

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

Case No. ARB/07/23

Between
Railroad Development Corporation
Plaintiff

vs.

The Republic of Guatemala
Defendant

THIRD EXPERT REPORT OF EDUARDO A. MAYORA

March 14, 2011

1. This opinion follows up on my previous opinion of (“the Second Mayora Report”) in the matter of “Railroad Development Corporation” (Claimant) v. “The Republic of Guatemala” (Respondent), ICSID Case No. ARB/07/23. The scope of this third report (“the Third Mayora Report”) is narrower than the two previous Mayora Reports. The main reason for this is that, in my opinion, the main legal questions concerning this matter have become sufficiently circumscribed. There are other issues of legal relevance than those I try to elucidate here but their bearing on the substance of this matter is very limited.
2. The main legal questions can be classified in three categories: (i) those related to the notions of *interests of the state* and of *legality*; the nature of *lesividad* (*injuriousness*): its essence and elements; (ii) those related to whether the fundamental elements of the notions of *due process* and of the *equal protection of the laws* are violated in general by the *lesividad*, and in particular by the way it is regulated under Guatemalan law; and (iii) those concerned with the alleged lack of presidential approval of Contracts 143 and 158.
3. In my opinion these main legal questions are not considered in sufficient depth in the report prepared by Mr. Juan Luis Aguilar Salguero dated October 1, 2010 (“the Aguilar Report”). By this I mean that, the Aguilar Report fails to address the ultimate implications of the contentions or assertions contained in it concerning what I have called “the main legal questions of this matter”. Of course, I am only referring to the law of Guatemala and to the bearing that it has on this case, not to the legal questions arising under CAFTA, the law of international treaties, or to substantive international law.

The notions of *interests of the state* and of *legality*; the nature of *lesividad*: its essence and elements.

4. In the Aguilar Report (at ¶21) its author argues that the statement (presented in the First Mayora Report, dated June 18, 2009) that the notion of *interests of the state* is not defined in the laws of Guatemala and that it is vague, is wrong. In the First Mayora Report I have tried to show, in effect, that neither the Constitution of the Republic of Guatemala nor any of its statutory laws, or case law, have provided to those who are in public office, either in the Executive Branch or the Office of the Prosecutor General,



with any definition of the notion of the *interests of the state*. This statement must be reiterated here even more emphatically.¹

5. It suffices to read through some of the conclusions in the Aguilar Report and through its "Section II" to prove that what I have stated in the First Mayora Report is true and correct. Between ¶¶ 6 and 21 in the Aguilar Report one finds that the *interests of the state* are the "ends" and the "duties" of the State of Guatemala mentioned in articles 1 and 2 of the Constitution (¶¶ 7 through 9); that "everything" related to "life, liberty, justice, security, peace, and the integral development of humans" is of the *interest of the state* (¶ 10); that the *interests of the state* are defined in the Constitution but become "materialized" in "each and every one of the laws of the country that refer to or are related with life, justice, security, peace, and the integral development of humans" (¶ 11); that the *interests of the state* can be found in the provisions of, "for example", the Civil Code, the Code of Commerce, the Labor Code, the Penal Code, the Fiscal Code, the Public Procurement Act, the Income Tax Law and, "in general", in all of the provisions of the laws of the Guatemalan legal system referred to the ends and duties of the State of Guatemala (¶12).
6. According with the Aguilar Report, these are not the only definitions, or places where the notion of *interests of the state* is defined, as these are only the sources where, on a general level, one can find such definition. Therefore it must be accorded, at least, that the sources of the definition of the notion of *interests of the state* as discussed in the Aguilar Report extend over a set of materials so vast that it is impossible to provide, say, a fifty words definition (as in effect one misses in the Aguilar Report). Not even a five hundred words definition can possibly be attempted.
7. As one moves from this general level to a particular or to a specific level concerning the definition of *interests of the state* in the Aguilar Report, the vagueness of the concept does not disappear. We are told that, in particular, the substantive rule that upholds the *interest of the state* is the specific rule that becomes transgressed by a determined act or resolution that harms the *interests of the state* (¶ 13); that in the present case, the "general" *interest of the state* was to attain the "common good" of its inhabitants through the development and rehabilitation of the railway transportation

¹ As indicated in the First Mayora Report at 8.3.7. there are simply no jurisprudential elements that could provide some guidance on this issue. Moreover, to the best of my knowledge, there has been only one known declaration of *lesividad* that has ever been confirmed by an Administrative Court, and therefore there is no legal precedent in Guatemala that would have put Claimant on notice that Contracts 143/158 could be declared *lesivo* based upon their alleged technical legal defects.



system of the country (¶ 14). In the Aguilar Report one does not find an explanation on just exactly how one can infer the notion of *interest of the state* from the Constitution and all the laws of the Republic of Guatemala.

8. However, the “common good” through getting the railway system to run again is not the end of the process leading to the definition of *interests of the state*. From this point there are still three more steps in the Aguilar Report leading to the *interests of the state* being defined as: (a) the terms of reference (*bases de licitación*) of February, 1997, for the usufruct on the right of way and those of November, 1997, for the usufruct over the railway equipment (¶ 15); (b) the “legal framework” of each one of the respective international public bidding processes (¶ 16); and (c) specifically concerning the usufruct over railway equipment, that all of the provisions referred to the legal framework for the public bidding process of November, 1997 be respected and complied with (¶ 18).
9. It is after such remarkable variety of definitions of the notion of *interests of the state* that the Aguilar Report states that it is not true what I have stated. Namely, that there is no such definition in the whole of the legal system of the Republic of Guatemala. However, it is the **vagueness** of the **undefined** notion of *interests of the state* in the legal system of Guatemala that has allowed for such extreme dispersion of definitions as are found in the Aguilar Report. Definitions that swing from the protection of life, liberty, justice, security, peace and the integral development of humans (¶ 8) to getting the railway system to function again (¶ 14), to complying with the legal framework concerning the November, 1997 public international bidding process (¶ 18).
10. In addition to what is mentioned above it should be noted that one cannot find in the Aguilar Report any bases for holding that any of the more than ten different definitions of *interests of the state* can be accepted as being valid. In other words, what one reads in the Aguilar Report concerning each one of those several definitions is the **opinion** – however respectable—of its author that each one of those things ought to be considered as such (as a valid definition). This is why I have also argued that any definition of *interest of the state* concerning the legal system of Guatemala is a matter of subjective **opinion**. It is true that there are some opinions that are better supported than others, but all remain subjective, all the same.
11. Let us now, turn to the nature of the legal institution of *lesividad* and the problem of *legality*. The conclusion in the Aguilar Report that, in this case, the *interests of the state* are that the legal framework of the public bidding process for the usufruct over



railway equipment be respected and complied with (¶ 18) is not independent of the main thesis presented in it.

12. The point is that the Republic has maintained all along that, as concerns the bases for a declaration of *lesividad*, the *interests of the state* and *legality* are one and the same thing. Therefore, any act, any resolution, or any proceeding carried out by any agency of the government that would appear to be in violation of the laws of the Republic, would warrant a declaration of *lesividad*. So maintains the Republic and such is the conclusion in the Aguilar Report regarding this issue.
13. As I have tried to prove in my previous reports and also through the exposition contained, on this issue, in the Aguilar Report, there is no definition of what exactly is the notion of *interests of the state* neither in the Constitution nor in the laws of Guatemala. Therefore, it is not possible to refute the conclusion in the Aguilar Report that this notion is equivalent to or coextensive with the notion of *legality*.
14. The circumstance that the definition of the notion of *interests of the state* is nowhere to be found in the laws of Guatemala, including in case law, is however no absolute impediment to argue or to prove that the *interests of the state* and the principle of *legality* are not equivalent nor coextensive.
15. In the First and the Second Mayora Reports² I have tried to do this by arguing that the laws of Guatemala provide for: (a) the agencies, such as the Office of the Attorney General³; (b) the causes of action, such as the nullity (*acción de nulidad*) of an act or a

² The First Mayora Report was issued on June 18th, 2009. The Second Mayora Report was issued on October 16th, 2009.

³ **Number 3.2 of the First Mayora Report, June 18, 2009, literally states:** “3.2. *In the Constitution of the Republic of Guatemala of 1985 as amended (“the Constitution”), presently in force, Article 154 specifically states that those in public office (funcionarios y empleados públicos) are subject to the law and are liable and accountable for their actions beyond the limits of the law. The civil liability (damages, generally speaking) of public officials is regulated by Article 155 and along with articles 232, 251 and 252 refer to the powers of the office of the Comptroller (Contraloría General de Cuentas), the Office of the Prosecutor General (Ministerio Público), and the Attorney General (Procurador General de la Nación) to the effect that the financial, legal, and administrative actions and proceedings of public officials and the Administration as a whole, be supervised and controlled in terms of their accordance with the law.”*

Number 2.3.6. of the Second Mayora Report, October 16, 2009, literally states: “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.”*



contract⁴; and (c) the proceedings, such as the ordinary civil procedure⁵ or the Appeal for Review to the Administrative Court⁶, that are necessary to challenge any conceivable act or contract for reasons having to do with legality.

Number 4.8. of the Second Mayora Report, October 16, 2009, literally states: “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 **Number 9.6. of the First Mayora Report, June 18, 2009, literally states:** “9.6. None of those allegations pertain to the “interests of the state” (no matter how loosely defined), but to rather minute or very specific technical legal questions. These questions or any other legal question could have been raised, *inter alia*, by the Office of the Attorney General when it examined the documents and proceedings prior to the public bidding, or before the expiration of the statute of limitations (of two years, according to Article 1312 of the Guatemalan Civil Code) in order to file a civil action seeking a declaration that Contracts 143 and 158 be declared null and void. The reasons why none of this was done before is of no relevance, except that the failure of the Office of the Attorney General to take any legal action (supposing any of those allegations warranted such thing) within the timeframe specified by law, rendered the whole matter firm and definitive. The only way to seek the nullification of Contracts 143 and 158 was to show that their execution or provisions were harmful to the interests of the state, not merely illegal. Questions of legality must be dealt with through different proceedings.”

Number 2.3.7. of the Second Mayora Report, October 16, 2009, literally states: “2.3.7. But it is one thing for the Attorney General to advise the Overseer 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.”

⁵ **Number 6.2. of the First Mayora Report, June 18, 2009, literally states:** “6.2. Thus, a substantive legal rule must determine and define the matter of the rights attributed to the so called “active subject”, that is, the person that may institute an action in order to enforce its right. For example, Article 464 of the Guatemalan Civil Code determines that private property is the right to enjoy and dispose of one’s goods within the limits and subject to the obligations prescribed by law. This is a substantive law rule, as it gives the owner the rights to enjoy and dispose of its goods; however, should any third party disturb the owner’s possession of his goods, the owner may seek injunctive relief against the infringer from a civil court, according with the proceedings instituted by Articles 253 and 254 of the Guatemalan Code of Civil Procedure.”

