

[Translation]

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

Case No. ARB/07/23

Between
Railroad Development Corporation
Claimant

c.

The Republic of Guatemala
Respondent.

**SECOND EXPERT REPORT BY
JUAN LUIS AGUILAR SALGUERO**

October 18, 2011

SECTION I

Introduction

1. I hereby submit the present Supplementary Expert Report (“Second Report”) to supplement my previous Report dated October 1, 2010 (“First Report”), in the context of the Arbitration before the International Centre for Settlement of Investment Disputes (ICSID) initiated by Railroad Development Corporation (RDC) against the Republic of Guatemala¹.
2. I confirm the contents of my First Report, and include it in the present Report by reference. My two Reports should be read jointly.
3. In its Reply, the Claimant, based on Mr. Eduardo Mayora’s opinion, tried to attack several of my conclusions and interpretations of Guatemalan law. Claimant’s and Mayora’s conclusions are, in my opinion, erroneous and unfounded, and do not affect in any manner whatsoever the conclusions reached in my First Report, as shall be explained in the Sections below.
4. This Expert Report confirms that Guatemala did not violate any property rights in Contract 143/158². Ferrovías never acquired any property rights under Contract 143/158 by virtue of the fact that, in accordance with Guatemala’s legal system, neither Ferrovías nor RDC had any reasonable expectations that Contract 143/158 was valid, or that the government should act as though it was valid.
5. This Expert Report confirms that, according to the Constitutional Guarantee of the Right of Defense³, Ferrovías’ right to an equitable trial was not violated nor restricted as Ferrovías was summoned and heard during the legal proceeding initiated by Guatemala before the courts of law, where Ferrovías was given the opportunity to prove the arguments asserted in defense of the rights invoked during the current legal process, and which is currently is deciding whether or not the *Lesividad* of Contract 143/158 will stand.
6. This Report confirms the violation of express rules of the Guatemalan legal system, which led the Government of Guatemala to declare Contract 143/158 *Lesivo* to the

¹ Case No. ARB/07/23.

² The Onerous Usufruct contracts entered into by FERROVÍAS and FEGUA by means of Public Deed No. 143 of August 25, 2003 and 158 of October 7, 2003, before Notary Public Claudia Mariela Marroquín Luther.

³ RL-45, Political Constitution of Guatemala. Article 12 of the Political Constitution of the Republic of Guatemala guarantees the “**Right of Defense**”, which extends to every person, whereby no person may not be sentenced, nor deprived of his rights, without having been summoned to, and heard before, a competent judge or court.

interests of the State of Guatemala. The Declaration of *Lesividad* of Contract 143/158 by the State of Guatemala was a requirement to initiate the *Contencioso Administrativo* legal proceeding, for the purpose of obtaining statements supporting the Declaration of *Lesividad*, and respective legal consequences;

7. This Report also confirms that although other avenues were suggested to solve the dispute between the Claimant and Guatemala, the sole legal avenue available to the Government of Guatemala to cure the illegalities in Contract 143/158 was the *Contencioso Administrativo* process, filed after the Declaration of *Lesividad*.

SECTION II

Under Guatemalan law, the Claimant Could Not Have Had Any Reasonable Expectation that Contract 143/158 was Valid

8. Before submitting its offer for the award of Contract 41 during the bidding process, Ferrovías was aware of the laws and conditions that governed said process, and it was under those conditions that Ferrovías submitted the offer, arising as the winner of the bid.⁴ Said laws of the Republic of Guatemala deal with, among other things, the nature and ownership of railroad equipment, and the conditions and budget required to legitimize the disposal of the Onerous Usufruct of railroad equipment owned by the State of Guatemala⁵.
9. As a result of the Award, Ferrovías entered into Contract 41 with Ferrocarriles de Guatemala and accepted the Mandatory Covenant (law between the parties) whereby said negotiation, which is governed by the provisions of the STATE PROCUREMENT LAW and Regulations, ***had to be approved by an Acuerdo Gubernativo, issued by the President of the Republic of Guatemala and his Cabinet⁶, in order to be valid.***

⁴ Ferrovías was declared the winner of the Public Bidding Process for the Use, Repair and Maintenance of Railroad Equipment, under Deed No. 21-97 of December 16, 1997, issued by the Board appointed to receive offers and award bids.

⁵ The BID TERMS FOR ONEROUS USUFRUCT OF RAILROAD EQUIPMENT, November 1997, cited the rules of the Guatemalan legal system that made up the bid framework. The Terms cite the Political Constitution of the Republic, and the State Procurement Law, their rules and regulations, among others, highlighting that goods given in usufruct are State property (Article 121, sub-section c, Constitution) and that they can only be negotiated by Public Bid. See R-191, State Procurement Law, Article 89. The Terms also stated that the Onerous Usufruct Contract had to be approved by an *Acuerdo Gubernativo* issued by the President of the Republic at a Cabinet Meeting. See R-2, Bid Terms, Contract 41, Sub-section 6.4.

⁶ First Aguilar Report § VI.

10. It is my understanding that the Claimant, supported by Mr. Mayora's Report, asserts that Guatemalan law did not require Contract 143/158 to: (i) be approved by *Acuerdo Gubernativo*⁷; nor (ii) be awarded in a new public bid⁸. As stated and supported in my First Report, neither of the above two statements are true. Contract 143/158 had to be approved by *Acuerdo Gubernativo*, not only because FEGUA's Overseer did not have the authority to enter into Contract 143/158, but also because the Terms that the contract incorporates required it; Contract 143/158 is absolutely null and void because it was not awarded through a new bidding process⁹, and because the use of the same bid set forth for Contract 41 was used, which is totally illegal¹⁰.

A. Requirement of approval of Contract 143/158 through *Acuerdo Gubernativo*

11. In my first Report, I showed why Contract 143/158 required an *Acuerdo Gubernativo* to become legally valid¹¹. In that sense, I concluded that given the nature and purpose of the contract (to award State of Guatemala movable property through Usufruct) the then FEGUA Overseer, Mr. Hugo René Sarceño, did not have the authority to award real estate or movable property owned by FEGUA, including railroad equipment¹². Special authorization by the State of Guatemala was required to award said property¹³. As we shall see below, and confirming what I stated in my First Report, under the Guatemalan legal system State-owned goods can only be awarded through special legislation that establish the requirements to be complied with.

1. *Under Guatemalan law, a Usufruct Contract is Equivalent to a Disposal of State Goods.*

12. Under FEGUA's Organic Law, no FEGUA official, including FEGUA's Board of Directors and Management – and, given the Receivership, the Overseer¹⁴ - is

⁷ Reply § II (G); Third Mayora Report ¶¶ 89-90.

⁸ Reply ¶¶ 45-46, 345; Third Mayora Report ¶¶ 69-106.

⁹ First Aguilar Report § VI.

¹⁰ First Aguilar Report § VI.

¹¹ First Aguilar Report § VI.

¹² First Aguilar Report ¶¶ 78-87, 134.

¹³ First Aguilar Report ¶ 91.

¹⁴ RL-54, *Acuerdo Gubernativo* 100-82. FEGUA went into Receivership by virtue of *Acuerdo Gubernativo* No. 100-82 dated July 1, 1982, and ratified by Decree 162-83 issued by the Head of State. As a result of the Receivership, the role and faculties granted to FEGUA's Board of Directors and Management, in accordance with Ferrocarriles de Guatemala Organic Law, contained in Congress Decree 60-72, were transferred to the Overseeing entity.

authorized to dispose, in favor of a third party, of any goods used by FEGUA¹⁵, given that said goods are exclusively intended for the provision of railroad services, as provided by Article 2 of Ferrocarriles de Guatemala Organic Law¹⁶.

13. In that sense, and in accordance with Artículo 462, Civil Code, goods that are “**State Assets**”, **be they for common usage or not**, are subject to “**special laws**” and, secondarily, to the provisions of the Civil Code contained in Decree Law 106¹⁷. FEGUA’s “**railroad equipment**”, mentioned in Contract 143/158, is part of Guatemala’s “**State Assets**”, therefore, their nature, use and disposal is governed by the following “**special laws**”: (a) The **Political Constitution of the Republic of Guatemala**, the supreme law; (b) **Ferrocarriles de Guatemala Organic Law**, contained in Decree 60-72 of Congress; (c) the “**State Procurement Law**”, contained in Decree 57-92 of Congress; and (d) the **Regulations** of the State Procurement Law, contained in *Acuerdo Gubernativo* 1056-92¹⁸.
14. According to Mr. Mayora, the conclusions in my First Report are wrong, and that even if they were not wrong, my Opinion ignores the fact that the State Procurement Law was amended by Decree 20-97, also known as the “Privatization Decree”¹⁹. In addition, Mayora states that the concept of “disposal” only refers to the disposal of property rights, when said rights are transferred to the other party.²⁰ Mayora’s interpretation is both narrow and wrong. Under Guatemalan law, the **transfer** of the usufruct of goods that are State Assets is, from a legal and doctrine point of view, an act of “**disposal**”, by means of which the owner of the good severs the “**use and exploitation**” of the goods, one of the essential elements of a **domain**, to the benefit of a third party while the disposer retains the bare legal title²¹.
15. Given that railroad equipment owned by Ferrocarriles de Guatemala cannot be negotiated for use or exploitation by a third party due to FEGUA’s Receivership²², the State of Guatemala, in its capacity as owner of said goods, announced that it intended to award the onerous usufruct of Ferrocarriles de Guatemala railroad equipment. The State of Guatemala set forth the terms and conditions governing the

¹⁵ First Aguilar Report ¶¶ 78-97.

¹⁶ First Aguilar Report ¶ 134.

¹⁷ RL-42, Civil Code, Article 462.

¹⁸ First Aguilar Report ¶¶ 92-94.

¹⁹ Third Mayora Report ¶¶ 99-101.

²⁰ Third Mayora Report ¶ 100.

²¹ Civil Code, Article 464.

²² First Report ¶¶ 80-85.

Usufruct Contract in the PUBLIC BIDDING TERMS FOR THE ONEROUS USUFRUCT OF RAILROAD EQUIPMENT drafted in November 1997²³.

