance of these fundamental rights through the administrative procedure is critical at a practical level, and not only as a matter of principle. This is because the legal and factual circumstances of the party that has contracted with, or has been extended a license, or granted a concession or usufruct by the state, is bound to change substantially upon a declaration of *lesividad:* nothing less than the President and his Cabinet will formally declare their position that the act or contract in question is harmful to the interests of the state. From that moment onwards, a number of legal proceedings will follow with the precise purpose and objective of declaring the act or contract null and void as being harmful to the interests of the state. To maintain, as in the Ruiz Report, that the declaration of *lesividad* by itself does not change anything or have any harmful effect on the private contracting party is, therefore, a gross misstatement of the reality of the situation that comes into play thereafter.

2.4.8. In synthesis, as to this specific point, the fact that the laws of Guatemala provide for a declaration of *lesividad* to be made without provision for adequate due process and the right to be heard, within the administrative proceedings, amounts to a clear and blatant violation of its Constitution.

2.5. The principle of legal certainty.

2.5.1. In the Ruiz Report (at 47, b.) the argument is made that "*...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.*"

2.5.2. This contention seems to relate the fact that a declaration of *lesividad* triggers an Appeal for Review before the Administrative Court, as a condition sufficient to safeguard legal certainty and legal security for the party to a contract, as in this case, or the holder of any other type of right, license or authorization. In my opinion, it would be perhaps an exaggeration to argue that there is no relation at all between one thing and the other, but, on the other hand, it is patent that the mere statutory possibility that the Administration may revoke its own acts and decisions, affecting innocent third parties, operates directly against legal certainty.

2.5.3. Of course, "direct operation against legal certainty" is not synonymous with "total negation of legal certainty". To argue "total negation" would require even broader discretionary powers on behalf of the President and his Cabinet such that arbitrariness would entirely substitute certainty.

2.5.4. However, the notion of legal certainty enters into direct conflict with the "uncertainty" of the meanings of "harmfulness" and of "interests of the state". Had the jurisdiction of the Republic of Guatemala been one were "the rule of precedent" operates, the probabilities that over time the vagueness of those two indeterminate legal concepts had been reduced to manageable proportions would have been higher. As it is, however, neither statutory law nor the rulings of the courts define with any degree of certainty those meanings and, as has been pointed out by some of the jurists that have studied the legal concepts and their terminology: *the ambiguity or obscurity of juridical texts is the cause of erroneous interpretations, and for that reason, also, of arbitrary or unjust solutions.*[ii]

2.5.5. In the Ruiz Report its author quotes a ruling by the Administrative Court (that neither creates a precedent nor jurisprudential doctrine) where, unfortunately, the court muddled the meaning of "interests of the state" further. Let me copy the translation of the paragraph that appears in the Ruiz Report (at 53):

2.5.6. *"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)."* (Emphasis added).

2.5.7. The court states in the paragraph above that a declaration of *lesividad* would be the consequence of a finding by the State of either a *"legal violation"* or a *"damage to the public interest"*. The court also states that the Appeal for Review would be instituted in order to obtain a declaration that the act is *lesivo*, that is: *"contrary and prejudicial to the general interest"*.

2.5.8. Thus, the court seemed to equate at least three different things with the notion of "harmful to the interests of the state":

2.5.8.1. A legal violation;
2.5.8.2. A damage to the public interest; and
2.5.8.3. Something contrary and prejudicial to the general interest.

2.5.9. But the critical question in respect of the principle of legal certainty and the declaration of *lesividad* is whether the extremely brief discussion of this matter by the court, contained in paragraph quoted above, makes things any clearer or not.

2.5.10. In my judgment, by stating that a "legal violation" is something "harmful to the interests of the state", within the context of the Administrative Procedures and Judicial Review Act of 1996, the court confirms my opinion

that a declaration of *lesividad* operates directly contrary to the principle of legal certainty. This is so because a proposition to the effect that:

2.5.10.1. The Administration can declare at "point 1" in time that it has entered **legally and lawfully** into a contract with a third party, but

2.5.10.2. The Administration can declare at "point 2" in time that entering into that contract with a third party constitutes a **legal violation**,

2.5.10.3. is clearly and simply incompatible with any reasonable notion of legal certainty.