Number 8.2.3. of the First Mayora Report, June 18, 2009, literally states: “8.2.3. Furthermore, the Administrative Court does not have the legal power to decide that the affected party be compensated for its losses resulting from a lesividad declaration. According with Article 155 of the Constitution, liability for damages against the state (public officials are jointly and severally liable) stems from illegal actions by the



16. Thus, Guatemala's legal system does not rest on the declaration of *lesividad* in order to deal with questions of *legality*. This is probably made plain *inter alia* by the provision in the Judiciary Act that states that: *any act executed against imperative legal rules or against rules that contain express prohibitions are null and void by the mere operation of the law*⁷ (the author's translation).

17. Moreover, just as in any other contemporaneous legal system, the Guatemalan addresses the fundamental question of *legality* in a considerable variety of aspects or dimensions: (a) as concerns the right to petition any agency of the government to act as

acting officials and, according with the Guatemalan Code of Civil Procedure, the matter should be tried before a civil court (Article 229, 4.)."

⁶ Numbers 4.1 to 4.3 of the First Mayora Report, June 18, 2009, literally state: "4.1. The Administrative Procedures and Judicial Review Act of 1996" ("the APRA"), repealed and replaced an earlier Act without introducing any substantive changes. The APRA, however, was issued under the Constitution now in force and is supposed to develop, *inter alia*, the general notions contained in Article 221. Thus, the APRA lays down the general rules for the Administration to issue its decisions or rulings (Resoluciones); it provides for the review, within the Administration, of the decisions or rulings of lower administrative bodies by their superior agencies or officials; for the revision by the same administrative bodies that issued the decision or the ruling, when there is no superior body or official; and in more detail, the judicial procedure through which the Administrative Court reviews the decisions and/or rulings of the Administration, once there are no further appeals (Recurso administrativo) to be filed within the Administration.

4.2. The vast majority of cases arising under the APRA consist of petitions made by private parties to one governmental agency or entity, concerning a wide variety of matters falling under the administrative jurisdiction of the several agencies and/or governmental entities. When petitions are partially or totally denied and the petitioner considers that there are no legal grounds for the denial of his petition, or that the agency or entity involved did not act strictly within its legal powers, or that it has not construed the applicable laws or regulations in the right way, the petitioner may then file an appeal (Recurso administrativo de Revocatoria) or request the competent authority to revise its initial decision or ruling (Recurso administrativo de Reposición).

4.3. Should the circumstances that give rise to the filing of an appeal or a petition to revise the administrative decision or ruling remain, the petitioner may then take the case to the Administrative Court through a special procedure—in the sense that it is different than the ordinary judicial procedure—known as the Recurso de lo Contencioso Administrativo (hereafter "the Appeal for Review"). The ruling of the Administrative Court may then be appealed to the Supreme Court of Justice, although the specific proceeding is not, strictly speaking, an appeal. Very succinctly, through this proceeding, called Recurso de Casación, the Supreme Court of Justice reviews whether there have been substantial procedural violations or whether the Administrative Court has not applied or interpreted the applicable law correctly. If the former, the matter is remanded to the Administrative Court; if the latter, the Supreme Court of Justice revokes the lower ruling and issues its own."

⁷ Article 4 of the Judiciary Act (Ley del Organismo Judicial, Congress Decree 2-89): "ARTÍCULO 4. Actos nulos. Los actos contrarios a las normas imperativas y a las prohibitivas expresas, son nulos de pleno derecho, salvo que en ellas se establezca un efecto distinto para el caso de contravención. (...)"



required by any substantive legal rule⁸; (b) as concerns the obligation of any public administration to follow procedures ordained by law⁹; (c) as concerns the execution of and performance of obligations under administrative contracts¹⁰; (d) concerning the execution and performance of obligations derived from private agreements into which the state may also enter into¹¹; (e) regarding the commission of actions or omissions that may be punished by criminal law¹²; (f) related to the rules of public finance and pertaining to the use and administration of public funds¹³; (g) concerning the rules of the civil service or labor law applicable to some state entities¹⁴.

⁸ **Article 28 of the Political Constitution of the Republic of Guatemala** (*Constitución Política de la República de Guatemala*): “**ARTÍCULO 28. Derecho de petición.** Los habitantes de la República de Guatemala tienen derecho a dirigir, individual o colectivamente, peticiones a la autoridad, la que está obligada a tramitarlas y deberá resolverlas conforme a la ley. (...)”

⁹ **Article 154 of the Political Constitution of the Republic of Guatemala** (*Constitución Política de la República de Guatemala*): “**ARTÍCULO 154. Función pública; sujeción a la ley.** Los funcionarios son depositarios de la autoridad, responsables legalmente por su conducta oficial, sujetos a la ley y jamás superiores a ella. (...)”

¹⁰ **Article 1 of the Government Procurement Law of the Republic of Guatemala** (*Ley de Contrataciones del Estado*, Congress Decree 57-92): “**ARTÍCULO 1. Objeto.** La compra, venta y contratación de bienes, suministros, obras y servicios que requieran los organismos del Estado, sus entidades descentralizadas y autónomas, unidades ejecutoras, las municipalidades y las empresas públicas estatales o municipales, se sujetan a la presente ley y su reglamento. Las donaciones que a favor del Estado, sus dependencias, instituciones o municipalidades hagan personas, entidades, asociaciones u otros Estados o Gobiernos extranjeros, se registrarán únicamente por lo convenido entre las partes. Si tales entidades o dependencias tienen que hacer alguna aportación, a excepción de las municipalidades, previamente oirán al Ministerio de Finanzas Públicas.

En lo relativo a lo dispuesto en convenios y tratados internacionales de los cuales la República de Guatemala sea parte, las disposiciones contenidas en la presente ley y reglamentos de la materia, se aplicarán en forma complementaria, siempre y cuando no contradigan los mismos.”

¹¹ *Ibid.* supra at 9

¹² **Article 419 of the Penal Code of the Republic of Guatemala** (*Código Penal*, Congress Decree 17-73): “**ARTÍCULO 419.** Incumplimiento de deberes. El funcionario o empleado público que omitiere, rehusare o retardare algún acto propio de su función o cargo será sancionado con prisión de uno a tres años. (...)”

¹³ **Article 237 of the Political Constitution of the Republic of Guatemala** (*Constitución Política de la República de Guatemala*): “**ARTÍCULO 237.** Presupuesto General de Ingresos y Egresos del Estado.



18. The declaration of *lesividad* is peculiar in many ways (so odd that it operates against basic principles of due process and legal certainty). It is not an ordinary proceeding, because it has to do with the eventual nullification of an act or a contract of a governmental agency or entity because of their own deeds and not those of the other party. It is an exception to the general principle that also within the context of the

El Presupuesto General de Ingresos y Egresos del Estado, aprobado para cada ejercicio fiscal, de conformidad con lo establecido en esta Constitución, incluirá la estimación de todos los ingresos a obtener y el detalle de los gastos e inversiones por realizar.

La unidad del presupuesto es obligatoria y su estructura programática. Todos los ingresos del Estado constituyen un fondo común indivisible destinado exclusivamente a cubrir sus egresos.

Los Organismos, las entidades descentralizadas y las autónomas podrán tener presupuestos y fondos privativos, cuando la ley así lo establezca, sus presupuestos se enviarán obligatoria y anualmente al Organismo Ejecutivo y al Congreso de la República, para su conocimiento e integración al presupuesto general; y además, estarán sujetos a los controles y fiscalización de los órganos correspondientes del Estado. La ley podrá establecer otros casos de dependencias del Ejecutivo cuyos fondos deben administrarse en forma privativa para asegurar su eficiencia. El incumplimiento de la presente disposición es punible y son responsables personalmente los funcionarios bajo cuya dirección funcionen las dependencias.

No podrán incluirse en el Presupuesto General de Ingresos y Egresos del Estado gastos confidenciales o gasto alguno que no deba ser comprobado o que no esté sujeto a fiscalización. Esta disposición es aplicable a los presupuestos de cualquier organismo, institución, empresa o entidad descentralizada o autónoma.

El Presupuesto General de Ingresos y Egresos del Estado y su ejecución analítica, son documentos públicos, accesibles a cualquier ciudadano que quiera consultarlos, para cuyo efecto el Ministerio de Finanzas Públicas dispondrá que copias de los mismos obren en la Biblioteca Nacional, en el Archivo General de Centro América y en las bibliotecas de las universidades del país. En igual forma deberán proceder los otros organismos del Estado y las entidades descentralizadas y autónomas que manejen presupuesto propio. Incurrirá en responsabilidad penal el funcionario público que de cualquier manera impida o dificulte la consulta.

Los Organismos o entidades estatales que dispongan de fondos privativos están obligados a publicar anualmente con detalle el origen y aplicación de los mismos, debidamente auditado por la Contraloría General de Cuentas. Dicha publicación deberá hacerse en el Diario Oficial dentro de los seis meses siguientes a la finalización de cada ejercicio fiscal.”

¹⁴ **Article 108 of the Political Constitution of the Republic of Guatemala** (*Constitución Política de la República de Guatemala*): “ARTÍCULO 108. Régimen de los trabajadores del Estado. Las relaciones del Estado y sus entidades descentralizadas o autónomas con sus trabajadores se rigen por la Ley de Servicio Civil, con excepción de aquellas que se rijan por leyes o disposiciones propias de dichas entidades.

Los trabajadores del Estado o de sus entidades descentralizadas y autónomas que por ley o por costumbre reciban prestaciones que superen a las establecidas en la Ley de Servicio Civil, conservarán ese trato.”



validity of contracts is part of our Civil Law: Article 1257 of the Guatemalan Civil Code provides *inter alia* that the party that causes the factor that leads to the voidance of the contract, cannot assert a claim for a declaration that it is null and void (my own translation). Yet, the declaration of *lesividad* allows for the government, through the President and his Cabinet, to seek the voidance of an act or a contract for reasons totally unconnected with how the other party conducted itself upon the formation of the contract, its execution, or the performance of the other party under the terms and conditions of the contract. The declaration of *lesividad* is peculiar in that it is not necessary that the other party be at fault concerning its legal or contractual obligations. The only issue to be argued for a declaration of *lesividad* is that the act or the contract is somehow harmful to the *interests of the state*.

19. As I have commented in the First and Second Mayora Reports¹⁵, in the legal system of Spain, for example, the latest reforms require two elements in order for a declaration of

¹⁵ **First Mayora Report, June 18, 2009. sections 5.1. through 5.3 literally say:** “5.1. The legal power of the Administration to declare harmful or injurious to the public interest its own decisions or actions is presently and has long been regulated in Spain¹⁵, where it is considered to be a peculiarity of Spanish law¹⁵, of an exceptional character, and, today, a questioned legal institution¹⁵.