2. *The Transfer of Railroad Equipment in Onerous Usufruct Under Contract 143/158 is Totally Null and Void*

16. With regard to the nullity of Contract 143/158, Mr. Mayora's Reports fail to analyze the powers that were actually conferred to FEGUA's Receivership, including its Board of Directors and Management. According to FEGUA's Organic Law, neither the Board of Directors nor the Management are authorized to negotiate with a third party Ferrocarriles de Guatemala's assets, which also applies to FEGUA's Receivership²⁴. If Mr. Mayora had included the legal analysis, he would have realized that FEGUA's Overseer awarded Contract 143/158 without having the authority to do so.

17. Mr. Mayora's Reports are also wrong when they consider that the Overseer's "lack of authority" and "violation of express prohibitive laws" are defects that can be cured²⁵ which is incorrect, since said defects give rise to "absolute nullity" and cannot be cured, in accordance with Article 1,301, Civil Code, as follows:

In a legal transaction, there is absolute nullity when the purpose of the transaction is contrary to public policy, or contrary to express prohibitive laws, and does not meet essential requirements. A legal transaction that suffers from absolute nullity has no effect and cannot be cured²⁶.

18. Equally, Mr. Mayora's Reports are wrong when they attempt to establish a difference between public goods for common usage and non-common usage²⁷ because eventually, all public goods, regardless whether they are for common usage or not, are State property and, as such, can only be transferred to a third party in accordance with the provisions of the State Procurement Law, and Regulations²⁸, which is not the case with Contract 143/158.

²³ R-2, Bid Terms, Contract 41.

²⁴ Third Report ¶¶ 94-98.

²⁵ Third Mayora Report ¶¶ 83, 86.

²⁶ RL-42, Civil Code, Article 1301.

²⁷ RDC Reply¶ 48; Second Mayora Report ¶¶ 3.5.1-3.5.7

²⁸ First Aguilar Report ¶90.

19. In view of the foregoing, and as stated in my First Report, the transfer of railroad equipment in onerous usufruct as established in Contract 143/ 158 is null and void, for the following reasons:

- a. FEGUA's Overseer did not have, and does not have the power or legal capacity, under the Constitution of the Republic of Guatemala, the State Procurement Law and Regulations, the Receivership Agreement No. 100-82, Ferrocarriles de Guatemala Receivership Decree, Decree Law 162-83, and Ferrocarriles de Guatemala Organic Law contained in Decree 60-72 of Congress, to dispose of, through Onerous Usufruct or any other form of negotiation in favor of Ferrovías, the railroad equipment referred to in Contract 143/158, because the aforementioned special laws did not grant the Overseer, nor FERROCARRILES DE GUATEMALA, the power or authority to dispose of said goods without authorization from the Executive²⁹;
- b. The overseer and Ferrovías, knowing that the Overseer was not authorized to dispose of the railroad equipment, entered into Contract 143/158, thus violating express prohibitive laws of the Guatemalan legal system³⁰;
- c. The special laws that regulate the disposal of State of Guatemala movable property require that, prior to the disposal, whether by usufruct or any other form of disposal, the Terms for the negotiation should have been laid, stating the terms, requirements, time periods, description of goods, etc.³¹. Also, the terms of the intended operation should have been published, which did not happen with regard to the Onerous Usufruct in Contract 143/158, thus violating the express prohibitive laws of the Guatemalan legal system³²;
- d. Contract 143/158 included, as a law between the parties, the PUBLIC BIDDING TERMS FOR THE ONEROUS USUFRUCT OF RAILROAD EQUIPMENT drafted in November 1997³³. The Terms provided that the Contract had to be authorized by the President of the Republic and his Cabinet³⁴. This did not happen for Contract 143/158³⁵, thus violating the prohibitive laws of the Guatemalan legal system³⁶.

²⁹ First Aguilar Report § VI.

³⁰ First Aguilar Report § VI.

³¹ First Aguilar Report ¶ 116.

³² First Aguilar Report ¶¶ 19-103

³³ R-5; Contract 143; R-6 Contract158

³⁴ R-5; Contract 143; R-6 Contract158; R-2, Bid Terms, Contract 41.

³⁵ First Aguilar Report § VI.

³⁶ First Aguilar Report § VI.

- e. Although they violated the requirement for a new bidding process, by including the Terms in Contract 143/158, the parties acknowledged the obligation that Contract 143/158 had to be approved by the Guatemalan Government through an *Acuerdo Gubernativo* issued by the President of the Republic and his Cabinet³⁷;
- f. None of the disposals of railroad equipment in favor of Ferrovías, whatever the purpose, carried out by exchange of letters dated April 9 and 12, 1999³⁸, August 22, 2002³⁹ and October, 9 2002⁴⁰; Contracts 3 and 5 of August 13, 2003⁴¹; or Contracts 41, March 23, 1999⁴², 143 of August 25, 2003 and 158 of October 7, 2003⁴³ (Contract 143/158), complied with the fundamental obligation of approval by *Acuerdo Gubernativo* issued by the President of the Republic and his Cabinet.
- g. Since the Contract was not approved by the Guatemalan Government through an *Acuerdo Gubernativo*, issued by the President of the Republic and his Cabinet, it never became legal *because an essential element was missing: the "consent" by the owner of the railroad equipment, the State of Guatemala*⁴⁴;

B. Contract 143/158 Required a New Bidding Process

20. Claimants argue that Contract 143/158 was simply the culmination of the same bidding process that awarded the Right of Way (Contract 402) and the railroad equipment (Contract 41)⁴⁵. Both the facts in the case, and the State Procurement Law, confirm that said interpretation is totally wrong.

21. First, it must be pointed out that Contracts 41 and 402 were awarded under two separate independent bidding processes⁴⁶. Indeed, as stated in my First Report, Contract 402 never granted Ferrovías any right to, option, or connection with the

³⁷ R-2, Bid Terms, Contract 41.

³⁸ R-196, Letter from A. Porras to R. Fernández; R-197, Letter from R. Fernández to A. Porras.

³⁹ R-198, Official letter No. 167-2002.

⁴⁰ R-42, Letter from R. Minera to J. Senn.

⁴¹ R-199, Lease Contract No. 3; R-66, Lease Contract No. 5.

⁴² R-3, Contract 41.

⁴³ R-5, Contract 143; R-6, Contract 158.

⁴⁴ RL-42 Civil Code 1251

⁴⁵ Reply ¶ 277; Mayora III ¶ 106.

⁴⁶ R-1 Bid Terms, Contract 402; R-2 Bid Terms, Contract 41.

usage of FEGUA's railroad equipment⁴⁷. Second, it is an uncontroverted fact that Contract 143/158 did not follow any public bidding process, or any other public process, to give other bidders the opportunity to submit their offers for the onerous usufruct of railroad equipment, nor were there any specific bidding terms for the negotiation that was signed in Contract 143/158, as required by Article 89, State Procurement Law, and Regulations⁴⁸.

22. In that respect, Article 89 of the State Procurement Law states that:

To dispose of, or transfer, real estate, personal property or materials, owned by the State, or by autonomous and decentralized State entities, and to sell movable property and materials, the method of public bidding, or any other method, shall be applied where bidders may submit their offers through clear channels, subject to fulfilling the requirements of advertising the bid, and complying with the Terms of the Bid, and any other legal requirement. In each case, and according to the nature of the goods to be disposed of, a competent, appointed authority, shall establish if the methods to be followed are those for a public auction, a public bid, or any other method, to guarantee that the auction or bid is public, and that bidders participate from domestic and international stock markets⁴⁹.

23. For practical purposes, it is worth noting that the terms of a bid are designed for a specific bid, to take place at a certain date. In the case of Contract 41, the Terms of

⁴⁷ First Aguilar Report ¶ 121.

⁴⁸ First Report ¶ 131.

⁴⁹ Similarly, Article 58, State Procurement Law, contained in Executive *Acuerdo* 1056-92, reads: *Public Bidding. Having fulfilled the requirements established in Articles 89 and 90 of the Law to dispose of and transfer real estate, movable property and materials owned by the State, the following public bidding procedure shall be implemented: 1. The negotiation shall be carried out by a high official or equivalent official of the relevant department or entity in whose name the goods in question are registered. 2. The bid shall be announced once in the Official Gazette, and once more in another major newspaper. Also, if real estate outside the municipality of Guatemala is involved, the negotiation shall be published by affixing notices in the law court of the relevant municipality for fifteen (15) days. The time to carry out the public bid cannot exceed forty-five (45) calendar days, from the date of publication of the first notice. 3. The notices stating the goods to be disposed of or transferred, shall contain a detailed description; if real estate is involved, then the location, size, boundaries, and cultivation, registration number, as well as the department or municipality where it is located, if applicable. The base price for the auction, the mode of payment and other conditions, day and time for the auction, and the place, shall be notified". Said provision was violated by the parties to Contract 143/158, because when the State-owned railroad equipment was disposed of, no public bid was held, nor were the conditions announced, nor the day and time when the negotiation would take place.*

November 1997 were used to award Contract 41, and after that they lost their validity. Contrary to Mayora's statement, it cannot be said that Contract 143/158 was the culmination of the Bidding Process for Contracts 402 and 41⁵⁰. Neither is it possible to claim that failure to set forth new Terms is justified because Contract 143/158 presumably resulted in better conditions for the State⁵¹. Mayora asserts that it would make no financial sense to believe that a third party could have paid the State more than the amount Ferrovías agreed to pay for the usage of the railroad equipment for 50 years⁵². This is, however, a subjective perception that has no legal basis.

C. The approval of the onerous usufruct contract, and a new bidding process, are not mere formalities

24. Contrary to Mr. Mayora's arguments, approval of the Onerous Usufruct Contract is not a "simple technicality"⁵³ concerning the validity of the Contract, instead the approval of the Onerous Usufruct Contract is an "essential validity" requirement because it contains the CONSENT of the Owner of the goods, in this case the State of Guatemala, which when ignored, as in the present case, absolute nullity of the legal transaction occurs, under the provisions of Article 1,251, Civil Code:

To be valid, a legal transaction requires: a subject legally capable and declaring its will to perform the transaction, a consent without defects, and a legal object.