2.5.11. Having said that, it is important to recall here that, in my opinion, a declaration of *lesividad* is entirely different from that situation where an institution **other** than the parties to the contract, such as the Office of the Prosecutor General, acting independently, finds that, in the exercise of its constitutional duties and/or powers, it must challenge the legal validity or enforceability of the contract before a competent court.

3. Legal bases.

3.1. As mentioned above, the Ruiz Report contends that the President's and his Cabinet's declaration of *lesividad* was issued on the basis of solid grounds because there are several legal technical defects concerning the execution of Contracts 143 and 158, as well as a failure to provide for the protection of the cultural patrimony of the Republic, pursuant to constitutional and statutory regulations.

3.2. The nucleus of these defects relate to the following:

3.2.1. FEGUA's receiver lack of powers.

That FEGUA's receiver lacked the power and authority to have executed Contracts 143 and 158, because their object and substance far exceed the powers of ordinary administration of this FEGUA's officer.

3.2.2. That the usufruct has the nature of a concession.

That FEGUA has the power to enter in to contracts, such as Contracts 143 and 158, but that since those are of the nature of licenses, authorizations, permits, concessions and similar rights, FEGUA has to comply with the Public

Procurement Act, which requires, *inter alia*, the approval of the highest ranking authority of a state autonomous entity, in this case, the President of the Republic (since FEGUA has been placed under a receivership by the Executive) [At 2 and 3]. Furthermore, it is maintained that the concession in this particular case refers to "public domain assets", of the kind regulated by Article 461 of the Civil Code (at 34 a.)

3.3. Certain background fundamental elements.

3.3.1. The Ruiz Report exhibits an understandable but unsuccessful effort to make things appear as if FEGUA's Overseer knowingly and willingly decided to assume the power and authority to transfer the operation of the Guatemalan railway system and its main assets to a private party for decades to come. One of the ways in which this effort is manifested in the Ruiz Report is the central importance given to the ruling of December 17, 2001 rendered by the Administrative Court where, according to the Ruiz Report: "*...in a case similar to that of Contract 143, where the 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 FEGUAS's Organic Law...*" (at 17).

3.3.2. Whether the privatization of the national railway system, through a comprehensive plan and in the manner that will be briefly outlined below, is "a case similar" to the one that this ruling dealt with, is a not a difficult question to resolve: the execution of a contract to grant the use of a piece of land to a third party can hardly be compared to a privatization process.

3.3.3. But the processes that led to the execution of Contract 41, Contract 143 and Contract 158, *inter alia*, do not in any way reflect the kind of transaction that was reversed by the 2001 Administrative Court Ruling.

3.3.4. As a matter of fact, if one reads the introductory recitals in the first clause of Contracts 402 and 41, one finds that it is the Government of Guatemala (not the receiver of FEGUA) that: "*...has set on to itself the objective of getting*

the railway system to function again because of it is an objective of economic interest for the economic activities of the Nation, but at the same time, it has decided to abandon its functions as railway operator and all other functions related with the activity of railway transportation ventures." Then, in the same clause, the document goes on to mention that, for those purposes: *"...the Government of Guatemala has issued the Executive Decree 493-96 (*Acuerdo Gubernativo 493-96) *which purports to develop a process of disincorporation without privileges through which the state may exercise its core functions efficiently, separating itself from entrepreneurial, industrial, agricultural or service activities ..."* (My own translations).

3.3.5. Furthermore, the second clause of both instruments specifically refers to the Public Procurement Act, as one of the legal foundations on the basis of which the process in general took place and, specifically, the public international bidding process organized to the effect of executing both contracts with the winner.

3.3.6. The only reasonable conclusion that can be drawn from the wording in those recitals is that FEGUA's receiver acted in a mere "instrumental character". When the Receiver executed Contracts 402 and 41, he was no more than the instrument through which the Government of the Republic materialized its decision to render back to the private sector the operation and administration of the national railway system and/or the assets, premises, and equipment necessary for that purpose.