5.2. Obviously, the possibility that the Administration may exercise these powers operates against basic notions of legal certainty in respect of any potentially affected private party¹⁵, particularly because the mere declaration of *lesividad* affects the rights and can be very disruptive of the business of the affected party regardless of the legal theory that the mere declaration should not be understood to operate as a prejudice against the affected party¹⁵.

5.3. It is important that, unlike under Guatemalan law, under Spanish law, all those potentially affected by a declaration of *lesividad* must be heard prior to the declaration.¹⁵ As is described more fully below, the absence of such an opportunity for hearing under Guatemalan law is one of the bases of my conclusion that the declaration of *lesividad* in this case did not comply with the Constitutional requirements of due process.”

Second Mayora Report. October 16, 2009. literally say: Thus, the Guatemalan Constitutional Court, in a ruling of an “Amparo” proceeding 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



lesividad to be made, namely: (a) some form of illegality (that makes the act voidable under Article 63); and (b) some kind of harm, damage, or detriment to the state or any lower entity. Why is the second element necessary? Quite clearly, because in a situation where some form of illegality has taken place and the damaged party is not the state but any third party, it is this third party that would pursue whatever action necessary to right the wrong committed upon it.

20. This problem can be articulated in still one more way: if the harm or damage to the *interests of the state* would be coextensive with some form of *illegality* nothing would prevent the possibility that the State pursues a legal action in order to get a contract otherwise favorable to its interests, to be declared null and void. The State would take the absurd position of pursuing legal actions in order to damage its own interests (other than abstract *legality*) and upholding those of the other party with whom the state has entered into a contract.

21. Therefore, although there is no definition whatsoever in the Constitution, the statutes, or the case law of Guatemala of the notion of *interests of the state*, it is however, perfectly valid to argue and state that the definition attempted in the Aguilar Report collides with the legal system of Guatemala. Rather than the exception, it makes of the action of *lesividad* the general and ordinary way to discuss questions of mere *legality* because, of course, it equates *legality* with the notion of *interests of the state*. By following this line of reasoning the Aguilar Report would place the President and his Cabinet in the impossible position of having to make a declaration of *lesividad* every time that a question of legality arises, independently of whether in any other respect there is no harm, no damage, no detriment to the *interests of the state*.

22. Additionally, the idea that the declaration of *lesividad* as the way to dispute the legality –and nothing more than the legality– of any act or contract, renders useless, meaningless, and purposeless very major areas of Guatemalan law, namely those related with the substantive bases, the procedural ways, and the officials, persons or entities that would have standing to discuss problems of *legality* or of nullity of acts and contracts entered into by the State. Finally, the scope of the definition of the

del veintiséis de Junio de mil novecientos ochenta y cuatro en la se expresa que la declaratoria de lesividad 'constituye un acto discrecional.'



interests of the state in the Aguilar Report is so broad and vague (as has been shown above) that the President and his Cabinet could possibly declare *lesivo* a contract because in their opinion it is not conducive, for example, to the integral development of persons.

23. The discussion above begs the question: what, then, is the essence and the nature of a declaration of *lesividad*? The answer to this question is not more than an exercise in recapitulation. First, since this legal mechanism operates against very important and major principles of law, namely that the one who has been the cause of a null or voidable act or contract cannot invoke it in his favor, it follows that a declaration of *lesividad* requires an equally exceptional justification. This is, precisely, that the *interests of the state* have been harmed, have suffered detriment or have been damaged. The determination of the existence of these circumstances is so important, that the law requires nothing less than the President of the Republic and his Cabinet to make such declaration. While some other legal systems, such as that one of Spain¹⁶, require that the act is also legally voidable (in addition to being harmful); the law of Guatemala excludes this element. Whether it should or not be deemed of the essence of the declaration of *lesividad*, there are good reasons for and against. However, there is no doubt that *illegality* or nullity as a consequence of *illegality*, are not sufficient to warrant and support a declaration of *lesividad*.

Whether the fundamental elements of the notions of *due process* and of the *equal protection of the laws* are violated by the *lesividad*.

¹⁶ LEGISLACIÓN ESPAÑOLA: LEY REGULADORA DE LA JURISDICCIÓN CONTENCIOSO ADMINISTRATIVA (LRJCA) Y DEL PROCEDIMIENTO ADMINISTRATIVO COMÚN (LPA).

(LRJCA)" 43. Cuando la propia Administración autora de algún acto pretenda demandar su anulación ante la Jurisdicción Contencioso-Administrativa deberá, previamente, declararlo lesivo para el interés público."

(LPA)"103. Declaración de lesividad de actos anulables. 1. Las administraciones públicas podrán declarar lesivos para el interés público los actos favorables para los interesados que sean anulables conforme a lo dispuestos en el artículo 63 de esta Ley, a fin de proceder a su ulterior impugnación ante el orden jurisdiccional contencioso-administrativo.

2. La declaración de lesividad no podrá adoptarse una vez transcurridos cuatro años desde que se dictó el acto administrativo y exigirá la previa audiencia de cuantos aparezcan como interesados en el mismo, en los términos establecidos por el artículo 84 de esta Ley."

(LPA) "63. Anulabilidad 1. Son anulables los actos de la Administración que incurran en cualquier infracción del ordenamiento jurídico, incluso por desviación de poder.

2. No obstante, el defecto de forma sólo determinará la anulabilidad cuando el acto carezca de los requisitos formales indispensables para alcanzar su fin o dé lugar a la indefensión de los interesados.

3. La realización de actuaciones administrativas fuera del tiempo establecido para ellas sólo implicará la anulabilidad del acto cuando así lo disponga la naturaleza del término o plazo."



24. The Aguilar Report introduces the problem of the declaration of *lesividad* from a very peculiar point of view. In effect, at ¶ 35 this is described as a legal “burden” (*carga*) on the Administration. It is explained as a kind of prerequisite to the initiation of a judicial process, an Appeal for Review, conducive to the nullification of the Administration’s own acts. It is portrayed as a “protection” of the interests of the affected party (the *administrado*).
25. It is a peculiar point of view because the Administration is presented as being subject to a standard more rigorous than that of any other party. The underlying assumption would be that an ordinary individual or corporation could, if so desired, file for an Appeal for Review directly and without any previous proceeding. From this perspective the Administration would be at some disadvantage if compared with any ordinary party having any business with the Administration, such that a declaration of *lesividad* would have to be made prior to and in addition to just going to court seeking the annulment or revocation of any given act or contract.
26. However, as mentioned in the First Mayora Report at ¶ 5.1 in connection with the way this institution has been regulated in Spain, the peculiarity of a declaration of *lesividad* is almost exactly the opposite of what is argued in the Aguilar Report.
27. This is a point that bears on the questions of *due process* and of *the equal protection of the laws* and that is why it is worth dwelling on it at some length.
28. The general rule given certain basic prerequisites is that, in a legal relationship, such as that of a bilateral contract, for example, neither of the parties to it can repudiate its covenants and obligations on the basis that the consequences thereof will not be to the best of its interests. Under Guatemalan law, those prerequisites are that the party declaring its will shall be “able” (not under age or subject to some mental disability, for example), and shall not be subject to some sort of coercion or intimidation nor to error or deception, and that the object of its declaration shall be licit (Article 1251 of the Civil Code). Other articles of the Civil Code elaborate on each one of these essential prerequisites, but for the purpose of this report, it is not necessary to go into any more detail on this issue.
29. Thus, provided those basic prerequisites are fulfilled and, where certain legal formalities are required (the intervention of a Notary Public, for example) that they are observed, each one of the parties to the legal relationship—a contractual relationship, for example—has to live with the consequences of their deeds. Each one of the parties

is barred from escaping its legally acquired obligations arguing that the consequences thereof are not to the best of its interests.

30. Moreover, neither of the parties can legally seek the annulment of its obligations (contractual obligations, for example) on the basis of circumstances to which the party that would want to escape the consequences of those obligations has contributed (Articles 1257 and 1537 of the Civil Code *in fine*).
31. Therefore, the general rule for any individual or corporation, private or public, or the State, even, is that legally acquired obligations are binding regardless of their good or bad consequences and neither those obligations nor any covenants legally made can be repudiated by the obligated party, if based on circumstances or facts to which the obligated party has contributed. This is the principle that translates into legal certainty and, also, the ultimate reason why individuals and corporations, public or private, exchange promises and enter into binding relationships, such as contracts are.
32. This principle is so fundamental that it has inspired some of the most elevated metaphors in the legal jargon: "...the sanctity of contract", "...the intangibility of contract" or, like in the French Civil Code, that "...the contract is law between the parties".
33. Even the rule concerning supervening, unforeseen and onerous circumstances (as in Article 1330 of the Civil Code), deals with this partial departure from the general principle with a very exceptional and limited character.
34. And it is therefore very clear that the declaration of *lesividad* is a peculiarity, but not in the sense discussed in the Aguilar Report but in an opposite way. It is a peculiarity that, contrary to the general principle applicable to every individual or corporation when entering into a binding legal relationship, the State can invoke that the consequences of a contract being detrimental to its interests the contract shall be voided.
35. While any other party has to live with the consequences of the agreements it enters into, the State can declare that, as those consequences are injurious or detrimental to its interests then the contract shall become annulled or revoked.
36. What is peculiar about the declaration of *lesividad* is that the State can evade the consequences of its free and purposeful acts and decisions, because those consequences



became unfavorable to its interests, while every other party is bound to perform under its contract just the same.

37. To describe this situation as a legal “burden” on the State, seems to us, just not possible. To the contrary, the possibility for the State to escape the consequences of its acts, agreements, contracts, decisions, etcetera, because they turned out to be detrimental to its interests is clearly a major and substantial advantage in respect of any other party entering into a binding relationship with the State (or its corporations or agencies, as in the case of FEGUA, for example).
38. The mere possibility that a contractor bound to deliver any goods or services to the State might one day unilaterally declare that the contract it has executed with any of the State’s agencies or corporations is harmful to its interests (the contractor’s interests) and therefore it will seek the annulment of the contract, is unthinkable. Yet, this is exactly what the Administrative Procedures and Judicial Review Act of 1996 (APRA) grants the State: the possibility to get off the hook if the deal did not turn out to be to the benefit of its own interests. Can this be described as a “burden”?
39. Unfortunately, within the context of this case this problem has become somewhat marred because of the confusion between *lesividad* and legality. This has already been discussed above and it is not necessary to insist here on the same point, except to mention that, considered carefully, each and every legal technicality that the legal advisors of FEGUA, the Office of the Attorney General, of the Secretary General of the President, etcetera, have pointed to as the substance of *lesividad* have been produced by the Government or one of its entities or agencies.
40. It was the Government that had the Terms of Reference prepared; it was FEGUA that conducted the international public bidding; the drafts of each and every contract—including Contracts 143 and 158—were prepared by the Government’s and/or FEGUA’s legal advisors; the decision to seek for the approval of the President and then the statement in Contract 158 that this approval is not required, originate both in the offices of the legal advisors of the Government and/or FEGUA.
41. Going back to the provision in Article 1537 of the Civil Code, namely, that the party that has contributed to the lack of validity of a contract cannot invoke that in its favor, this is exactly what the President and his Cabinet claim to be legally capable of doing.