25. In the case of Contract 143/158, not only was there no legal authorization given to the individual who declared his will to give State goods in usufruct (FEGUA's Overseer), but also, there was no consent from the State of Guatemala as owner of the railroad equipment, because Contract 143/158 was not authorized by the President of the Republic and his Cabinet⁵⁴. It is also worth noting that given the defects of legality of Contract 143/158, the President of the Republic of Guatemala could not have authorized said contract. First, a new contract would have had to have been negotiated, to cure the defects of Contract 143/158, and in observance of FEGUA's Organic Law, Article 124 of the Constitution, and the State Procurement Law and Regulations.

⁵⁰ Third Mayora Report ¶ 106.

⁵¹ Third Mayora Report ¶ 106.

⁵² Reply ¶ 49; Mayora III ¶¶ 78-86.

⁵³ Third Mayora Report ¶ 70.

⁵⁴ First Aguilar Report ¶ 97

26. The Reports submitted by Mr. Eduardo Mayora are wrong when stating that the property of the State of Guatemala, specifically railroad equipment, can be negotiated within “private law”, without observing that the State of Guatemala is a “public law” entity, whose goods can only be negotiated under the obligatory provisions of FEGUA’s Organic Law, Article 24 of the Constitution, as well as the State Procurement Law and Regulations, which provide the “public” procedures, that are mandatory to dispose of State goods through a Bidding Process.
27. Mr. Mayora’s opinions are also wrong when they ignore that the Public Bidding Terms for the Onerous Usage of Railroad Equipment that were drafted by the Government of Guatemala in November 1997 were considered an integral part of Contract 143/158 and, as such, in order to be valid, said Contract should have been approved by the President of the Republic and his Cabinet. This did not happen.

D. Contract 143/158, the exchange of letters, and the lease agreement for railroad equipment are all null and void

28. According to the Claimant, the Guatemalan Government always executed Contract 143/158 as though it were valid, including, for example, accepting canon fee payments without any protest or reservation⁵⁵.
29. However, the latter is not true. In the present case, there was reservation, and there was a protest on the part of Guatemala. This is shown in the text of the *Contencioso Administrativo* Complaint, where the Guatemalan Government demands, among others, that things go back to their original state⁵⁶, as expressly requested in Petition “3” of the SENTENCE, which literally reads:

Taking things back to the way they were before the purported signature of the contracts that were declared null and void, the parties to the contract shall proceed to return what they received. Thus, FEGUA shall refund the money received, and the USUFRUCTUARY shall return possession of the goods.

30. With regard to the contracts and the exchange of letters, the negotiations are absolutely null and the fact that they were implemented does not mean that they are lawful. In other words, the fact that a system was implemented to authorize the use of equipment under an illegal contract does not ratify the system. Acts or contracts that suffer from absolute nullity cannot be cured⁵⁷.

⁵⁵ RDC Reply § III (B)(5).

⁵⁶ R-331, Complaint by the Attorney General before the *Contencioso Administrativo* Court, p. 36.

⁵⁷ RL-42, Civil Code, Article 1,301.

31. The State of Guatemala never awarded to, or acknowledged, Ferrovías any contractual property right for the usage of railroad equipment as none of the documents signed by Ferrovías and FEGUA's Overseer gave Ferrovías a legitimate property right; Under Article 1301, Civil Code, the absolute nullity of Contract 143/158 implies that said contracts "...have no effect **and their validity cannot be cured**".
32. All the agreements and contract entered into by Ferrovías and Ferrocarriles de Guatemala's Overseer through letters exchanged dated April 9, 1999 and April 12, 1999, August 22, 2002 and October 9, 2002, as well as the Lease Agreement contained in Contracts 3 and 5, are absolutely null and void due to the fact that they were awarded by Ferrocarriles de Guatemala's Overseer, who had no legal authority to do so and because they were granted against the express prohibitive laws of the Republic of Guatemala, which were violated in said contracts. As can be seen, the legal consequence resulting from the absolute nullity of the acts and contracts, under the provisions of Article 1301, Civil Code, is that the contract have no effect and their validity cannot be cured.
33. Ferrovías acknowledged the absolute nullity of the letters exchanged on April 9, 1999, April 12, 1999, August 22, 2002 and October 9, 2002, as well as the Lease Agreement contained in Contract 3 and 5, because Ferrovías never made use of the letters to claim any rights and, on the contrary, substituted Contract 143/158 for the letters, and is now trying to use Contract 143/ 158 to support the presumed legality of Ferrovías possession and usage of railroad equipment owned by the State of Guatemala
34. Ferrovías, despite knowing and agreeing that the negotiation of the Onerous Usufruct contained in Contract 41, enabling Ferrovías to take possession and usage of railroad equipment, had to be approved through an *Acuerdo Gubernativo* issued by the President of the Republic of Guatemala and his Cabinet, took possession of the railroad equipment without having obtained the approval for Contract 41 through an *Acuerdo Gubernativo* issued by the President of the Republic of Guatemala and his Cabinet. The Onerous Usufruct Contract 41 was never approved by the President of the Republic, or his Cabinet and, therefore, said contract was never legal⁵⁸.
35. The Claimant knew that Contract 143/158 was null and void under the Guatemalan legal system, and that it did not give Ferrovías the possibility to legitimize any contractual property rights as a basis for the possession and usufruct of railroad equipment which is owned by the State of Guatemala, and which Ferrovías acquired illegally⁵⁹.

⁵⁸ First Aguilar Report § VI.

⁵⁹ See *supra* ¶ 8.

36. The acts and contracts contained in the letters exchanged dated April 9 and April 12, 1999, August 22, 2002 and October 9, 2002, as well as the Lease Agreement contained in Contracts 3 and 5, and Contract 143/158, were entered into by Ferrovías and Ferrocarriles de Guatemala's Overseer for the purpose of avoiding "consent" by the State of Guatemala to the onerous usufruct of state-owned railroad equipment, a consent that was never granted through an *Acuerdo Gubernativo* issued by the President of the Republic, and his Cabinet⁶⁰.
37. Ferrovías was not entitled to take possession, or usufruct, of the railroad equipment owned by the State of Guatemala before the President of the Republic approved Contract 41⁶¹ and his Cabinet. Therefore, by having taken possession and usufruct of railroad equipment owned by the State of Guatemala, without Contract 41 having been approved by the President of the Republic and his Cabinet, the following provisions of the Guatemalan legal system were violated:
- a. Article 124, Political Constitution of the Republic, which refers to national goods that can only be disposed of according to the manner, limitations and formalities established by law for the transaction and tax purposes. In the present case, the disposal of onerous usufruct of railroad equipment owned by the State of Guatemala was governed by the provisions of the State Procurement Law. Also, among other conditions, the BIDDING TERMS stated the obligation that, for the Contract to be valid, it had to be approved through an *Acuerdo Gubernativo* issued by the President of the Republic and his Cabinet. Since that condition was not fulfilled, and given that Ferrovías took possession of the railroad equipment, Article 125 of the Constitution was violated.
 - b. Article 19, subsection 13, State Procurement Law, which provides that the BIDDING TERMS will establish the fundamental requirements. In this case, the requirements were defined, among others, under sub-section "6.4" of the PUBLIC BIDDING TERMS FOR THE ONEROUS USUFRUCT OF RAILROAD EQUIPMENT, drafted by the Government of Guatemala in November 1997 where said sub-section expressly stated, as a fundamental requirement, that the Onerous Usufruct Contract be "approved" by the President of the Republic of Guatemala at a Cabinet meeting, through an *Acuerdo Gubernativo* to be published in the Official Gazette.
 - c. Articles 1518 and 704, Civil Code, which refer to the requirements for a Contract to be valid, on the one hand; and that there can only be a usufruct if

⁶⁰ First Aguilar Report § VII.

⁶¹ First Aguilar Report § VI.

there is a contract between the parties, which is not the case here because neither Usufruct Contract 41 nor Contract 143/158 are legal;

- d. Article 464, Civil Code, which refers to the content of property rights, whereby an owner has the right to benefit and dispose of the goods within the limits established by law. This provision was violated when Ferrovías entered into the enjoyment and usage of goods owned by the State of Guatemala without approval by the State of Guatemala, through the President of the Republic, at a Cabinet meeting of the Contract authorizing Ferrovías to take possession and use the railroad equipment owned by the State of Guatemala.

38. Ferrovías and FEGUA exchanged letters dated April 9, 1999, April 12, 1999, August 22, 2002 and October 9, 2002, for the purpose of justifying Ferrovías' illegitimate possession and enjoyment of the railroad equipment, owned by the State of Guatemala, without obtaining the approval of Contract 41 by Guatemala through the President of the Republic and his Cabinet. Said letters cannot be a substitute for, or legitimize the will of the State of Guatemala as owner of the railroad equipment in light of the lack of approval of Contract 41⁶².

39. The exchange of letters represented violations of the following legal provisions:

- a. Article 124, Political Constitution of the Republic, because goods belonging to the State of Guatemala were disposed of without fulfilling the special provisions that govern the disposal of State goods, contained specifically in the State Procurement Law and Regulations, and the Bidding Terms drafted by the Government of Guatemala in November 1997;
- b. Articles 1 and 89, State Procurement Law, which establish that any negotiation of State goods shall be governed by the provisions of the State Procurement law, which was not observed in the exchange of letters, and that movable property owned by the State of Guatemala must be disposed of through a public auction, through a bidding process, or other mechanisms where bidders can submit their offers through clear channels, after fulfilling the publishing and bidding terms requirements;
- c. Article 19, Sub-section 13 of the State Procurement Law, and Sub-section 6.4 of the Bidding Terms for the Onerous Usufruct of Railroad Equipment, which establish fundamental requirement and conditions that governed the usufruct of the railroad equipment, which included, among other essential requirements, that the Onerous Usufruct Contract be approved by the President of the Republic at a Cabinet meeting. This did not happen during

⁶² First Aguilar Report §33.

the aforementioned exchange of letters. The obligation contained under Sub-section 6.3 of the aforementioned Bidding Terms also was violated, since the negotiation was not carried out before the Government Notary.