3.3.7. In order to complete this background sketch, it is important to refer to two other elements directly related to the question of whether the President of the Republic approved or not these proceedings and transactions. The first such element is that Contract 143 reproduces, in its first clause, almost verbatim, the same references to the decision of the Government (i. e., the President and his Cabinet) to privatize the railway system. The second element is that, in recital "V." of that same clause, there is an express allusion to the fact that Contract 41 was not approved by the President, because this was an unnecessary requirement given the fact that the Receiver has the necessary powers in order to execute the agreement.

3.4. The question of the lack of powers.

3.4.1. Going back to the question of the lack of powers of FEGUA's receiver, as is argued in the Ruiz Report, in my opinion it is impossible to maintain in good faith that position. It can be argued that the President did not issue a decree or any other formal declaration *"ratifying"* the execution of any of those contracts, but there is absolutely no legal rule in the Public Procurement Act requiring specifically such thing. As a matter of fact, in the opinion of the Attorney General dated August 1, 2005, towards the end of paragraph "a)", there is a statement that, according with the Public Procurement Act, the contract *should have been approved by the Board, but as the case is that the Institution (FEGUA) is under a receivership, this is a sui generis case not contemplated by the Public Procurement Act* (my own translation).

3.4.2. In order resolve this question, then, it must be clearly understood that:

3.4.2.1. The Overseer of FEGUA was appointed by the President of The Republic;

3.4.2.2. The receivership had, as one of its consequences, that the Board of FEGUA ceased to exist and function;

3.4.2.3. The Government, that is, the President of the Republic and his Cabinet, decided to carry on the privatization processes that included, *inter alia*, the national railway system;

3.4.2.4. The Overseer of FEGUA had been not only empowered but specifically instructed to carry out the international public bidding for the privatization of the national railway system (including the use and operation of its premises and equipment), and all the subsequent acts and contracts; and

3.4.2.5. Not only is there no legal rule demanding a ratification of his actions by the President, but it made no logical sense to seek such ratification, because the President of the Republic had ordained the whole process and because there was no other official of any higher ranking than the Overseer within FEGUA.

3.4.3. It is fundamentally flawed to analogize the office of the President of the Republic to the Board of FEGUA; the only reasonable analogy would be between the Receiver of FEGUA and the pre-existing Board.

3.5. The question of the usufruct as a concession.

3.5.1. As mentioned in "B." above, the contention that it was necessary for the President to have approved contracts 143 and 158 is connected with the view that "the usufruct has the nature of a concession" and that it relates to public domain assets.

3.5.2. This contention and the underlying views that sustain it are, to say the least, mistaken. The argument basically goes that Article 461 of the Civil Code provides for any concession over public assets to be granted through a concession, and that concessions are subject to a special legal regime that *"only the Administration can award"* (The Ruiz Report and 37).

3.5.3. However, a careful reading of Article 461 of the Civil Code is more than sufficient to show that this argument is totally flawed. In effect, Article 461 refers to those goods (*"bienes")* subject to *"common use"*. These are inalienable and the State cannot lose dominion over them by prescription (the lapse of time). This type of goods *"of common use"* can be, however, granted under a concession for *"special exploitation"* ("aprovechamientos especiales").

3.5.4. But two other articles of the Civil Code clarify this matter further: Articles 457 and 458. The former states that goods under public domain (or "public domain assets", as called in The Ruiz Report) can be of public *"common use"* or of *"special use"*. The latter lists those public goods of *"common use"*. These are:

3.5.4.1. Streets, parks, public squares, roads and bridges not of private property;

3.5.4.2. Ports, docks, dry docks, pontoons, and other premises open to general use built or acquired by the state or the municipalities;

3.5.4.3. Territorial waters; lakes; navigable rivers and their banks; rivers; basins and streams that operate as limits to the national territory; waterfalls and water springs subject to industrial exploitation; waters not put to profit by private persons;

3.5.4.4. The maritime zone of the Republic; the continental platform; air space and the atmosphere. [iii]

3.5.5. By contrast, Article 459 of the Civil Code describes those goods or assets not subject to common use and, right in section "1°" one finds *"...those destined for the services of ... state decentralized entities..."*, of which FEGUA is clearly one.