42. The next question is, whether this substantial advantage in favor of the State can be deemed to be consistent with the fundamental notions of *due process* and of the *equal protection of the laws*.

43. In the Aguilar Report (at ¶47) the Guatemalan Constitutional Court is quoted saying in essence three things:

- That the declaration of *lesividad* has no other purpose and object than allowing the Administration to submit its own acts to the review of the Administrative Court;
- That the affected private party has the right to be a party to the judicial proceedings for the review of the declaration of *lesividad* and the acts or contracts so declared; and
- That it is before the Administrative Court that the affected party shall enjoy the protection of the constitutional right to the due process of law.

44. The *Amparo* ruling where these assertions are made does not create a precedent yet because, according with the Amparo Act (*Ley Constitucional de Amparo, Exhibición Personal y de Constitucionalidad*, Article 43) three rulings with the same *ratio decidendi* would be required. Additionally, the object of this *Amparo*, in the end, was to determine whether claimant had actually suffered the alleged injuries. The Court found that, to the extent that claimant would have access to the Appeal for Judicial Review, the declaration of *lesividad* in and of itself had caused claimant no injury. This question cannot be considered unrelated with the broader and more important issue of whether the discriminatory and exceptional advantage that the APRA (not the Constitution) creates in favor of the State is consistent with the notions of *due process* and of the *equal protection of the laws*.

45. In other words, what has to be pondered here is whether the fact that the State can invoke as a reason to seek the annulment of a contract it has entered into:

- that the contract produced consequences contrary to the interests of the State; or
- that the very proceedings and/or formalities that the State required the other party in order to enter into the agreement and execute the contract are illegal (and therefore contrary to the State's interests), is properly and sufficiently "balanced" by the fact that the affected party can become a defendant in the proceedings of an Appeal for Review before the Administrative Court.



46. From the perspective of the constitutional principles of *due process* and of the *equal protection of the laws*, as I have argued by reference to the rule of law and legal certainty in the First (¶¶ 8 and 9) and in the Second (¶¶ 2.4 and 2.5) Mayora Reports, this “balance” is neither attainable nor conceivable.
47. In the Aguilar Report it is argued that, *inter alia*, the Appeal for Review should right all these wrongs and produce this equilibrium. He refers to the possibility that, according with Article 40 of the APRA the affected party might even file a counterclaim against the State. However, the provision which Mr. Aguilar cites states that “[i]n the cases to which subsection 2) of Article 19 refers, the counterclaim may be made in the answer to the complaint, in the same cases in which it may be made in the civil proceeding.” But the fact of the matter is that an Appeal for Review originating from a declaration of *lesividad* would be filed pursuant to Article 19, 1) of the APRA and not pursuant to Article 19, 2).¹⁷
48. The point is that, with the exercise of public powers, the basic problem is how to limit or constrain the officials vested with those powers in their actions, so that they will not proceed *ultra vires*.¹⁸ One of the main problems of constitutional law is thus how to contain the power of the State within certain limits and for this purpose numerous

¹⁷ RL-49, Art. 40.

¹⁸ **Guatemalan Constitutional Court ruling 974-2003. Gazzete Number 69. September 16, 2003**

“(…) el amparo, es una garantía contra la arbitrariedad de actos de funcionarios en quienes está depositada la autoridad, y protege a las personas contra las amenazas de violaciones a sus derechos o restablece los mismos cuando se hubiere ocasionado algún agravio, por lo que para su procedencia es indispensable que las leyes, disposiciones, resoluciones o el acto, de autoridad que se impugnen lleven implícito amenaza, restricción o violación a los derechos del o los reclamantes y que constituyan agravio no reparable por otro medio de defensa.(…) mientras que el agravio se traduce en aquel acto u omisión de autoridad que implique una amenaza, restricción o violación a los derechos que al peticionario le garantizan la Constitución Política de la República y las leyes, es decir el sujeto pasivo de ésta acción es la autoridad que emitió el acto reclamado, en quien recae la responsabilidad de la emisión del mismo.

Es viable otorgar la protección que esta garantía constitucional conlleva cuando la autoridad de cualquier jurisdicción, dicte reglamento, acuerdo o resolución, excediéndose en el uso de sus facultades, en forma tal, que el agravio que se causare o pueda causarse no sea reparable por otro medio legal de defensa.”

“En el caso que se examina, el Procurador de los Derechos Humanos interpone amparo contra el Presidente de la República por estimar que violó los principios de autonomía del Instituto Guatemalteco de Seguridad Social, de la sujeción a la ley y de la competencia presidencial, contenidos en los artículos 100, 154 y 183 inciso s) de la Constitución Política de la República de Guatemala, al emitir los nombramientos del Gerente, Subgerente Administrativo y Subgerente Financiero, todos, de dicho Instituto, atribuyéndose facultades que no le corresponden, actuando de forma *ultra vires*, en flagrante y abierto desacato a la autoridad (Corte de Constitucionalidad) y efectuando un acto nulo de pleno derecho.”

techniques have been developed over the last couple of centuries since the historical ruling of *Marbury v. Madison*.

49. One of those techniques is the notion contained in Article 12 of the Guatemalan Constitution that no one can be deprived of his rights without the due process of law and only after a proper hearing. This right to be heard has been expanded by Guatemalan constitutional case law to administrative proceedings as well.¹⁹ However,

¹⁹ **19.1 Guatemalan Constitutional Court ruling 1706-2008. Gazzete Number 89. September 17, 2008.**

“Esta Corte, en atención con lo expresado en el párrafo anterior, ha sostenido que los derechos de audiencia y a un debido proceso reconocidos en el artículo 12 de la Constitución Política de la República de Guatemala, 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; que su aplicación es imperativa en todo tipo de procedimientos, aún ante la administración pública y cualquier otra esfera de administración, siempre que por actos del poder o autoridad se afecten derechos de una persona. Ha concluido este Tribunal que su observancia es vital por cuanto determina la protección de los derechos de la persona y fortalece la seguridad jurídica. Es doctrina legal de este Tribunal que la condena o privación de derechos de una persona puede ser legítima sólo si se ha tenido como antecedente la citación previa al interesado con la oportunidad de una adecuada defensa (expedientes setecientos ochenta - noventa y cinco; ochocientos noventa y cuatro - noventa y seis y trescientos veintisiete - noventa y ocho); y que la garantía de audiencia conlleva la necesidad de satisfacer la exigencia de oír adecuadamente a quien la denuncia afecte, a fin de llevar a cabo el iter procesal. Se ha afirmado, además, que es la audiencia la que legitima la labor de ponderación de la autoridad que decida el asunto. En virtud de la supremacía constitucional, todo el ordenamiento jurídico debe guardar armonía con los valores, principios y normas, por lo que en materia administrativa, como en cualquier otra, el derecho de defensa y el de audiencia deben sostenerse plenamente (expedientes doscientos veintitrés - ochenta y siete; trescientos ochenta y seis - noventa y ocho y doscientos setenta y dos - dos mil).”

19.2 Guatemalan Constitutional Court ruling 648-2006. Gazzete Number 81. August 23, 2006. *“Esta Corte ha considerado que una de las garantías propias del debido proceso la constituye la seguridad y certeza jurídicas de que los actos administrativos y procesales deben estar revestidos al momento de su emisión por originarse de una adecuada selección de la norma aplicable al caso concreto. La garantía del debido proceso no sólo se cumple cuando en un proceso judicial o administrativo se desarrollan los requisitos procedimentales que prevé la ley y se le da oportunidad de defensa a las partes, sino que también implica que toda cuestión administrativa o litigiosa judicial deba dirimirse conforme las disposiciones normativas aplicables al caso concreto con estricto apego a lo que disponen los artículos 44 y 204 de la Constitución Política de la República de Guatemala.”*

19.3 Guatemalan Constitutional Court ruling 780-95. Gazzete Number 39. March 28, 1996. *“(…)La relevancia del derecho de defensa asume la doble condición de ser un derecho subjetivo y de constituir una garantía de los demás derechos y libertades, por lo que cuando este derecho es violado o bien amenazado de una violación debe colocarse al perjudicado bajo la protección del amparo, a efecto de restituir la situación jurídica vulnerada. La garantía de audiencia es ineludible para que se cumpla el derecho de defensa; su importancia en el proceso administrativo es incuestionable, pues mediante ella se permite el acceso bilateral a la jurisdicción que habrá de dirimir o resolver el conflicto de intereses que se hubiera suscitado entre personas determinadas y cumplir con el objeto del procedimiento que consiste en garantizar los derechos de los administrados y asegurar la pronta y eficaz satisfacción del interés general. Esta garantía auditor inter*



the proceedings leading to a declaration of *lesividad* do not afford such hearing to the affected party. One can argue, as in the Aguilar Report (at ¶ 34), that such proceedings are “purely internal” affairs of government; but is this legally and materially true?

50. In as much as the object of those proceedings is an act or a contract in relation with an individual or a corporation of any kind other than a State agency or entity, it is clearly impossible to speak of a “purely internal” affair of government.

51. The *lesividad* proceedings can lead, the very least, to the filing of an Appeal for Review in order to seek the annulment of the act or the contract involved. One can argue (as the Constitutional Court argues from a merely technical, not a material, point of view) that the filing of such appeal does not imply, for the affected private party, the automatic loss of its rights. However, legally and materially, it is not one and the same situation to have been brought as a defendant by the State in an Appeal for Review than not to face any such judicial proceeding. Putted in simpler terms: it is not the same thing being sued by the State than not being sued by the State.²⁰

52. Also from a legal perspective, any private party required to keep accounting records and books in accordance with generally accepted accounting principles and subject to an independent audit (such as those carried on by CPA firms), must disclose and must have its independent legal counsel appraise the probabilities that an unfavorable decision may be rendered in any material judicial proceedings that the audited individual or corporation may be a party to.

53. In some cases, where the corporation is listed on a securities exchange, this must be disclosed also to investors and the public in general, precisely because of the probabilities that the judicial proceedings might result in a ruling unfavorable to the corporation.²¹

partes se cumple mediante la notificación, que a su vez, es el acto que pone en conocimiento de la persona el acto que la afecta para que asuma la actitud que estime pertinente. (...)

²⁰ As a technical legal matter, the Administrative Court can disagree with an executive determination of *lesividad*. However, there exists no known case where the Administrative Court has ever disagreed with or denied a Government *lesivo* claim when such claim was made within the requisite three-year time frame. Indeed, a review of the seventeen known claims for the revocation of an act declared *lesivo* made by the State of Guatemala since 1991 shows that *only one claim* has ever been officially adjudicated to a judgment by the Administrative Court. Please refer to the chart attached to this opinion as “Annex I”i.