40. Knowing that the exchange of letters dated April 9, 1999, April 12, 1999, August 22, 2002 and October 9, 2002 could not regularize the illegitimate possession and usufruct of railroad equipment, Ferrovías, in agreement with FEGUA's Overseer, entered into a civil lease agreement for the same equipment through Lease Agreements 3 and 5 of August 13, 2003. The agreements were also issued in violation of the legal system, given that to dispose of movable property owned by the State the same legal provisions in the preceding Sub-section were violated by not complying with the provisions of the Political Constitution of the Republic of Guatemala (Article 124) and the State Procurement Law, which establishes requirements to dispose of movable property owned by the State of Guatemala (Articles 1-19, Sub-sections 13-89) and the Bidding Terms (Sub-section 6.4), with the aggravating circumstance that FEGUA's Overseer did not have the authority to dispose of assets belonging to Ferrocarriles de Guatemala, which are owned by the State of Guatemala. Thus, the provisions of the Organic Law of Empresa Ferrocarriles de Guatemala (Decree 60-72 of Congress) and the provisions governing the Receivership of Ferrocarriles de Guatemala, contained in Decree Law 162-83, were also violated.
41. Knowing that Lease Agreements 3 and 5 did not comply with the legal requirements for the disposal of goods owned by the State of Guatemala under the Constitution, the State Procurement Law and Regulations, and the Organic Law of Empresa Ferrocarriles de Guatemala, the Decree Law 162-83 for FEGUA's Receivership, as well as the Bidding Terms drafted by the Government of Guatemala in November 1997, Ferrovías, in agreement with FEGUA's Overseer, entered into an Onerous Usufruct Contract for the same railroad equipment mentioned in Contract 41, which was never approved through *Acuerdo Gubernativo* by the President of the Republic at a Cabinet meeting and which was contained in Contract 143/158.
42. Contract 143/158 also violated the prohibitive laws of the Guatemalan legal system, as it breached the following provisions:
 - a. Article 124, Political Constitution of the Republic, because goods owned by the State of Guatemala are being disposed of without observing, the special provisions that govern the disposal of goods belonging to the State, contained in the State Procurement Law and Regulations, and the Bidding Terms drafted by the Government of Guatemala in November 1997;
 - b. Articles 1 and 89, State Procurement Law, which state that all negotiations for goods belonging to the State shall be governed and regulated by the provisions of the State Procurement Law, which was not observed for Contract 143/158, and that movable property owned by the State of Guatemala must be disposed of

- through a public auction, through a bidding process, or other mechanisms where bidders can submit their offers through clear channels, after fulfilling the publishing and bidding terms requirements;
- c. Article 19, Sub-section 13, State Procurement Law, and Sub-section 6.4 of the Bidding Terms for the usufruct of railroad equipment; (d) the provisions of Organic Law of Empresa Ferrocarriles de Guatemala (Decree 60-72 of Congress); and (e) the provisions that govern the Receivership of Ferrocarriles de Guatemala, contained in Decree Law 162-83.

43. The Claimant, based on Mr. Mayora's opinion, also claims that the Government never made use of its right to file an action before a court to render Contract 143/158 null and void within the 2 years following the signature of the Contracts⁶³. This is also wrong. As we have seen, Contract 143/158 is not a valid contract.⁶⁴ Under Guatemalan law, the concept of voidability is based on the existence of a valid contract that suffers from a defect⁶⁵. Contract 143/158 is not even a valid contract. ***It is a non-existing contract because it never fulfilled the requirements under Guatemalan law to legally exist***⁶⁶. Therefore, none of the provisions about statute of limitation are applicable. It is not even necessary to analyze the term relevant statute of limitation because we are dealing with a contract that never existed; it is absolutely null.
44. Therefore, the State does not file a complaint arguing the "voidability" of the Contract but rather for the *lesión* caused by the contract, and action that can only be heard in a *Contencioso Administrativo* Court, and whose subject matter is evidence of absolute nullity⁶⁷. I analyze this subject more in depth under Section IV of this Report.

SECTION III

Under Guatemalan law, Guatemala Did Not Violate Due Process, Neither During the *Contencioso Administrativo* Process Related to the *Lesividad*

45. The Claimant and Mr. Mayora's Reports are wrong in stating that Ferrovías was treated in an arbitrary and discriminatory manner when the Declaration of

⁶³ Reply ¶¶ 278 - 280.

⁶⁴ First Aguilar Report § VI.

⁶⁵ RL-42, Civil Code, Article 1301.

⁶⁶ First Aguilar Report § VI.

⁶⁷ First Aguilar Report ¶¶ 59, 127-129, § VII.

Lesividad was issued⁶⁸. Said Declaration is a general condition that the State of Guatemala must fulfill in order to initiate legal action before the courts in cases where State interests have been damaged and because said administrative procedure, whereby the *Lesivo Declaration* is issued, has not been declared as unconstitutional by the Constitutional Court⁶⁹. Clearly, Mr. Mayora ignores the Constitutional Court's judgment in the action filed by Equipos del Puerto, Sociedad Anónima, recognizing that the process for *lesivo* declarations does not violate the Political Constitution of the Republic of Guatemala, nor does it limit the exercise of due process owed to anyone who is considered damaged by the Declaration⁷⁰.

46. In addition, as I stated in my First Report, the *Contencioso Administrativo* Court, when issuing a judgment, will examine the legality of the act or resolution in question, and may revoke, confirm, or amend the *Lesivo* Declaration⁷¹. In that sense, Mr. Mayora grants that the *Contencioso Administrativo* Court may not agree with a *Lesivo* decision by the Executive, but that "there is no known case where the *Contencioso Administrativo* Court rejected or denied a *Lesividad* request by the Government filed within the required three years"⁷². This is not true. Actually, the same chart that Mr. Mayora presents to support his foregoing affirmation in Appendix 1, Third Report, includes a case before the *Contencioso* Court, with a ruling in September 2010, six months before the date of Mr. Mayora's Report (March 14, 2011), where the *Contencioso Administrativo* Court DISMISSED the *Lesivo* Declaration in a lawsuit filed by Guatemala against Confederación Deportiva de Guatemala (Sentence, September 22, 2010)⁷³.

A. There Was No Violation of Due Process During the Publication of the *Lesivo* Declaration

⁶⁸ Reply RDC ¶¶293; Third Mayora Report ¶ 62.

⁶⁹ RL-172, Decision by the Constitutional Court; First Aguilar Report ¶ 47.

⁷⁰ RL-172; First Aguilar Report ¶ 47.

⁷¹ First Aguilar Report ¶ 58.

⁷² RL-198, Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A., Case 379-2006, Decision, 5th Chamber, *Contencioso Administrativo* Court (Sept. 22, 2010). see R-308, Chart of *Lesividad* Lawsuits before the *Contencioso* Court.

⁷³ In addition, Mr. Mayora states that "of the seventeen known complaints regarding the revocation of an Act declared as *Lesivo* by the State of Guatemala since 1991, only one complaint was officially resolved by the *Contencioso Administrativo* Court", Third Mayora Report, footnote 20, Appendix I. This is not correct, as shown by the updated review of Mr. Mayora's chart of processes. There are at least two cases where a sentence was rendered, and the other followed their respective course. See R-308.

47. Mr. Mayora's assertions that the *Lesivo* Declaration is totally inconsistent with the fundamental principle of due process⁷⁴ are incorrect. The mere fact that the Claimant did not have access to the Executive decision making process which led to the Declaration does not violate due process⁷⁵. Curiously, the Claimant does not complain that the *Lesividad* process was applied against the Claimant in an unfair, discriminatory or arbitrary manner, but that the *Lesividad* in itself is invalid and violates the principles of due process and equal protection under the law in all cases⁷⁶.
48. As explained in detail in my First Report, the Declaration of *Lesividad* was an internal decision. Ferrovías was not part of the internal administrative process and there is no reason why Ferrovías should have been heard during this decision making process.⁷⁷ Mr. Mayora is wrong when he states that it is "impossible" to talk about a "purely internal" government process⁷⁸. A clear example of the foregoing is the bidding process to award Contract 41. Because it was an internal process, Ferrovías did not participate because the "award" decision was internal, for the Government to choose the best bidder.
49. Along the same lines, assuming that the other options that Mr. Mayora refers to as available to cure the illegality of Contract 143 had been viable — which, I insist, they were not — the Claimant would not have had access to the internal decision making process either. Similarly, the Government of Guatemala does not participate in a decision making process by the Claimant's Board of Directors. The Claimant was heard and was served notice, and was able to exercise its rights during the *Contencioso Administrativo* process. It must be noted that the Claimant stated its objections, and replied to the Complaint, thereby submitting themselves to the competence of the court⁷⁹.
50. In other words, taken to its logical conclusion, Mayora's argument implies that the only way the Government would not violate a party's due process in a case where the Government has legitimate legal grievances, would be to allow said party to participate in the Government's internal decision making process before deciding whether to take legal action (or which action to take).

⁷⁴ Third Mayora Report ¶¶ 57-59.

⁷⁵ First Aguilar Report ¶¶ 34, 47 (b).

⁷⁶ First Mayora Report ¶¶ 8.2.1., 9.2.1, 5.3.

⁷⁷ First Aguilar Report ¶ 34.

⁷⁸ Third Mayora Report ¶ 50.

⁷⁹ R-276, Submission of previous exceptions by Ferrovías, during the *Contencioso* process.

51. In addition, as I have already mentioned, the Constitutional Court validated the *Lesividad* institution, and rejected that *Lesividad* violates due process⁸⁰. Therefore, Mayora's opinions to the contrary⁸¹, are nothing more than personal opinions, divorced from the constitutional and jurisprudential reality of Guatemalan law.
52. Now, the *Acuerdo Gubernativo* on *Lesividad* had to be published by virtue of the provision in Article 23, *Contencioso Administrativo* Law and paragraph 2, Article 2, Decree 1816 of Congress. Under the publicity principle, the publication of an *Acuerdo Gubernativo* de *Lesividad* is mandatory⁸². It is worth noting that publication of *Acuerdo Gubernativo* 433 was not aimed at Ferrovías, and was not arbitrary or capricious. Guatemalan law states that an *Acuerdo Gubernativo*, regardless of its content, can only be effective if it is made public⁸³.