3.5.6. Therefore, and although it is clear that the Government of the Republic never intended to elude the dictates of the Public Procurement Act and was keen on carrying out an international public bidding process, it is technically mistaken to characterize Contracts 402, 41, 143 and/or 158 **as a set of concessions over public goods of common use**.

3.5.7. All those contracts as amended **regulate the creation of rights of usufruct of public goods not subject to or for common use, and do not fall under Article 461 of the Civil Code**. Therefore, all the contentions in The Ruiz Report that the Administration is the only department of government legally authorized to grant such contracts (that do not constitute concessions of public goods of common use), is plainly mistaken.

4. Compelling action.

4.1. The Ruiz Report argues (at 79 *et seq.)* that the President of the Republic did not have a choice but to proceed to declare the *lesividad* of Contracts 143 and 158, mainly because of the request by the Receiver of FEGUA and because five legal opinions were issued in support of making such declaration (see Conclusions at 101).

4.2. It is not any use to dispute either that the President holds the most prominent office in the Administration, with the greatest constitutional and legal powers, or that the exercise of those powers carries the weight of various types of legal liability.

4.3. The question is whether the officer the government that holds those powers and is accountable for their proper and legal exercise, can be forced to issue a declaration of *lesividad* upon request of the chief executive of one of the several state entities and upon the "opinions" of counsel to several governmental

agencies (that, as can be easily ascertained in this case, do not really concur even in the main aspects).

4.4. In my opinion, the answer to that question is very simple: **No, the President cannot be forced and cannot be considered to be obligated to issue such a declaration.**[iv]

4.5. In terms of the law of the Republic, there is a very conspicuous provision in the Administrative Procedures and Judicial Review Act. The first paragraph of Article 3 states, towards the end, that: *"...It is forbidden to take as a resolution the opinions given by any legal or technical advisor."* (My own translation).

4.6. In other words: "an opinion is an opinion..." There is no question that the President and other public officials have to face, in the course of the discharge of their offices, multiple complicated and often critical decisions. But so long as they discharge their duties within the boundaries of the Constitutional and legal rules, their judgment as to the convenience, opportunity or merits of each decision cannot be the source of any legal liability, subject only to the final verdict of the democratic process or the judgment of history.

4.7. Particularly in a matter such as a declaration of *lesividad*, where the issue is whether the contract, act, or decision in question are "harmful to the interests of the state", the judgment of the President of the Republic cannot be constitutionally or legally substituted by the judgment of no matter how many legal advisers or the requests of no matter how many lower ranking officers.

4.8. As we have mentioned above and there is no use elaborating on that point here again, questions of strict legality are for either the Office of the Attorney General or that of the Prosecutor General to consider and, should the case be, to institute the corresponding legal actions. Even against the President, if the case ever demanded so.

4.9. A determination of whether the terms and conditions on which the Republic of Guatemala, by decision of its Government and through one of its entities (FEGUA), decided to privatize the national railway system, <u>are harmful or not harmful to the interests of the state rests on the President, and on the President only</u>.

Moreover, **to argue that the President was obligated to issue such a declaration would be tantamount to affirming that this legal power does not really belong to the President of the Republic, but to those who make a request for such a declaration or to those who give their "opinion" on the matter.**

4.10. Lastly, we have carefully researched the rulings of the highest tribunals in our jurisdiction and we have not been able to find one single case where the President has been made personally liable for failing to adopt a declaration of *lesividad*, or for that matter, related with the failure to exercise of any other discretionary power.

5. The substance of the notion of "interests of the state".

5.1. It is really not necessary to argue again that the constitutional structure of the state of Guatemala clearly contemplates those offices in charge of overseeing that the actions of public officials, of any rank and order, be "legal". This oversight shall take place, both, at a preventive and at a corrective level. Therefore, I have opined several times that the notion of "interests of the state" cannot be coextensive with the problem of legality, but that it is something else which is too vague and undetermined to be compatible with notions of legal certainty and the rule of law.