²¹ 21.1. Article 368 of the Guatemalan Code of Commerce (*Código de Comercio*). states the use of the Generally Accepted Accounting Principles (GAAP) “*Artículo 368. Contabilidad y registros*



indispensables. Los comerciantes están obligados a llevar su contabilidad en forma organizada, de acuerdo con el sistema de partida doble y usando principios de contabilidad generalmente aceptados. Para ese efecto deberán llevar, los siguientes libros o registros: 1.- Inventarios; 2.- De primera entrada o diario; 3.- Mayor o centralizador; 4.- De Estados Financieros.

Además podrán utilizar los otros que estimen necesarios por exigencias contables o administrativas o en virtud de otras leyes especiales.

También podrán llevar la contabilidad por procedimientos mecanizados, en hojas sueltas, fichas o por cualquier otro sistema, siempre que permita su análisis y fiscalización.

Los comerciantes que tengan un activo total que no exceda de veinticinco mil quetzales (Q. 25,000.00), pueden omitir en su contabilidad los libros o registros enumerados anteriormente, a excepción de aquellos que obliguen las leyes especiales.”

21.2. Regarding the securities exchange, the Guatemalan Securities and Commodities Law (Ley del Mercado de Valores y Mercancías) in its article 29 states the necessary information to be disclosed regarding the securities. “Artículo 29.- Información. Toda oferta pública de valores, bursátil o extrabursátil, deberá contener información veraz sobre los valores objeto de la misma y la situación financiera del emisor, En aquellos casos en que, por disposición de un emisor, se haya emitido una calificación de riesgo sobre su situación financiera, la bolsa en que se realice la emisión tendrá la obligación de divulgar dicha calificación y sus actualizaciones. Las sociedades mercantiles emisoras de valores que a los efectos de esta ley ejerzan o deban considerarse sujetas a control directo, indirecto o efectivo, de otra u otras sociedades, quedan obligadas, sin perjuicio de la observancia de lo establecido en el párrafo anterior, a poner en conocimiento del registro y del público tal circunstancia, así como los extremos siguientes: a) La integración e identidad del órgano de administración, la gerencia general y mandatarios de las sociedades, controladora y controlada. b) Si los recursos a obtenerse mediante la negociación de los valores se destinarán exclusivamente para la financiación de actividades de la sociedad emisora, o bien, si por el contrario serán empleados parcial o totalmente para financiar directamente actividades de otra u otras sociedades o personas. c) Si la sociedad emisora fuese una sociedad controlada, deberá indicarse si la sociedad controladora responderá por las obligaciones de la sociedad controlada o no, y en caso afirmativo, exactamente en qué forma y bajo qué condiciones. d) Si la sociedad emisora fuese una sociedad controladora, deberá indicarse si una o más sociedades controladas responderán por sus obligaciones o no, y en caso afirmativo, señalar exactamente en qué forma y bajo qué condiciones.

La sociedad que ejerce el control se denomina controladora y la que lo soporta se denomina controlada. Existe control directo cuando una sociedad es titular de la mitad más una o más de las acciones emitidas y con derecho a voto por otra sociedad; existe control indirecto, cuando dicha proporción se adquiere por conducto de otras sociedades que, a su vez, son controladas por otra; y existe control efectivo, cuando una sociedad ejerce por derecho propio facultades de decisión sustancial, en relación a la sociedad controlada.”

21.3. This is also regulated by the Regulation for the registration of securities of the Guatemalan National Stock Exchange (Reglamento de Inscripción de Valores de la Bolsa de Valores Nacional de Guatemala) on its article 2. “Artículo 2. Inscripción de Acciones. Para autorizar la inscripción de acciones de sociedades mercantiles, éstas deberán presentar al Consejo de Administración de la Bolsa la siguiente información: (...) 2. FACTORES DE RIESGO a) Detalle y descripción de los factores críticos inherentes al negocio, tales como pero no circunscritos a los siguientes aspectos: operaciones,



54. From a perspective of materiality, a declaration of *lesividad* could hardly refer to a petty affair of Government. The APRA would not have the President of the Republic and his Cabinet pondering whether any of the thousands of second and third rate business of the State are in its best interest. They simply would not have the time.
55. The present case is one good example of the nature of those matters that become the object of attention of the highest ranking officials of the Guatemalan Government, namely, that the railway system of the country may work again. But, to the extent that only very substantial problems will normally merit the intervention of the President and his Cabinet, it is obvious that the concession, the agreements, the authorized activity or whatever the matter may be that becomes the object of a declaration of *lesividad*, will also be a substantial part of the business of the private parties involved in it.
56. It is also clear that substantial financial investments or commitments will (and do) become affected by any declaration of *lesividad*, by the mere fact that the very foundation for their existence and continuity is thereby called into question. Moreover, any prudent banker, commercial creditor, supplier, employee, or even client (as in the present case) will necessarily reconsider its business relationships with a corporation against whom a declaration of *lesividad* is issued. No reasonable person would suppose that the President and his Cabinet have made a declaration of *lesividad* just for the sake of it (a different question is whether the alleged legal bases of the *lesividad* are valid).
57. Therefore, one thing is to state and maintain that a declaration of *lesividad* does not deprive definitively the affected party of any right, this is true and I have not argued to the contrary. But quite another thing is to say: (a) that the administrative proceedings

estructura financiera y flujo de fondos, mercado, competencia, relaciones con proveedores, personal, tecnología, reclamos judiciales y extrajudiciales, proyectos de expansión o crecimiento. b) Detalle y descripción de los factores externos de riesgo, tales como pero no circunscritos a los siguientes aspectos: políticos y sociales, macroeconómicos, política monetaria, cambiaria y crediticia, volatilidad en tipo de cambio y tasas de interés, legislación, sistema de justicia, política fiscal, ambientales. c) Detalle y descripción de otros riesgos no incluidos en los apartados anteriores, pero que pudieran incidir en la decisión de inversión d) Divulgar si existen activos situados fuera de Guatemala, indicando su lugar de ubicación y el contenido de los mismos.”



leading to a declaration of *lesividad* is “a purely internal” affair of government; or (b) that there are no legal consequences for the affected party thereby; or (c) that there are no material consequences for the affected party thereby. None of these assertions are true and correct.

58. Concerning, then, the notion that *due process of the law* requires that any affected party be given adequate opportunity to be heard and defend its rights and interests, as the Guatemalan Constitutional Court has determined that should be the case in administrative proceedings also,²² **it is clear that the unilateral declaration of *lesividad* is totally inconsistent with this fundamental principle.**

59. No less can be said in relation to the also fundamental principle of the *equal protection of the laws*. This principle is contained in Article 4 of the Guatemalan Constitution and has been the object of multiple rulings in a variety of contexts.²³

²² **22.1 Guatemalan Constitutional Court ruling 1706-2008. Gazzete Number 89. September 17, 2008.** “(...) *la garantía de audiencia conlleva la necesidad de satisfacer la exigencia de oír adecuadamente a quien la denuncia afecte, a fin de llevar a cabo el iter procesal. Se ha afirmado, además, que es la audiencia la que legitima la labor de ponderación de la autoridad que decida el asunto. En virtud de la supremacía constitucional, todo el ordenamiento jurídico debe guardar armonía con los valores, principios y normas, por lo que en materia administrativa, como en cualquier otra, el derecho de defensa y el de audiencia deben sostenerse plenamente (expedientes doscientos veintitrés - ochenta y siete; trescientos ochenta y seis - noventa y ocho y doscientos setenta y dos - dos mil).*”

22.2. Guatemalan Constitutional Court ruling 223-87. Gazzete Number 7. February 4, 1988 “*En cuanto a la materia aquí estudiada, esta Corte ya asentó que "si bien existe diferencia entre un proceso administrativo y un proceso judicial, uno y otro deben tener como fundamento común, los valores, principios y normas que establece la Constitución, debiéndose poner cuidado en reconocer los casos en que éstos son predicados para cada tipo de proceso. (...) en virtud de la supremacía constitucional, todo el ordenamiento jurídico debe guardar armonía con los valores, principios y normas, por lo que, en materia administrativa, como en cualquier otra, el derecho de defensa y el de audiencia deben sostenerse plenamente. (...) Respecto del proceso legal (...) no pueden tenerse como iguales los judiciales con los administrativos, por existir en la legislación diferentes regulaciones, las que responden a la naturaleza de cada uno de ellos, siendo, eso sí, aplicables a ambos aquellos principios que son fundamentales en todo sistema de Derecho.*”

²³ **23.1. Guatemalan Constitutional Court ruling 2243-2005. Gazzete Number 80. January 6, 2005.** “*Esta Corte ha analizado que el principio de igualdad, consagrado en la Constitución Política de la República de Guatemala en su artículo 4º, hace imperativo que situaciones iguales sean tratadas normativamente de la misma forma, lo cual impone que todos los ciudadanos queden sujetos de la misma manera a las disposiciones legales, sin clasificarlos, ni distinguirlos, ya que tal extremo implicaría un tratamiento diverso, opuesto al sentido de igualdad preconizado por el texto supremo; sin embargo, para que el mismo rebase un significado puramente formal y sea realmente efectivo, se impone también que situaciones distintas sean tratadas desigualmente, conforme sus diferencias (...)*”



60. Here the problem is of a double nature: first, because contrary to any other person or corporation, the Republic and its advisors have argued that the State can invoke in its favor and in order to seek the annulment of Contracts 143 and 158, the very proceedings and formalities that the State or FEGUA required from FVG in order to execute them and to begin operations. Second, because contrary to any other contractual relationship, through a declaration of *lesividad* the State can seek the annulment of a contract because the rightful performance of the contract, not its breach, turns out to be found harmful to the interests of the State.

61. I will not refer again here to the fact that, although mistakenly, the Ruiz Report and the Aguilar Report persist in equating the question of “legality” and the “interests of the State” as one and the same thing. For the purpose of showing how this double discrimination is inconsistent with the principle of the *equal protection of the laws* this mistaken view of the meaning and nature of the *lesividad* does not really affect.