B. Guatemala Has Not Violated Due Process During the *contencioso administrativo* process related to the *Lesividad*

53. It is not true that the State of Guatemala did not grant Ferrovías the right to a fair trial wherein in Ferrovías could appear and be heard, with regard to the rights that Ferrovías may be entitled to under Contract 143/158⁸⁴. Guatemala filed a *Contencioso Administrativo* proceeding against Ferrovías within the time and in the proper way as required by the laws of the country, with the purpose of allowing the courts of justice to determine the legality or illegality of Contract 143/158⁸⁵.
54. Mr. Mayora Alvarado's reports are wrong when they state that Ferrovías was not given a fair trial. Mayora omits that Ferrovías appeared at the trial about *Lesividad* of Contract 143/158 and, after submitting itself to the competence of the court it exercised its right of defense. This shows that Ferrovías had a fair trial, where Ferrovías has raised the defenses that it believes will serve it.
55. The State of Guatemala produced the *Lesivo* Declaration of Contract 143/158 within the three years established by Article 20, *Contencioso Administrativo* Law, and filed a *Contencioso Administrativo* complaint against Ferrovías. Ferrovías was served notice, and then heard, in compliance with the constitutional principle of due process, so that it could exercise the rights and defenses it deems proper.

⁸⁰ RL-47; First Aguilar Report ¶ 47.

⁸¹ Third Mayora Report ¶ 58.

⁸² RL-181, Decree 1,816 of Congress; First Aguilar Report ¶¶ 2(r), 38.

⁸³ RL-181, Decree 1,816 of Congress; First Aguilar Report ¶¶ 2(r), 38

⁸⁴ Third Mayora Report ¶ 58.

⁸⁵ First Aguilar Report ¶¶ 69-71.

56. In addition, according to Mr. Mayora, any action to confirm a Declaration of *Lesividad* cannot be initiated under Article 19, Sub-section 2), but must be brought under Article 19, Sub-section 1) of the *Contencioso Administrativo* Law, which deals with “disputes regarding acts and resolutions issued by the Administration, and autonomous, decentralized entities (that is to say, actions to declare the *Lesividad*)⁸⁶. This is not true.

57. Article 19, Sub-section 2, *Contencioso-Administrativo* Law, reads as follows:

*“Article 19.- APPLICABILITY.- The Contencioso Administrativo process shall be applicable: 1.).... 2) In cases of disputes resulting from **contracts** and administrative concessions”.*

58. Clearly, Contract 143/158 is not a resolution but an administrative contract. The Claimant, supported by Mr. Mayora, seems to refer to the *Acto Gubernativo de Lesividad*. However, this does not make sense. The State is asking for *Lesividad* to be confirmed and, consequently, for the Contract to be nullified - not for the nullity of the resolution. Mr. Mayora’s statement does not make sense under Guatemalan law, and is totally out of context. The dispute before the *Contencioso* is about a contract, not about the executive resolution. That Contract 143/158 is of an administrative nature does not alter this conclusion. Therefore, a counter-claim is possible under Sub-section 2), Article 19⁸⁷.

59. With regard to the allegations about due process violations caused by delays in certain time period issues, it is important to note that both the State of Guatemala and Ferrovías are part of the same process. And this situation prejudices Guatemala even more given that Ferrovías will continue to benefit from certain rights for as long as the process is pending. In addition, none of the time - period violations destroys the rights of defense, or due process, which Ferrovías has been granted.

60. In addition, Ferrovías has raised numerous motions, including requests for annulment, that have delayed and slowed the process. The Claimant cannot allege that there were due process violations caused by legal delays when the Claimant itself, precisely sheltered by the principle of due process, have filed actions that delayed the process.

⁸⁶ RDC Reply ¶ 224.

⁸⁷ RL-49, *Contencioso Administrativo* Law.

**C. Complaints/Counter-claims Under Article 19, Sub-section 2,
Contencioso Administrativo Law**

61. Claimant's allegations that private parties under Guatemalan law have **no** right to file a Complaint/Counter-claim against the State, to seek compensation from the government in a *Contencioso Administrativo* action that confirms a *Lesividad* decree⁸⁸, are clearly not true.
62. Based on Article 119, Civil and Commercial Procedural Code, the Claimant had the right to file a counter-claim against the State, but did not do so. Along the same lines, it is worth pointing out that the *Contencioso Administrativo* process, apart from having its own special regulations, also includes provisions from the Civil and Commercial Procedural Code, whose Article 19 grants the right to file a counter-claim.

SECTION IV

**Under Guatemalan Law, *Lesividad* Was the Only Legal Way
for Guatemala to Deal With the Illegality of Contract 143/158**

63. In its Reply, based on Mr. Mayora's Opinion Claimant alleges that the illegalities of contract 143/158 could be resolved by less *draconian* measures than *Lesividad*⁸⁹. Mr. Mayora insists that the President of the Republic was not obligated to issue the *Lesivo* Declaration, and that my First Report is wrong in saying that *Lesividad* was the only way to deal with any contract illegality⁹⁰. This is simply incorrect. Mr. Mayora also points out that Decision No. 205-2005 by General Counsel, Attorney General's Office, stated that there were other options to tackle the problem, including rescission, nullity or mutual agreement⁹¹.
64. Although it is true that there were other avenues to resolve the dispute between Ferrovías and Guatemala, *Lesividad* was the **only** available way for Guatemala to deal with the illegalities of Contract 143/158. Indeed, for the State of Guatemala, *Lesividad* was not an **option**, but a **mandatory condition** in order to be able to initiate legal actions regarding the illegality of Contract 143/158, among others. As explained in my First Report, it was a matter of competence⁹². This is why, from a

⁸⁸ RDC Reply ¶¶ 224, 306; RL-49 *Contencioso Administrativo* Law; Mayora III ¶ 8.2.3; Reisman I ¶¶ 35-39.

⁸⁹RDC Reply ¶ 287

⁹⁰ Third Mayora Report ¶¶ 67-68.

⁹¹Third Mayora Report ¶¶ 67-68.

⁹² First Aguilar Report ¶¶ 24-29.

legal point of view, neither rescission, nor mutual agreement, were available, , to cure the illegalities.

65. With regard to competence, given the **administrative contract** nature of State goods⁹³, the only court competent to hear administrative contract disputes is the *Contencioso Administrativo* Court. Therefore, the State had to issue a *Lesivo* Declaration because it was an issue directly related to competence⁹⁴. Indeed, under Guatemalan law and given the administrative nature of Contract 143/158 - related to goods owned by the State of Guatemala - the *Contencioso Administrativo* Court ⁹⁵ has the exclusive competence to hear any dispute related to said contracts. And, for said Court to hear a dispute when the State is the Plaintiff, the State must declare the *Lesividad* of the Contract in dispute as a pre-requisite.⁹⁶

66. Article 221, Constitution of the Republic of Guatemala, when defining the competence of the *Contencioso Administrativo* Court, states:

*Contencioso Administrativo Court. The Contencioso Administrativo Court is a comptroller of the legality of public administration. It has the competence to hear disputes resulting from administrative acts or resolutions, and from State decentralized and autonomous entities, as well as disputes resulting from administrative contracts and concessions...*⁹⁷

⁹³ Contract 143/158 is an administrative contract because it deals with State-owned and because it was entered into by a Public Administration entity and a Private Law entity, with regard to good that are the property of the State of Guatemala. Also, although it was not legally permitted, the parties adopted the 1997 Bidding Terms for Contract 143/158, which means, under Guatemalan law, that the Political Constitution of the Republic of Guatemala, and the State Procurement Law and Regulations, are applicable to the contractual relationship (the Terms say so). This highlights the “administrative” nature of the contract, which refers to the usufruct of goods that are the property of the State of Guatemala.

⁹⁴ RL-198, Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A., Case 379-2006, Ruling, 5th Chamber, *Contencioso Administrativo* Court (September 22, 2010).

⁹⁵ RL-45, Article 221, Political Constitution of Guatemala; RL-198, Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A., Case 379-2006, Decision, 5th Chamber, *Contencioso Administrativo* Court, (Sept. 22, 2010).

⁹⁶ RL-72, *Contencioso Administrativo* Law, Article 20, Paragraph 2o.

⁹⁷ In that sense, the Political Constitution of the Republic of Guatemala defines the “functions” and “jurisdiction” of the *Contencioso Administrativo* Court which, for the present case, can be summarized as follows: a) *FUNCTIONS: To be the comptroller of “legality” in public administration, that is, to establish if acts by the public administration are carried out in compliance with the laws of the country; and b) JURISDICTION: To hear cases “...resulting from disputes resulting from administrative contracts and concessions”, among others.*

67. The Political Constitution of Guatemala is also clear with regard to the constitutional guarantee of the Right of Defense contained in Article 12, whereby a legal process can only be won through a judge or tribunal with the “jurisdiction” to hear the matter⁹⁸.

68. Thus, it is not a question of simple choice, or of the existence of “other” alternatives different from the process of *Lesividad*. It is an imperative requirement by the *Contencioso Administrativo* Law, that the Court hear the Complaint filed by the State of Guatemala.

69. As a result, owing to the jurisdiction of the court that would hear the Complaint and declare the *Lesividad* of Contract 143/158, the State of Guatemala had no other option. The requirement is contained in Article 20, *Contencioso Administrativo* Law, second paragraph, which reads:

If the process is initiated by the administration owing to administrative acts or resolutions, the stated requirements need not be met, provided that the act or resolution is declared lesivo to State interests through an Acuerdo Gubernativo issued by the President of the Republic at a Cabinet meeting. The declaration may only be made within three years following the date of the resolution, or act that gives rise to it⁹⁹.