5.2. But, as I have mentioned above, according to the Ruiz Report, the declaration of *lesividad* rests not only on grounds of illegality but also on factual bases, such that it is irrelevant to distinguish mere "illegality" from the notion of "harmfulness to the interests of the state".

5.3. So, what are those factual bases that render this fundamental distinction "irrelevant" in this case?

5.4. It turns out there is only one factual element that the opinions given by the legal advisors to several agencies of the Government and in the Ruiz Report that would be the basis for the issuing of a declaration of *lesividad*: that Contract 143 fails to provide adequately for the protection of the historical patrimony of the Nation. (See The Ruiz Report at 45 and 77).

5.5. The lack of materiality of this allegation may be reflected in the Explanatory Statement (a document prepared in order to justify the adoption of and provide background support to the President's declaration of *lesividad),* where there is no reference –not even in passing—to the supposed failure to protect the historical patrimony of FEGUA and the Nation, either in Contract 143 or as a matter of fact.

5.6. It must be said at the outset that there are no legal rules that mandate that usufruct contracts should provide for the protection of the historical patrimony of the Nation, but the major problem with this contention by the Government and in the Ruiz Report, is that this is not a "fact" but, at most, a technical deficiency (one that could only be imputed to those in the Government who were in charge of drafting Contract 143). This, in any case, is debatable because clause ten of Contract 143 does make specific provision for this very point.

5.7. Furthermore, when it comes to matters of fact, it appears from Claimant's Memorial on the Merits (at 86) that, far from having depleted FEGUA's historical heritage, Ferrovías de Guatemala was publicly recognized in August 2003 because of its support to the Railroad Museums of Guatemala City and Zacapa.

5.8. Once again, these aspects could simply not be the basis for a declaration of *lesividad* because the state of Guatemala has, through its Ministry of Culture and several of its offices, the necessary mechanisms and the competent authorities to oversee and to promote any and every administrative or judicial action for the protection of the historical patrimony of the Nation. Therefore, **had any instance or actions actually taken place with the consequence that the historical heritage or the patrimony of the Nation would have suffered damage or depletion, the appropriate action on behalf of the Government would have been to apply the constitutional and legal provisions and to set the proceedings in motion, through the competent governmental authorities, to stop and correct any such violations, rather than to issue a declaration of *lesividad*.**

Dr. Eduardo A. Mayora

Guatemala October 16, 2009.

[i] See, for example, the ruling of 06-07-2000, Gazette N° 57, P. 121: "*...Los derechos de audiencia y al debido proceso reconocidos en el artículo 12 de la ley fundamental, al provenir de una norma general prevista en la parte dogmática, deben tener plena observancia en todo procedimiento en que se sancione, condene o afecten derechos de una persona. Tienen mayor relevancia y características en los procesos judiciales es cierto, pero su aplicación es imperativa en todo tipo de procedimientos, aún ante la administración pública y Organismo legislativo y cualquier otra esfera de actuación...*"

[ii] Vid. Bielsa, Rafael; LOS CONCEPTOS JURÍDICOS Y SU TERMINOLOGÍA. Ediciones Depalma, Buenos Aires 1993; Pag. 29. The original text in Spanish reads as follows: "La ambigüedad u obscuridad de los textos jurídicos es causa de erróneas interpretaciones, y por eso, también, de soluciones injustas o arbitrarias."

[iii] My own translation in summary.

[iv] Thus, the Guatemalan Constitutional Court, in a ruling of an "Amparo" procceding dated 21/01/2009, (Court file N° 15-2007) referred to the writings of Professor Garberi Llobregat who, on the basis of a Spanish court ruling, explains the "discretionary" nature of any decision to declare the *lesividad*. In the case of our jurisdiction, that discretionary power rests on the President of the Republic. The text in Spanish is the following:

"El Tribunal estima pertinente, para dejar claramente expresada cual es la naturaleza propia de una declaratoria de lesividad, citar al profesor José Garberi Llobregat que en su obra sobre Derecho Administrativo (Editorial Tirant lo Blanch-1992-pag.748) cita una sentencia del Tribunal Supremo de España del veintiséis de Junio de mil novecientos ochenta y cuatro en la se expresa que la declaratoria de lesividad 'constituye un acto discrecional."