23.2. Guatemalan Constitutional Court ruling 232-2004. Gazzete Number 73. September 30, 2004. “*La ley debe tratar de igual manera a los iguales en iguales circunstancias; sin embargo, en el caso de variar las circunstancias, de ser desiguales los sujetos o de estar en desigualdad de condiciones, han de ser tratados en forma desigual, ya que si bien el ideal de todo ordenamiento jurídico es, sin duda, “la norma común” que excluye excepciones, pero ese ideal no vale por sí mismo, sino en cuanto que él conlleva una aspiración de justicia, que es la igualdad, esa igualdad que no sería verdaderamente respetada, sino al contrario traicionada, si en nombre de ella quisiera mantenerse frente a toda circunstancia el carácter común de toda norma jurídica. El derecho de igualdad puede expresarse en síntesis como el mismo tratamiento a situaciones iguales, y distinto a situaciones diferentes. La discriminación es la negación de este derecho, entendiéndola como el trato desigual injustificado (...)* Debe entenderse así que el derecho constitucional de igualdad es esencialmente jurídico, y debe tenerse presente que la igualdad ante la ley, por naturaleza, no necesariamente equivale a una igualdad real, efectiva y absoluta. De ahí que no cualquier desigualdad importa obligadamente un tratamiento normativo diferente; verbigracia, conforme el artículo 270 constitucional para ser Magistrado de la Corte de Constitucionalidad, entre otros requisitos, es necesario tener por lo menos quince años de graduación profesional.”

23.3. Guatemalan Constitutional Court ruling 34-91. Gazzete Number 21. August 6, 1991 “(...) el principio de igualdad, significa, entonces, un derecho a que no se establezcan excepciones que excluya a unos de lo que se concede a los otros en iguales circunstancias. El ideal de todo ordenamiento jurídico es, sin duda, la norma común que excluye las excepciones, pero ese ideal no vale por sí mismo, ino en cuanto que él trasunta una aspiración de justicia, primordialmente definible como “igualdad”, esa “igualdad” no sería verdaderamente respetada, sino al contrario traicionada, si en nombre de ella quisiera mantenerse a ultranza el carácter común de toda norma jurídica; es tanta la complejidad en la organización y vida del Estado, y tan grande la diversificación de actividades y medios de que debe tomar cuenta el derecho constitucional, que la existencia de un *Jus Speciale* al lado del *Jus Commune*, resulta prácticamente inevitable en homenaje a la auténtica igualdad y a la genuina justicia (...)”



62. That the legal institution of *lesividad* introduces a discriminatory exception needs not be proved. As discussed in the first part of this report, the Republic and the Aguilar Report insist that the nature of *lesividad* is to be an exception to the general rules that one cannot invoke one's own voluntary deeds to be illegal in order to escape their consequences. This is wrong, because as I have tried to clarify in my previous and present report, the APRA allows for a declaration of *lesividad* only where the interests of the State have been harmed by the very acts of the State. But regardless of this imprecision, the point here is that the *lesividad* introduces a discrimination against the other party to any relationship with the State that shall be affected by any such declaration of *lesividad*, patently in violation of the principle of the *equal protection of the laws*.
63. This principle, as mentioned above, is another technique developed over centuries in order to contain the power of public officials and of government in general within reasonable limits. The idea that the same rules apply equally to those who govern and to those who are governed reduces enormously the possibility that governmental agencies may act arbitrarily. However, the nature of *lesividad* is such that the party to a contract, concession, or any other bilateral legal relationship with the State, can be subject to the consequences of judicial proceedings, because it has complied with whatever the State or any of its entities required from it.
64. Because of the *lesividad* any party entering into a legal relationship with the State can find itself in a situation where the rightful and exact performance of its obligations, under a contract, for example, can be invoked as the source of consequences injurious or harmful to the interests of the State, leading to the annulment of its contract.
65. So the question arises: what can any private party entering into a contractual or any other kind of relationship with the State do to attain the *equal protection of the laws* under Guatemalan law? The answer is: nothing. Complying with the law, performing under its contract, or acting as directed by the competent officials at any point in time is not enough. For a period of three years, the same officials or other officials can find that their decision to conclude and execute the contract with that party, or the contract itself, or both things, was harmful to the interests of the State.
66. For all those reasons, in my opinion, it is clear that the declaration of *lesividad* is repugnant to the notions of *the rule of law, legal certainty, due process of law, and the equal protection of the laws*.




67. In the Aguilar Report (¶¶ 65 through 72) one finds again the assertion that, on the basis of the several opinions issued by legal advisors of FEGUA, the Office of the Attorney General, and the Secretary General, the President of the Republic was “obligated” to issue the declaration of *lesividad* of Contracts 143 and 158. This is related, also, with the idea reflected also in the Aguilar Report (¶¶ 36 through 40) that the declaration of *lesividad* is the only way to deal with any illegality found, as in this case, in the contracts or in the proceedings.

68. These assertions would, if true and correct, imply that the declaration of *lesividad* cannot be deemed to be contrary to the fundamental principles mentioned above, because it is the only legal remedy available to the State, through the President and his Cabinet, to right a legal wrong. But this is not true and is totally incorrect, as has been shown in the First and Second Mayora Reports.²⁴ However, all these contentions fall to pieces, because the fact of the matter is that the legal advisor of the Office of the Attorney General (with whom the Legal Advisor of the Ministry of Finance was also in agreement) expressly and clearly referred in his opinion to three other courses of action, in order to deal with the alleged illegalities, namely: “rescission”, “annulment”, or by “common agreement”.²⁵ Because these are the options to discuss any illegality in

²⁴ 24.1.) **First Mayora Report, June 18, 2009. section 5.6.**, literally says: “This cannot be at all surprising since, as mentioned above, the notion that any private party, or any citizen in general, whose contract or concession has been granted by the Administration, might find himself three years later facing an Appeal for Review is contrary to the principle of legal certainty. Article 2 of the Constitution protects this principle and the Constitutional Court has made clear the paramount importance that it should be accorded”

24.2.) Second Mayora Report. October 16, 2009. section 2.3. literally says: “**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 virtually impossible to reconcile the constitutional principle of legality, as a standard on the bases 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 hand.”

²⁵ “Dict.205-2005.
Ingreso 1914-2605.



a contract with any state entity, such as FEGUA, it lacks any logical support that the APRA would have regulated the declaration of *lesividad*, in view of harm to the “interests of the State”, meaning in view of “illegalities”. By the way, this legal opinion of the Office of the Attorney General also shows how it is impossible to argue that the President and his Cabinet were “obligated” to issue the declaration of *lesividad*.

On the alleged lack of presidential approval of Contracts 143 and 158.

69. In the Aguilar Report there are two statements or assertions (at ¶¶ 87 and 100) that lead, exactly, in the opposite direction of the conclusion in the report that FEGUA’s Overseer lacked the necessary powers to execute Contracts 143 and 158 (see ¶ 91) and that both contracts are absolutely null and void (see ¶ 128).
70. But before showing how that is so, it is important to underscore how one of the main arguments in the Aguilar Report, namely, that Contract 41 (and by extension Contracts 143 and 158) had to be approved by the President and his Cabinet (see ¶¶ 95 through 97) appears to be a mere technicality.
71. In other words, the declaration of *lesividad* and the opinions in the Aguilar Report would not be based on a material lack of approval of the usufruct of railroad equipment, documented through a long and complicated process starting with Contract 41 and ending with Contract 158, but in the failure of the very government and FEGUA officials and their legal advisors, to have had the presidential approval take the form of an ex post executive accord (*Acuerdo Gubernativo*).

Sección. Consultoría.

IHPJRd

ASUNTO: Interventor de Fegua solicita opinión en relación al contrato de Usufructo Oneroso celebrado entre Fegua y Compañía Desarrolladora Ferroviaria. S.A

SEÑOR INTERVENTOR:

...

OPINIÓN:

Tal y como se dice en el cuerpo de este dictamen, el contrato se considera lesivo a los intereses del Estado, y debe buscarse la forma de dejarlo sin efecto mediante la declaratoria de lesividad, rescisión, anulación o de común acuerdo, pero teniendo cuidado de no incurrir en actos que puedan deteriorar más el patrimonio usufructuado, podría estudiarse la posibilidad de que, de acuerdo a la forma de tenninación del contrato establecida en el mismo, basar la rescisión en el incumplimiento de la usufructuaria en cuanto a sus obligaciones.”



72. I have referred in the Second Mayora Report to the fact that the decision to take the necessary measures in order to reestablish the railway transportation services was taken at the highest level of government, including the President.²⁶ This is mentioned in the bidding terms of reference, in the usufruct contracts, in the resolution passed by Congress approving the usufruct of FEGUA's right of way, and was the object of so many public and notorious events that to insist on this point is almost a waste of time. But the interesting thing here is that we also find a clear statement in the very Aguilar Report (at ¶ 98), that it was "the Government of the Republic" that promoted the bidding process in order for "the formalization of a contract of onerous usufruct for the use of railway equipment..."

73. So, obviously, to say that the President and his Cabinet –the Government of the Republic—did not approve of the whole process and of Contract 41 has to have a rather "technical" meaning, in the Aguilar Report as well.

74. It can only mean that the President and his ministers did approve the process for reestablishing the railway transportation service in Guatemala, and of its legal and material consequences, but that the same President and the same ministers failed to

²⁶ 26.1) **Second Mayora Report. October 16, 2009. section 3.2.2 literally says:** "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 since those are of the nature of licenses, authorizations, permits, concessions and similar rights, FEGUA has to comply with the Public Procurement Act, which require, *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 place under a Intervention 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."

26.2) **Second Mayora Report. October 16, 2009. section 3.3.4. literally says:** "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 (no the Overseer FEGUA) that: "*has se on itself the objective of getting the railway system to function again because 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 translation).



formalize their approval through issuing an Executive Accord once Contract 41 had been signed by the parties.

75. And here again the question of what is the meaning of “interests of the state” arises in a very interesting context. It is very interesting because it shows exactly how the declaration of *lesividad* is not concerned with the fundamental objective that the railway transportation system becomes reestablished in Guatemala, or even with whether the Government of the Republic, at the time, wanted to achieve this very strategic objective for the economy of the country, but the declaration of *lesividad* is concerned with whether the formal ratification by the President, of a process promoted by the same President, did or did not happened.

76. I do not want to imply that legal form and procedure are not important. They are. But when it comes to “**the interests of the State**” what should be given more weight? Whether that formal ratification was legally required or whether the fundamental objectives of the actions promoted by the very President and his government turned out to become realized or not?

77. Rather than a substantial question such as mentioned in the above paragraph, the Republic and the Aguilar Report focus on a question that is, in yet another sense, irrelevant.

78. In effect, although the Aguilar Report (see ¶¶ 132 through 140) characterizes the alleged lack of powers of FEGUA’s Overseer to enter into Contracts 143 and 158 as a source of absolute nullity of those contracts, it is nowhere to be found which constitutional and/or legal provision specifically “prohibits” FEGUA’s Overseer from entering into those contracts or from authorizing the temporary use of the railroad equipment while the formal requirements of the transaction would become finalized.