70. The foregoing is also confirmed in the framework of the *Contencioso* process filed by Guatemala to confirm the *Lesividad*, where Ferrovías filed an exception to jurisdiction arguing that the Court did not have jurisdiction to hear the complaints by the State of Guatemala¹⁰⁰. However, the Court rejected the argument and declared itself as the only Court with jurisdiction to settle the Complaint filed by the State of Guatemala¹⁰¹. Subsequently, Ferrovías accepted and submitted itself to the Court’s jurisdiction by replying to the Complaint and exercising the right of defense¹⁰².

71. Along those lines, and from a legal point of view, the State of Guatemala had no other option, in seeking the nullity of Contract 143/158, than to issue the *Lesivo*

⁹⁸ RL-45, Political Constitution of Guatemala, Article 12.

⁹⁹ RL-184, *Contencioso Administrativo* Law, Article 20.

¹⁰⁰ R-276, Jurisdiction Exception, submitted by Ferrovías.

¹⁰¹ R-292, Resolution, March 12, 2,008, First Chamber, *Contencioso Administrativo* Court, Process No. 389-2006, 2nd Officer in charge.

¹⁰² R-292, Ferrovías Answer to the Complaint (May 12, 2008).

Declaration. Otherwise, Guatemala would have been unable to access a competent tribunal, as required by Article 20, *Contencioso Administrativo* Law¹⁰³.

72. Now, returning to the subject of the “other options” mentioned in Decision No. 205-2005, General Counsel, Attorney General’s Office, a few clarifications are in order regarding a request of contract nullity or annulment, or rescission, without a prior *Lesivo* Declaration. First, these options would have required that the State of Guatemala initiate actions before civil tribunals - assuming that the State had been deprived of its public nature in Contract 143/158, which it was not. However, as shown, civil tribunals have no jurisdiction to hear the dispute and consequently, the complaint by the State of Guatemala would have failed.
73. In addition, with regard to rescission itself, it is worth noting that this is the way that the parties to a “valid” contract - a contract that has not been executed - decide to terminate it by mutual agreement, or via a legal declaration¹⁰⁴. It is an option available to contracts that were “validly” entered into, which is not the case here because we are dealing with a contract that is absolutely null, and cannot be cured by the parties. Also, rescission must be requested within the first year from the date of the contract.¹⁰⁵
74. On the other hand, according to Mr. Mayora, the statute of limitations for the nullity legal action of Contract 143/158 under Article 1312, Civil Code, was two years. Mayora states that the Attorney General did not take action within the time established by the law¹⁰⁶. More importantly, Mayora states that the only way to request nullity was to show that the contracts were *Lesivo* to State interests¹⁰⁷. With regard to the affirmations by Mayora about the statute of limitations in a case of *Lesividad*, and the Complaint to be filed before the *Contencioso Administrativo* Court, a distinction must be made between “expiration” and “time limit for action”.
75. A Declaration of *Lesividad* and the Complaint to be filed before a *Contencioso Administrativo* Court are subject to expiration because, in accordance with paragraph 2, Article 20, *Contencioso-Administrativo* Law, the State of Guatemala can only issue a Declaration “... within three years subsequent to the date of the resolution or act that gives rise to the declaration.” This means that the right of the State of Guatemala to declare the *Lesividad* of Contract 143/158 would have expired if the Declaration had not been issued within three years from the date when

¹⁰³ RL-49 , *Contencioso Administrativo* Law, Article 20.

¹⁰⁴ RL-42, Civil Code, Article 1,579.

¹⁰⁵ RL-42, Civil Code, Article 1,585.

¹⁰⁶ First Mayora Report at ¶ 96

¹⁰⁷ First Mayora Report at ¶ 96

Contract 143/158 was entered into. Equally, the time-period granted by the State of Guatemala to file a *Contencioso-Administrativo* Complaint before the *Contencioso-Administrativo* Court would have expired if the Complaint had not been filed within three months following the date when the Declaration of *Lesividad* was issued¹⁰⁸.

76. On the other hand, “the statute of limitations” refers to the extinction, or acquisition, of a right or an obligation - to the material nature of the contract. Contrary to a contract suffering from relative nullity, there is no statute of limitations for a contract that suffers from absolute nullity because an absolute nullity contract cannot be cured, even with confirmation by the parties¹⁰⁹. The contracts that suffer from relative nullity can be cured by express or tacit confirmation, and the statute of limitations is two years from the date of the contract¹¹⁰. That is precisely why Mr. Mayora’s opinions are wrong. Under Guatemalan law, there is relative nullity under Article 1303, Civil Code, in cases of relative incapacity of the parties, or one of the parties, or due to a defect of consent¹¹¹. This type of nullity can be cured by confirmation or validation. It happens, for example, when a minor enters into a sales agreement, or when someone takes on an obligation by mistake, or through an external act affecting his/her consent¹¹². The defect that causes relative nullity can be cured, for example, when the minor’s intention is ratified by the minor’s legal representative, or when the person ratifies the defective consent¹¹³.
77. By contrast, in the case of absolute nullity, the defect cannot be cured because it affects an essential requirement for the existence of the contract¹¹⁴. In this regard, Contract 143/158 suffers from defects that cannot be cured and which emphasize the absolute nullity of the negotiation. As we have seen, FEGUA’s Overseer did not have the legal authority to represent the State of Guatemala in a negotiation for assets that are State property. Also, the assets were negotiated against express prohibitive laws, of a special nature, that regulate the procedures for the negotiation of State property.
78. For all the aforementioned reasons, it is important to distinguish the following points: (i) the Declaration of *Lesividad* and the Complaint that must be submitted to

¹⁰⁸ RL-72, *Contencioso Administrativo* Law, Article 23; RL-198, *Republic of Guatemala v. Confederación Deportiva Autónoma de Guatemala S.A.*, Case 379-2006, Decision, 5th Chamber, *Contencioso Administrativo* Court (September 22, 2010).

¹⁰⁹ RL-42, Civil Code, Article 1301.

¹¹⁰ RL-42, Civil Code, Article 1312.

¹¹¹ RL-42, Civil Code, Article 1301.

¹¹² RL-42, Civil Code, Article 1301.

¹¹³ RL-42, Civil Code, Article 1301.

¹¹⁴ RL-42, Civil Code, Article 1301.

the *contencioso-administrativo* tribunal are not subject to a statute of limitations because said acts do not refer to the subject matter of the negotiation, but to the “claim assumptions”; consequently, said acts are subject to expiration (*caducidad*); (ii) the “material content” of the statements in a contract are not subject to expiration, but are subject to a statute of limitations, provided the contract can be validated in case of relative nullity; (iii) in case of defects that affect the existence of the contract, nullity shall be absolute and cannot be cured; (iv) relative nullity is subject to a two-year statute of limitations, which means that if nullity is not requested within 2 years, the contract shall be cured; and (v) absolute nullity is not subject to a statute of limitations because it cannot be cured.

79. To conclude, the State of Guatemala had to declare the *Lesividad* and file the Complaint within a period of 3 years (for the *Lesividad*) and of 3 months (for the Complaint), otherwise the State’s right to a claim would have expired - with the proviso that with regard to the substance of Contract 143/158, given the absolute nullity of the Contract, there was no statute of limitations because the Contract cannot be cured. In other words, the statute of limitation for Contract 143/158 does not affect the State of Guatemala because said contract suffers from absolute nullity. However, the State of Guatemala was affected by the “expiration to exercise rights” because if it had not declared the *Lesividad*, and had not filed a Complaint in the time frame provided by the law, the right to file a Complaint before the *Contencioso-Administrativo* Court would have expired.
80. Finally, and as already stated, the process of Declaration of *Lesividad* did deprive of Ferrovías of any rights with regard to the usufruct of the railroad equipment.

SECTION V

Under Guatemalan Law, the Notion of State Interests, Legality and the Nature of *Lesividad* Confirm that Guatemala Acted in Accordance with of Guatemala’s Law

81. The Claimant alleges that Guatemalan law does not define what makes an act *lesivo* to State interests and that, therefore, there is no legal precedent to allow Guatemalan courts to rule accordingly¹¹⁵. This is false. The Guatemalan courts are fully competent to rule on a case without having precedents or formal sources on which to base their rulings, since, **in accordance with the provisions of Article 203 of the Constitution of the Republic of Guatemala**, justice shall be dispenses in accordance with the Constitution and the laws of the Republic of Guatemala and it is precisely these bodies of law that regulate the manner in which the courts of justice must proceed when a contract, such as Contract 143/158, is absolutely null,

¹¹⁵ Reply ¶ 308; Reisman I ¶ 33; Mayoral ¶ 8.3.5; Reisman II ¶¶ 25–26, 33; Mayora III ¶¶ 4-10.

or when dealing with reciprocal restitution of goods received during the implementation of a contract. In this sense, the standards for applying and interpreting the law are defined in the *Ley del Organismo Judicial*¹¹⁶. A law is applied and interpreted in accordance with the spirit of the law, and possibly based on precedents. But this is an exception to the exception. Article 15, Judiciary Law.

82. Nor is it true that “State interests” are so wide, vague and ambiguous that their application is impossible to foresee. Both the State, as a public law person, and private law persons, have “interests”. If Mr. Mayora’s statements were valid, then the interests of a private party would also be wide, vague and ambiguous - which is not the case. As stated in my First Report, State interests, such as the protection of individuals and family (common good being the supreme goal (Article 1, Constitution)), and its duties to guarantee life, freedom, justice, safety, peace and integral personal development to the inhabitants of the Republic (Article 2, Constitution), are the fundamental “objectives” that led to the creation of the State.
83. The State interests that were harmed in the present case were the loss of usage and usufruct of the railroad equipment owned by the State of Guatemala because the equipment was appropriated by Ferrovías. This is acknowledged by Article 464, Civil Code, which reads: “*Property is the right to enjoy and dispose of goods within the limits and, in compliance with, the obligations established by the law.*” In the case of Contract 143/158, the particular State interest, as owner of the railroad equipment, was to claim the property illegally held by Ferrovías. This interest is not vague or ambiguous, and it is the same interest that was expressed in the Complaint filed before the *Contencioso-Administrativo* Court.
84. According to Mr. Mayora, my First Report’s ample explanation of the concept of State interests proves that the notion of State interests in Guatemalan law is vague¹¹⁷. I repeat, this is simply not true. Guatemalan law does define a *Lesivo* act as damage or harm caused to the State interests. In the present case, the *Lesivo* act is the undue and illegal usage, by Ferrovías, of the railroad equipment owned by the State of Guatemala. Specifically, the interest being harmed is the “property right” which, according to Article 464, Civil Code, grants the right to enjoy and dispose of your goods. In this sense, the legal action that enables a tribunal to rule accordingly is based on Article 469, Civil Code, which grants the owner the right to claim his property back from anyone who may possess it or hold it.
85. Moreover, based on its etymology, the term “*Lesividad*” derives from the word “**Lesion**” which, in turn, means “**Damage, Harm, or Detriment**”¹¹⁸. Article 1434 of

¹¹⁶ RL-193, Legal Entity Law.

¹¹⁷ Third Mayora Report ¶¶ 8-9.

¹¹⁸ R-334, Dictionary of Royal Spanish Academy, Twenty-Second Edition.

the Guatemalan Civil Code¹¹⁹ establishes that damage consists in **asset losses suffered by a creditor**, and harm is **loss of income**, which may be a direct consequence of the violation.

A. Legality and *Lesividad* to State Interests Are Not Two Different and Independent Concepts

86. Claimant states that under Guatemalan Law the notion of legality and *Lesividad* of State interests are two completely different and independent concepts¹²⁰. In particular, Mr. Mayora asserts that the Guatemalan legal system does not deal with issues of legality based on the declaration of *Lesividad*. This is presumably proved by Judiciary Law, for example, which establishes: “*ARTICLE 4. Null and Void Acts. Acts that are contrary to imperative rules and express prohibitive rules are null and void, except a different effect is established in case of violation. (...)*”. According to Mayora, the implication in this statement is that a *Lesividad* procedure need not be followed because any act that violates Guatemalan law is null and void. This is simply incorrect.
87. The issue of damage is an internal act of will, where a decision is made to produce a legal resolution because damage has been suffered. The concept of legality says that no act or action will be acknowledged by a court of law if it is not done within a legal framework. Mr. Mayora tries to separate legality from damage. Actually, damage, as well as the actions that cause it, take place within a legal framework
88. Under Guatemalan law, an administrative contract that suffers from absolute nullity produces, necessarily, an injury to the interests of the State, as it contravenes the law on matters which concern the public administration, and as a result the State of Guatemala¹²¹. The State of Guatemala cannot tolerate the execution of an absolutely null contract by virtue of the fact that under Article 1301, Civil Code, an absolutely null contract is nonexistent, and cannot be cured by the parties. Thus, the execution of an absolutely null contract would violate the principle of legality, and harm the

¹¹⁹ RL-42, Civil Code, Article 1434 Civil Code, Decree Law 106, reads as follows: “*Damage, consisting in asset losses suffered by a creditor, and harm caused by loss of income, must be an immediate and direct consequence of the violation, whether the violation has taken place or will necessarily take place.*”

¹²⁰ RDC Reply ¶¶ 233-235; Mayora III ¶¶ 19-22.

¹²¹ First Aguilar Report ¶¶ 127-128.

State of Guatemala, who is obliged to guarantee legal certainty and prevent contracts from being entered into and executed outside the law.

B. The Notion of *State Interests* Cannot Be Compared to the Notion of *Economic Interests*

89. Although Mr. Mayora does not offer a definition of “State interests”, he seems to compare the concept only with economic interests when he argues that *Lesividad* should not be linked to legality defects. Hence the assumption expressed by Mayora, that a contract that is “beneficial” to State interests may exist but that it may still be declared *lesivo* due to legality defects¹²².

90. The above argument is totally invalid. The following example shows why. A contract that is beneficial to the economic interests of the State or a department, but was obtained through bribes or another act of corruption, could perfectly exist. Following Mr. Mayora’s logic, such a clearly illegal, but economically advantageous, contract should not be declared *lesivo*. The result here would be anathema to the figure of *Lesividad*.

C. Nullity does not occur automatically

91. In spite of the existence of absolute nullity, in the exercise of due defense, contained in Article 12, Political Constitution of the Republic of Guatemala, said nullity must be acknowledged by a judge or a competent tribunal, where the affected party may have the opportunity to be summoned and heard, before any ruling is made¹²³.

92. In other words, even if nullity occurs automatically, a legal declaration, within a legal process is required so that, once the invalidity of the contract is acknowledged, the consequences resulting from a null and void contract may be determined. In the case of the State of Guatemala, although the absolute nullity of Contract 143/158 is obvious, Guatemala must obtain a declaration of nullity from a competent tribunal. Without this declaration the Government cannot legally recover the goods that are the subject matter of the contract.

93. Although Mayora claims that an action violating Guatemalan law is null by law¹²⁴, it is extremely important to highlight that said nullity does not give the Government the authority to act against any existing rights by illegally declaring the nullity.¹²⁵ In other words, FEGUA’s Overseer was not allowed to simply say “the contract does

¹²² Third Mayora Report ¶¶ 19-21

¹²³ First Aguilar Report ¶ 129.

¹²⁴ Third Mayora Report ¶ 16.

¹²⁵ First Aguilar Report ¶ 129.

not observe Guatemalan law, therefore FVG's rights are nullified." Even if the Government were of the opinion that an act or contract violates Guatemalan law, the Government has the obligation to observe the processes established by Guatemalan laws. *Lesividad* is one of said processes¹²⁶.

D. Being Aware of the Decisions on the *Lesividad*, the President Was Forced to issue the Declaration of *Lesividad* Least He Become Liable

94. As I have pointed out on several occasions, by virtue of Guatemala's legal system President Berger was forced to issue the Declaration of *Lesividad* with his Cabinet meeting via Acuerdo Gubernativo¹²⁷. If he had not done so, he would have become jointly and severally liable¹²⁸. I reiterate the statement in my First Report, that the Declaration of *Lesividad* is not a discretionary matter¹²⁹.

95. The Declaration of *Lesividad*, mandatory if the State of Guatemala wants to file a Complaint, requires an internal administrative procedure which ends with the Declaration of *Lesividad* issued by the President of the Republic and his Cabinet meeting. In short, a Declaration of *Lesividad* is an internal, public administration act, which states that the State suffered damage¹³⁰. The damage or harm being caused is dealt with under Article 1434, Civil Code, which reads as follows:

Damage, consisting in asset losses suffered by a creditor, and harm caused by loss of income, must be an immediate and direct consequence of the violation, whether the violation has taken place or will necessarily take place.

E. The Declaration of *Lesividad* is Not a Mere Formality of the Guatemalan Legal System

96. The Declaration of *Lesividad* constitutes a "burden" imposed on the State of Guatemala, under Paragraph 2, Article 20, *Contencioso-Administrativo* Law, as a condition for filing a Complaint before the *Contencioso-Administrativo* Court. This burden is not imposed on private parties.

¹²⁶ First Aguilar Report ¶¶ 29, 36(a), 36(f).

¹²⁷ First Aguilar Report ¶ 72.

¹²⁸ First Aguilar Report ¶¶ 72; RL-45, Constitution, Articles 153 and 154; RL-50, Executive Law, Article 16.

¹²⁹ First Aguilar Report ¶ 72.

¹³⁰ First Aguilar Report ¶¶ 35;

97. A DECLARATION OF *LESIVIDAD* does not entail the loss of any right that a third party may be entitled to. It is simply a “declaration” with regard to the existence of damage suffered by the State of Guatemala that must be acknowledged by a court of law in a legal process.

F. Mr. Mayora’s Conclusions About the Practical Effects of *Lesividad* are Purely Speculative, and Legally Unfounded Statements

98. Mr. Mayora agrees with me, and does not argue the fact that the Declaration of *Lesividad* “does not deprive the affected party of any right indefinitely”¹³¹. Diminishing the value of this important legal conclusion, however, Mr. Mayora ventures to submit a series of personal opinions about some presumed practical effects of the Declaration of *Lesividad*¹³².

99. According to Mr. Mayora, “clearly, any prudent banker, commercial credit institution, vendor, employee, or even a client (as in this case) will necessarily re-assess their relationship with a company that has been declared *Lesiva*”¹³³. Mr. Mayora goes on by saying that “no reasonable person would assume that the President and his Cabinet issued the Declaration of *Lesividad* just for the sake of it”¹³⁴.

100. The foregoing are clearly just speculative, legally unfounded perceptions and, as I have said before, the law does not admit perceptions of this nature. Along the same lines, Claimants allegations about the presumed “death” of certain companies in Guatemala as a result of other declarations of *Lesividad*¹³⁵ are also equally speculative and lacking in any legal or evidentiary support. As I have stated on several occasions, the Claimant still enjoys its rights under Contract 143/158 and it is only when the *Contencioso Administrativo* Court rules on the legality of that contract that the *Lesivo Declaration would have a material or practical effect*¹³⁶. While the Court decides about the nullity of Contract 143/158, the State has to behave as though Contract 143/158 were valid¹³⁷. Any allegations of the Claimant, or its witnesses or experts to the contrary has no basis under Guatemalan law¹³⁸. A

¹³¹ Third Mayora Report ¶ 57.

¹³² Third Mayora Report ¶ 57.

¹³³ Third Mayora Report ¶ 56.

¹³⁴ Third Mayora Report ¶ 56.

¹³⁵ RDC Reply ¶ 307.

¹³⁶ First Aguilar Report ¶¶ 32-33.

¹³⁷ RL-45, Political Constitution, Article 12.

¹³⁸ Along these lines, see Mayora I ¶ 8.2.1; Mayora II ¶ 2.4.7; Fuentes I ¶ 12; Reisman II ¶ 26; Ex. C-144

decision by the *Contencioso Administrativo* Court is not mere illusion. It has full legal and practical meaning, and actually constitutes a materialization of the principles of due process and right of self-defense¹³⁹.