79. The Aguilar Report rests on the provisions in Article 1301 of the Civil Code for this characterization of absolute nullity; however, absolute nullity requires one of three things to be determined:

- That the object of the transaction (*negocio*) be contrary to overriding public policy (*orden publico*);
- That the object of the transaction be contrary to expressly prohibitive legal provisions; or

- The failure to comply with the essential elements of a valid transaction, namely:
- Any of the parties absolutely lacks civil capacity (*i.e.*, is a child, mentally impaired, a criminal sentence has suspended his/her legal capacity)²⁷;
 - The subject matter of the contract is illegal²⁸; or
 - Consent was obtained or procured through violence or intimidation.²⁹

80. At ¶ 133 in the Aguilar Report the source of absolute nullity would be that the letters signed by FEGUA's Overseer "are against expressly prohibitive legal provisions". However, none of those provisions cited (but not quoted, please refer to their contents below³⁰) contain any such express prohibition.

81. At ¶ 135 in the Aguilar Report the source of absolute nullity would be the fact that lease agreements 3 and 5 of 13 August 2003 are contrary to "express legal provisions" obligating the parties to obtain presidential approval; but, according with Article 1301 of the Civil Code this would not be a source of absolute nullity. This refers to "expressly prohibitive legal provisions", not to "express legal provisions". In any case, no legal provision of any kind is cited there.

²⁷ Guatemalan Civil Code article 1251 literally says: "**Artículo 1251.** *El negocio jurídico requiere para su validez: capacidad legal del sujeto que declara la voluntad, consentimiento que no adolezca de vicio y objeto lícito.*" CL-37.

²⁸ *Ibid.*

²⁹ Guatemalan Civil Code articles 1264 and 1265 literally says:

"**Artículo 1264.** *Será ineficaz el consentimiento prestado por violencia o intimidación.*"

"**Artículo 1265.** *La violencia o intimidación deben ser de tal naturaleza que causen impresión profunda en el ánimo de una persona razonable y le inspiren temor de exponer su persona o su honra o la de su cónyuge o conviviente de hecho, ascendientes, descendientes o hermanos, a un mal grave o la pérdida considerable de sus bienes.*

Si se trata de otras personas, el juez podrá la nulidad según las circunstancias."

CL-37.

³⁰ Footnote 81 of the Aguilar report literally says: "Artículos 121 de la Constitución Política de la República de Guatemala (RL-70); 1°-17-18-19-20-21-22-23-33 de la Ley de Contrataciones del Estado (RL-46); 3°-7°-19-21-269 de la Ley Orgánica de FEGUA (RL-43); 5° del Decreto Ley 91-84 (RL-44)."



82. At ¶ 136 in the Aguilar Report apparently (because there is no explicit indication there) the source of absolute nullity would be that FVG knew that Contract 41 had not entered into force, but again, this is not a source of absolute nullity under Article 1301 of the Civil Code.
83. Thereafter, through ¶ 140, although this section in the Aguilar Report purports to show how Contracts 143 and 158 are null and void, there is a discussion that, on the basis of the legal theory of “one’s own deeds” (*teoría de los actos propios*) RDC is bared from arguing that the expressly written authorizations to use and the leases on the railroad equipment while legal formalities leading to the execution of Contracts 143 or 158 became finalized, have become a validation of **a relative and not an absolute source of nullity**.
84. Once again, as Mr. Aguilar rightly says at ¶ 98, the international public bidding process in order to get the railway system running again was promoted by the Government of the Republic. No one disputes this. Subsequently, under the next Administration, the point was to introduce amendments to the original terms of the bidding process **more favorable** to FEGUA and the State, and FVG continued to use the railroad equipment and all of this happened with the express will and authorization of the competent authorities, until finally Contracts 143 and 158 became executed. The idea to declare these *lesivos* did not exist until a third Government had been elected and came into power.
85. Thus, assuming *arguendo* that a civil law contract such as a usufruct contract in fact required Executive approval in order to be “lawful” and such approval was never obtained, this “defect” would only make this contract *voidable* under Guatemala law, not void *ab initio*. In the instant case, if the Government had properly brought a timely civil court action to challenge the Contracts 143/158 on the ground that the FEGUA Overseer lacked authority to enter into these contracts without further Presidential approval, the court would look to the Organic Law of FEGUA to determine the Overseer’s authority and, when the court did so, it would find that the Overseer properly exercised the power of the extinct FEGUA Board of Directors to enter into the Usufruct Contracts in question without the need for approval by any higher authority.
86. On the basis of all of that, it is clear that (a) **there are no sources of absolute nullity**; and (b) **Contracts 143 and 158, if at all voidable, became validated in multiple ways through a considerable period of time**. In any case, the strongest claim to such possibility (of the contracts becoming voided) is the lack of a legal formality.



87. It is a lamentable tribute to the legal formalism of the Guatemalan legal environment that this matter is not about whether FVG or RDC have really complied with their obligations to reestablish railway services in the country, but about whether a certain legal formality was or not required by the applicable rules. As I have argued in the Second Mayora Report, no other official in the structure of the Guatemalan Government bears a greater responsibility in terms of devising the measures of public policy conducive to foster the best interests of the State than the President of the Republic. He is the highest ranking official of the Guatemalan Government³¹; he appoints the ministers of Government and they serve at his pleasure³²; he presides over the Cabinet's meetings³³; he can refuse a vote of lack of confidence issued by Congress against any of his ministers, shall he find that the minister's censured actions conform with the general policy of his government³⁴, and pursuant to Article 183 of the

³¹ Article 182 of the Political Constitution of the Republic of Guatemala literally says: "Artículo 182. Presidencia de la República e integración del Organismo Ejecutivo. El Presidente de la República es el Jefe del Estado de Guatemala y ejerce las funciones del Organismo Ejecutivo por mandato del pueblo. El Presidente de la República, actuará siempre con los Ministros, en Consejo o separadamente con uno o más de ellos; es el Comandante General del Ejército, representa la unidad nacional y deberá velar por los intereses de toda la población de la República.

El Presidente de la República juntamente con el Vicepresidente, los Ministros, Viceministros y demás funcionarios dependientes integran el Organismo Ejecutivo y tienen vedado favorecer a partido político alguno."

³² Article 183, s) of the Political Constitution of the Republic of Guatemala literally says: "Artículo 183. * Funciones del Presidente de la República.

Son funciones del Presidente de la República: (...) s) Nombrar y remover a los Ministros de Estado, Viceministros, Secretarios y Sub-Secretarios de la Presidencia, embajadores y demás funcionarios que le corresponda conforme a la ley. (...)"

³³ Article 183, n) of the Political Constitution of the Republic of Guatemala literally says: "Artículo 183. * Funciones del Presidente de la República. Son funciones del Presidente de la República: (...) n) Presidir el Consejo de Ministros y ejercer la función de superior jerárquico de los funcionarios y empleados del Organismo Ejecutivo."

³⁴ Article 167 of the Political Constitution of the Republic of Guatemala literally says: "Artículo 167. Efectos de la interpelación. Cuando se plantee la interpelación de un ministro, éste no podrá ausentarse del país, ni excusarse de responder en forma alguna. Si se emitiera voto de falta de confianza a un ministro, aprobado por no menos de la mayoría absoluta del total de diputados al Congreso, el ministro presentará inmediatamente su dimisión. El presidente de la República podrá aceptarla, pero si considera en Consejo de Ministros, que el acto o actos censurables al ministro se ajustan a la conveniencia nacional y a la política del gobierno, el interpelado podrá recurrir ante el Congreso dentro de los ocho días a partir de la fecha del voto de falta de confianza. Si no lo hiciere, se le tendrá por separado de su cargo e inhábil para ejercer el cargo de ministro de Estado por un período no menor de seis meses.

Si el ministro afectado hubiese recurrido ante el Congreso, después de oídas las explicaciones presentadas y discutido el asunto y ampliada la interpelación, se votará sobre la ratificación de la falta de confianza, cuya aprobación requerirá el voto afirmativo de las dos terceras partes que integran el total de diputados al Congreso. Si se ratificara el voto de falta de confianza, se tendrá al ministro por separado de su cargo de inmediato.



Constitution, he is vested with every instrument of government and power necessary to take adequate care of the interests of the state. Yet, in the Ruiz and in the Aguilar Reports the President of the Republic is depicted as a government official that can be led to repudiating a major contract for the operation of the national railway system on the basis of an opinion **about the lack of a legal formality** issued by a modest legal adviser of one State owned corporation.

88. Let us analyze again whether this formality was legally required and let us do that using the very thesis contained in the Aguilar Report. It is important to clarify that I do not share that thesis and so the following analysis is only in order to show that it leads to conclusions contrary to those affirmed by attorney Aguilar.

➤ The only place where in the Aguilar Report one finds an explicit reference to the obligation of the “Presidential approval” (it should be precisely referred to as the “Presidential ratification”, and so I shall do hereafter) is in ¶ 102. There, the source of the obligation of a Presidential ratification is precisely defined. **It is the section 6.4 of the Bidding Terms.** Because someone decided to include this obligation there, and because the bidding terms were made part of Contract 41, the Aguilar Report (as the Ruiz Reports before) argues that this was absolutely legally required (see ¶¶ 102 through 109 of the Aguilar Report).

89. It is undeniable that the fact that the Bidding Terms call for a Presidential ratification of Contract 41, and that there was no such Presidential ratification, is a legal problem that has to be reckoned with. But it is also undeniable that there is a previous legal question of still more fundamental nature, namely: **is the obligation to produce a Presidential ratification contained in the Bidding Terms supported by any constitutional or legal rule?**

90. The answer is: **no, there are no constitutional or legal rules requiring such Presidential ratification.** And this explains why in the Aguilar Report there is no reference to any such specific constitutional or legal rule.

91. So, this begs the question whether the FEGUA Overseer actually had the requisite powers of legal representation and to bind FEGUA through Contract 41, initially, and subsequently through Contracts 143 and 158.

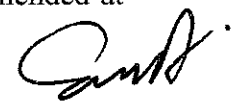
En igual forma, se procederá cuando el voto de falta de confianza se emitiere contra varios ministros y el número no puede exceder de cuatro en cada caso.”



92. Once again, the legal bases to show that such is the case are found in the very Aguilar Report. At ¶ 100 we find that the legal framework for the public bidding for railway equipment is provided by the following: (i) the Constitution; (ii) The Public Procurement Act (*Ley de Contrataciones del Estado*); (iii) the Civil Code; and (iv) FEGUA's Organic Law, including the Intervention Decree 91-84. What do we find in all these legal sources concerning the question of Presidential ratification and of the powers and functions of FEGUA'S Overseer at the time these events unfolded.
93. Neither the Constitution nor the Civil Code address these questions directly. The former is the general foundation for the public law and the latter for the private law of Guatemala and, of necessity, both are of a general character.
94. But FEGUA's Organic Law (as amended by the Intervention Decree) and the Public Procurement Act do provide the answers to these legal questions.
95. As explained, again, in the Aguilar Report at ¶ 87, FEGUA's Overseer was given all of the powers corresponding to the Board of Directors and the President of FEGUA, according with its Organic Law.
96. These are quite broad patrimonial and administrative powers. As recognized in the Aguilar Report at ¶ 79, FEGUA is an entity, an autonomous corporation, with its "own patrimony" (*patrimonio propio*). If one looks at FEGUA's Organic Law and to the Intervention Decree, one finds that Article 1 of FEGUA's Organic Law establishes it is a decentralized government entity with its own legal existence which has the "full capacity to acquire rights and assume obligations." Article 19 l) of FEGUA's Organic Law gives the Board of Directors the power to approve contracts executed by the FEGUA Manager for amounts in excess of 10,000 quetzals. Decree Law 91-84 of the Congress of the Republic provides that the FEGUA Chairman/Overseer "shall undertake all duties and exercise the authority granted to the Board of Directors, the Manager and other executive officer, as applicable, under the Organic Law of the company. The Chairman/Overseer is also the legal representative of the company, both in and out of court. For such purposes, any reference to the Board of Directors and the Management under the terms of the Organizational Law, its Regulations and other legal provisions applicable to the company shall be construed as a reference to the Overseer's administration, while it lasts."
97. However, according with the narrow reading of this piece of legislation in the Aguilar Report, there is nowhere to be found any power authorizing either the Board or the President of FEGUA to grant a usufruct of its railroad equipment. The view taken in

the Aguilar Report is that the Board and the President of FEGUA –and therefore the Overseer as well—did not have any other powers but to see that FEGUA would provide the railway transportation service.

98. However, as one reads in Contracts 41 and 143, *inter alia*, FEGUA collapsed, ceased to provide any services directly and, therefore, the Government of the Republic –the President and his ministers—decided that FEGUA should thence fulfill its corporate purpose indirectly, through the supervision that the beneficiaries of the usufructs over the right of way and over railroad equipment would invest, get the trains going, and provide the transportation services that had come to an end under FEGUA’s direct administration.
99. Whether this was a fair construction and implementation of the legal framework at the time is not the object of this report, but the fact of the matter is that the Public Procurement Act, a piece of legislation that was amended in 1997 in order to support, in general, the processes of privatization and/or de-nationalization of several public services (including telecommunications, electric power, postal services and, of course, the railways) created the rules and procedures necessary for those state entities which specific organic legislation did not cover the sale, contribution to private corporations, leasing (with a transferred of the leased property) or disposition of their assets in general. This was Congress’s Act N° 20-97 (The Privatization Act).
100. As mentioned above, I do not share the thesis in the Aguilar Report related to the lack of presidential approval and this is the place to explain why. The Privatization Act refers, in my opinion, to disposition of public property, assets, or goods where title to the same is transferred and there is a conveyance in favor of the acquirer. It is my opinion that *enajenar*, the expression used in The Privatization Act (as it amended the Public Procurement Act) refers to a disposition of property rights where the rights are conveyed to another party. This is not the case with the “real right” of usufruct where the property over the assets remains with the original owner (in this case FEGUA) and only the rights to use and to reap the profits therefrom are transferred, temporarily, to the beneficiary of the usufruct (in this case, FVG). However, the Aguilar Report takes the view –mistaken in my opinion—that the usufruct as a means to dispose of property is a form of “*enajenación*” –a transfer and conveyance—and that is why the Public Procurement Act is considered in it as one of the main elements that compose the legal framework of the public bidding process and its legal consequences, including the usufruct contracts (see ¶¶ 82 and 100). However mistaken that view is, as I show here below, the application of the provisions in the Public Procurement Act as amended at



the time of the events by the Privatization Act, leads to the conclusion that no approval or ratification by the President was required.

101. Concerning the disposition of movable property, such as railroad equipment, The Privatization Act amended Article 91 of the Public Procurement Act and provided that in the case of state entities the power would be for their highest ranking authority (“*autoridad superior*”) to make the decision³⁵. The Privatization Act further amended Article 94 of the Public Procurement Act to provide, specifically, that contracts for the disposition of assets (“*bienes*”) of state autonomous entities, such as FEGUA, ought to be executed by the legal representative thereof.³⁶ In this case, by FEGUA’s Overseer.

102. As I said at the beginning of this section, the assertions in the Aguilar Report lead to the opposite conclusions drawn there by its author.

Some conclusive observations.

103. I mentioned in another context at ¶ 84 that the Public Administration subsequent to the one that promoted the reestablishment of the railway services (among other processes of privatization and of market liberalization), attained from FVG better terms and conditions for the State upon the execution of Contracts 143 and 158. This happened in several ways:

- The basis for the calculation of the canon due to FEGUA became clarified to make it consistent with previous practice (gross revenues never included the Value Added Tax) and to eliminate any ambiguities;
- The maximum of payment for the canon or ceiling of Q. 300,000.00 was removed;

³⁵ “ARTICULO 91.- Reglas Para la Venta de Bienes Muebles. Para la venta de bienes muebles propiedad del Estado, se observarán las reglas siguientes: 1. Que la autoridad interesada determine la conveniencia de la enajenación e inicie el trámite del expediente, acompañado las justificaciones pertinentes. 2. Que practique el avalúo del bien por una institución bancaria del Estado. 3. **Que se emita el acuerdo por la autoridad superior de la entidad interesada.**”

³⁶ “ARTÍCULO 94.- Ejecución de los actos y contratos y determinación del destino fiscal de los ingresos resultantes de la enajenación. (...) 2. Cuando se trate de la enajenación de bienes o de patrimonios unitarios propiedad de entidades descentralizadas o autónomas del Estado, la ejecución y otorgamiento de los actos, contratos y documentos correspondientes deberán realizarse por la persona a quien corresponda la representación legal de la entidad enajenante.”

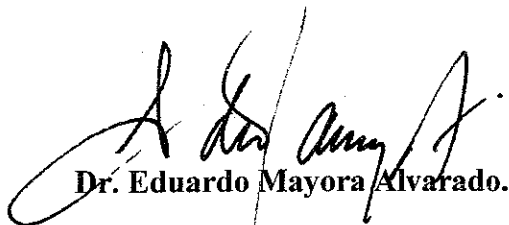


- The rate applicable to the clarified base was increased by a magnitude of 25% (from 1% to 1.25%); and
- It was agreed that payments would go directly to FEGUA, rather than to the Trust Fund.

104. This is the main reason why a second bidding process would have been unnecessary from a legal and logical point of view. The point of any public bidding process is to get the best possible offer through a competitive mechanism. In this case, FVG's was the only offer and to think that other bidders would have been interested in the deal **at a higher cost** than FVG's original bid lacks any logical sense. Moreover, FVG had already acquired the usufruct over the right of way, therefore it runs against financial rationality to think that any other third party would have (a) paid the State more than FVG itself had offered; and (b) on top of that, pay FVG for the use of the right of way to which FVG was already the beneficiary;

105. The public bidding process determines a "floor" for the highest bidder regarding the terms and conditions of the deal, but it does not bar the highest bidder from agreeing to even better terms for the State or any of its entities, such as FEGUA. Usually the highest bidder would not agree to any better terms and conditions than the floor determined through the bidding process, but on occasions –such as might have well been the present one—the final closing of an open process that has dragged on for too long may be a reason compelling enough to agree to even more costly terms than the ones accepted through the bidding process.

106. Therefore, the contention in the Aguilar Report that Contracts 143 and 158 required another bidding process fails to see that these contracts (a) are the culmination of one and the same process that started with the public bidding; and (b) translated into even better terms and conditions for the State.


Dr. Eduardo Mayora Alvarado.

Guatemala City, March 14, 2011.

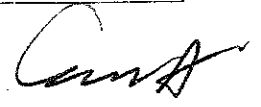
ANNEX I

Claims for declarations of lesividad by the Government of Guatemala.¹

No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
1	140-1991	11/15/1991	State of Guatemala	Fundación para el Ecodesarrollo y Conservación (FUNDAECO) and Instituto Nacional de Transformación Agraria (INTA)	Pending Final Judgment
2	168-1995	11/07/1995	State of Guatemala	Ferrocarriles de Guatemala (FEGUA) and Poliproducos del Pacifico, S.A.	Judgment for the State Confirmed Administrative Lesion Dec. 17, 2001.
3	186-2000	09/12/2000	State of Guatemala	Empresa Guatemalteca de Telecomunicaciones (GUATEL)	Out-of-Court Settlement
4	271-2000	12/05/2000	State of Guatemala	Instituto de Comercialización Agrícola (INDECA); Silo Central, S.A. and Grupo Thronos, S.A.	Dismissed for Failure to Prosecute
5	206-2002	09/26/2002	State of Guatemala	Mayoreo de Computación, S.A. (MAYCOM)	Out-of-Court Settlement
6	126-2003	05/19/2003	State of Guatemala	Concreto Preesforzado de Centroamérica, S.A. (COPRECA)	Court-approved Settlement



No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
7	194-2003	08/14/2003	State of Guatemala	<i>Instituto Guatemalteco de Seguridad Social (IGSS)</i>	Hearings Pending
8	123-2004	06/01/2004	State of Guatemala	<i>Empresa Portuaria Nacional de Santo Tomas de Castilla (EMPORNAC) and Equipos del Puerto, S.A.</i>	Out-of-Court Settlement
9	50-2005	02/25/2005	State of Guatemala	<i>Crédito Hipotecario Nacional de Guatemala (CHN)</i>	Hearings Pending
10	51-2005	02/25/2005	State of Guatemala	<i>Crédito Hipotecario Nacional de Guatemala (CHN)</i>	Hearings Pending
11	52-2005	02/25/2005	State of Guatemala	<i>Crédito Hipotecario Nacional de Guatemala (CHN)</i>	The case is at the Constitutional Court over an injunction of an overruled defendant objection.
12	360-2006	11/09/2006	State of Guatemala	<i>Bodegas Fiscales de Carga, S.A.</i>	The case is at the Constitutional Court over an injunction of an overruled defendant objection.
13	361-2006	11/09/2006	State of Guatemala	<i>Bodegas Fiscales de</i>	Hearings Pending



No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
			Guatemala	Carga, S.A.	
14	389-2006	11/14/2006	State of Guatemala	Ferrocarriles de Guatemala (FEGUA) and Compañía Desarrolladora Ferroviaria, S.A. (COFEDE)	Judgment Pending
15	371-2009	08/18/2009	State of Guatemala	Confederación Deportiva Autónoma de Guatemala (CONFEDE)	Hearings Pending

Claims for Administrative *Lesion* Filed by Other Entities of the State of Guatemala

No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
1	97-2004	05/05/2004	Municipality of Antigua Guatemala, Sacatepequez	Buganbilia, S.A.	Hearing Pending
2	185-2004	08/09/2004	Municipality of Santa Lucia Cotzumalguapa, Escuintla	Soluciones Cartográficas, S.A.	Claim dismissed for failure to comply with legal requirements.