101. In the same vein, I must clarify that the statements presumably made by the Attorney General to the Guatemalan press on December 19, 2006¹⁴⁰, do not indicate that the *Lesividad* process is arbitrary and lacking in due process. On the contrary, the Attorney General's statements — clearly referring to the closing of the *Contencioso* Process — confirm that until there is a ruling from the *Contencioso* Court, the Contract will continue to be executed, subject to the consequences and effects decided by the Court¹⁴¹.

102. The Declaration of *Lesividad*, as a burden imposed on the State of Guatemala, is not discriminatory, nor arbitrary, nor unconstitutional. On the contrary, the Constitutional Court has acknowledged that said Declaration does not violate any rule of the Political Constitution of the Republic of Guatemala, or any law in Guatemala's legal system¹⁴².

G. The Facts and Circumstances in the *Shufeldt* Case Cannot Be Compared with the Facts and Circumstances in This Case

103. The Claimant alleges that the *RDC v. Guatemala* International Arbitration is “extraordinarily similar to another expropriation case that was initiated against Guatemala more than 80 years ago”, referring in its Reply to the *Shufeldt* case¹⁴³. However, although there may be similarities between the two, the truth is that one case cannot be compared to the other under Guatemalan law.

104. In the *Shufeldt* case, when considering whether the claimant had property rights resulting from the contract, the arbitrator concluded that the legislative decree “was approved by the President and published in *El Guatemalteco* on July 7, 1928.” This led to the termination of the contract, depriving *Shufeldt* of all his rights under the contract.”¹⁴⁴.

105. Contrary to the *Shufeldt* case, in the *RDC v. Guatemala* International Arbitration, there is no place for the validity of Claimant's presumed rights under Contract

¹³⁹ First Aguilar Report § IV.

¹⁴⁰ C-144, Press Release, Free Press.

¹⁴¹ C-144 Press Release, Free Press.

¹⁴² First Aguilar Report ¶¶ 2 (c); § III.

¹⁴³ RDC Reply ¶¶ 310 - 316.

¹⁴⁴ RL- 128, *Shufeldt* Decision.

143/158, given that, as explained above, the Claimant never acquired any property rights over the railroad equipment which is the object of Contract 143/158. In addition, even assuming that the Claimant may have acquired a right, the *Shufeldt* case cannot be compared with the *RDC v. Guatemala* International Arbitration because the Declaration of *Lesividad* does not deprive the Claimant of any right, as confirmed by Claimant's own expert¹⁴⁵.

106. In addition, in the *Shufeldt* case, the Ministry of Agriculture's lack of authority, as part of the Executive, was invoked under laws that **WERE NOT IN FORCE**¹⁴⁶ when the right to exploit Chicle was granted, and because the Rules of the Civil Code in force at the time referred to lease or sale agreements. In the *RDC v. Guatemala* International Arbitration, the violation of the legal system takes place through **REGULATIONS** that were **IN FORCE** when Contract 143/158 was entered into.

SECTION VI

FORMALITY OF THE NOTARY FUNCTION IN GUATEMALA

107. It is my understanding that in the *RDC v. Guatemala* International Arbitration, it is alleged that Mr. Freddie Pérez, one of the witnesses, made a sworn affidavit before a Notary Public via telephone¹⁴⁷. Specifically, according to RDC "***the witness was personally before the Notary***" when he confirmed the content and accuracy of his declaration in a telephone conversation with Mr. Senn, in which the Notary was present and listening¹⁴⁸. " This alleged ratification to a Notary by telephone is not valid.

108. Indeed, under Guatemalan law, acts and contracts that are entered into before a Notary Public must observe the ***unity principle***, whereby the parties and the Notary Public ***are all present***. A declaration before a Notary Public cannot be made by long distance, or by telephone. In case of a NOTARY ACT, the PRESENCE of all parties to the act must be observed, and the Notary can only vouch for what he/she sees, as confirmed by Articles 60 and 61, Notary Code:

*ARTICLE 60 .- A Notary Public, in any act required by law or by a party, shall draft an affidavit containing all the facts and **events witnessed by the Notary.***

¹⁴⁵ Third Mayora Report ¶ 57; First Aguilar Report ¶¶ 2(h).

¹⁴⁶ RL- 128 Official Letter from J. Senn to A. Gramajo.

¹⁴⁷ RDC Reply ¶¶ 213-215.

¹⁴⁸ RDC Reply ¶ 215 (emphasis added)

ARTICLE 61 .- In the affidavit, the Notary Public shall record: place, date and time of the formality; the name of the person that requested the affidavit; the names of personas taking part in the act; a description of the circumstances of the act; and the value and number of officially stamped and sealed that preceded the last page.

109. Along these lines, a Notary cannot attest that a person making a phone call is the person who made the statement. Therefore, the act is not valid¹⁴⁹.

SECTION VII

CONCLUSIONS

110. None of the affirmations made by Mr. Mayora in his Reports distort the truth in the following conclusions:
- a) That the railroad equipment is part of FEGUA's assets are property of the State of Guatemala, as established in Article 121, Sub-section c), Political Constitution of the Republic of Guatemala;
 - b) That for the disposal of goods that are the property of the State of Guatemala, a bidding process must be carried out, and Bidding Terms must be prepared to establish the terms and conditions of the negotiation through clear and public mechanisms;
 - c) That railroad equipment, which is property of the State of Guatemala, can only be disposed of through public auction, public bidding or other procedures where the bidders can submit their offers through clear mechanisms - having previously fulfilled the publication and bidding terms requirement under Article 89, State Procurement Law;
 - d) That the creation of an onerous usufruct is an act of disposal by virtue of which the owner of the goods gives the owner's right of usage and usufruct of the benefits to another person;
 - e) That FEGUA's Overseer, in accordance with Empresa Ferrocarriles de Guatemala's Organic Law, contained in Decree 60-72 of Congress, does not have the power to dispose of, in any manner whatsoever, in favor of a third party,

¹⁴⁹ RL-192, Notary Code, Articles 60 and 61 (emphasis added).

including but not limited to railroads, goods that are part of FEGUA's assets and property of the State of Guatemala, including, but not limited to, railroad equipment;

- f) That the State of Guatemala never awarded, or acknowledge for Ferrovías any contractual property right for the usage and usufruct of railroad equipment. None of the documents that Ferrovías signed and entered into with FEGUA granted Ferrovías a contractual property right for the use and usufruct of railroad equipment;
- g) That Contract 41 for the onerous usufruct of railroad equipment that is the property of the State of Guatemala, had to be approved by the Government of the Republic of Guatemala through an *Acuerdo Gubernativo* issued by the President of the Republic and his Cabinet, as established by Sub-Section "6.4" of the Bidding Terms for the onerous usufruct of railroad equipment;
- h) That Contract 41 for the Onerous Usufruct of Railroad Equipment never entered into by Ferrovías and FEGUA because it was never approved by the Government of Guatemala;
- i) That Contract 43/158, the exchange of letters dated April 9, 1999 and April 12, 1999, August 22, 2002 and October 9, 2002, and Lease Agreements 3 and 5 are null and void;
- j) That FEGUA's Overseer and Ferrovías entered into Contract 143/158 without observing the special laws for the disposal of movable property, in particular Article 89, State Procurement Law. They did not comply with the publication procedures, and did not create special Bid Terms for said contract to guarantee the transparency of any offers that may have been made;
- k) That notwithstanding the absolute nullity of Contract 143/158, which prevents the nullity from being cured, even by confirmation of the parties, contract 143/158 signed by Ferrovías and FEGUA's Overseer, should have been approved by the President of the Republic and his Cabinet. The parties to the contract had included the Bidding Terms drafted by the Government of Guatemala in November 1997. Therefore, the parties acknowledged the requirement that Contract 143/158 had to be approved by the Government of Guatemala through an *Acuerdo Gubernativo* issued by the President of the Republic in a Cabinet meeting, as established by Sub-section 6.4 of the Bid Term;
- l) That the State of Guatemala, owner of the railroad equipment, exercised the right to claim possession and usage of said equipment and that, therefore, under the Guatemalan legal system, the State of Guatemala issued the Declaration of *Lesividad* of Contract 143/158, to demand the nullity of Contract 143/158 and claim back the possession and usage of Guatemala's railroad equipment;

- m) That the process of Declaration of *Lesividad* did not violate, or deprive Ferrovías of, any rights with regard to the usufruct of railroad equipment, which is in Ferrovías possession to date;
- n) The Declaration of *Lesividad* process of Contract 143/158 is not an alternative or an option. It is a mandatory condition established by the legal system, that the State of Guatemala must fulfill in order to file a Complaint before the *Contencioso Administrativo* Court, to request the absolute nullity of Contract 143/158 and claim possession of Guatemala's railroad equipment;
- o) That the State of Guatemala produced the Declaration of *Lesividad* of Contract 143/158 within the three years established by Article 20, *Contencioso Administrativo* Law, and filed a Complaint before the *Contencioso Administrativo* Court against Ferrovías. Ferrovías was served notice, and was heard at a hearing, in compliance with the Constitutional principle of due process and the right of self-defense.
- p) That the State of Guatemala was required to publish the Declaration of *Lesividad* regarding Contract 143/158, in accordance with Article 23, *Contencioso Administrativo* Law, and Article 2, Decree 1816 of Congress.
- q) That the publication of the Declaration of *Lesividad* of Contract 143/158 did not prevent Ferrovías from exercising any of the rights that Ferrovías may be entitled to under the Contract;
- r) That the damage caused to the interests of the State of Guatemala under Contract 143/158 is not wide, vague or ambiguous. The damage under Contract 143/158 is related to the right to property. And the specific awaited legal ruling is a claim of property rights that the State of Guatemala has over railroad equipment which must be returned by Ferrovías, with the effects and consequences resulting from their illegal usage and usufruct;
- s) That the State of Guatemala has respected Ferrovías right to constitutional defense because the State of Guatemala did not deprive Ferrovías of any material right under Contract 143/158 - assuming Ferrovías had any rights - and granted Ferrovías the right to a fair trial and the right of self-defense;
- t) That Ferrovías, within the *contencioso-administrativo* process initiated by the State of Guatemala to have the nullity of Contract 143/158 acknowledged, made use of the right to be heard at a legal process, and the right of self-defense. Thus, the right to a fair trial was not violated.