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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RAILROAD DEVELOPMENT CORPORATION

Claimant,

v.

THE REPUBLIC OF GUATEMALA

Respondent

ICSID Case No. ARB/07/23

OPINION OF EDUARDO A. MAYORA

JUNE 18TH, 2009

Eduardo A. Mayora
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1. Basic background for this opinion.

1.1. Scope of engagement.

I have been asked by RAILROAD DEVELOPMENT CORPORATION to give my professional opinion on the procedure for the Guatemalan Government to declare certain administrative contracts and acts harmful to the interests of the State (declaration of *lesividad*) under Guatemalan law. This opinion refers to the Constitutional and legal framework concerning the declaration of *lesividad* and to its consistency with the constitutional principles of the rule of law and due process in Guatemala.

1.2. Personal qualifications.

I have attached to this opinion a copy of my résumé for ease of reference. My basic educational and professional background is the following:

Education:

- Attorney at Law and Notary Public, Rafael Landívar University School of Law; Guatemala City, 1980;
- Master of Laws, Georgetown University; Washington, D.C., 1982;
- Doctor of Laws, Francisco Marroquín University; Guatemala City, 1997;
- Doctor of Laws, Universidad Autónoma de Barcelona; Bellaterra, Catalonia, 2004.

Professional experience:

- Partner of the Guatemala City law firm of Mayora, Mayora, S.C., 1986- ;
- Director of the graduate seminar on Constitutional Economics, Francisco Marroquín University;
- Former Dean of the School of Law, Francisco Marroquín University, Guatemala City 1989-2000;
- Former alternate member of the Board of Directors of the commercial bank *Banco del Quetzal, S.A.*, Guatemala City 2005-2007;
- Former member of the Governing Board (*Directorio*) of the Superintendence of the Tax Administration, Guatemala City 1998-2000;
- Former member of the Board of Directors of the commercial bank *Banco Americano, S.A.*, Guatemala City 1995-1996;
- Former Professor of Constitutional Law, Francisco Marroquín University School of Law, 1989-1993.

2. Documents and materials reviewed.

In order to prepare this opinion, I have consulted, considered, or reviewed, as appropriate:

- The relevant laws and regulations of Guatemala;

- Certain rulings by the Constitutional Court of Guatemala and certain scholarly commentary, both by domestic and foreign law professors on matters related to the object of this opinion;
- Dated February 14, 1997, a copy of the bidding terms (*bases de licitación*) for the negotiation and execution of usufruct agreements, one over railroad related assets and the other over railroad equipment;
- Dated November 25, 1997, a copy of the usufruct agreement over railroad related assets between *Ferrocarriles de Guatemala (FEGUA)* and *Compañía Desarrolladora Ferroviaria, S.A.(CODEFE)*, contained in the public instrument recorded by the Notary of the Government, numbered 402 ("Contract 402");
- Dated January 9, 1998, a copy of the decision of the Receiver in Charge of FEGUA where CODEFE is declared the winner of the public bid to negotiate and enter into a usufruct agreement with FEGUA over its railroad equipment;
- Dated January 29, 1998, a copy of the letter from FEGUA to CODEFE, whereby the former delivers to the latter a copy of the decision of the Receiver in Charge of FEGUA where CODEFE is declared the winner of the public bid to negotiate and enter into a usufruct agreement with FEGUA over its railroad equipment;
- Dated March 23, 1999, a copy of the usufruct agreement over railroad equipment between FEGUA and CODEFE, contained in the public instrument recorded by the Notary Mario Antonio Cornejo Marroquín, numbered 41 ("Contract 41");
- Dated August 28, 2003, a copy of the usufruct agreement over railroad equipment between FEGUA and CODEFE, contained in the public instrument recorded by the Notary Claudia Mariela Marroquín, Luther, numbered 143 ("Contract 143");
- Dated October 6, 2003, a copy of the instrument recorded by the Notary Claudia Mariela Marroquín Luther, numbered 158 ("Contract 158"), for the amendment to the usufruct agreement over railroad equipment between FEGUA and CODEFE, contained in the public instrument recorded by the Notary Mario Antonio Cornejo Marroquín, numbered 143;
- Dated August 1, 2005, a copy of the opinion issued by the Attorney General's Office (*Procuraduría General de la Nación*), on the foundations for the declaration that Contract 41 is harmful to the interests of the state;
- Dated September 12, 2005, a copy of the opinion issued by the Attorney General's Office (*Procuraduría General de la Nación*), on the foundations for the declaration that Contract 143 is harmful to the interests of the state;
- Dated January 13, 2006, a copy of the opinion issued by FEGUA's counsel on the foundations for the declaration that Contract 143 and Contract 158 are harmful to the interests of the state;
- Dated January 13, 2006, a copy of the letter of petition to the President of the Republic by FEGUA to the effect that Contract 143 and Contract 158 be declared harmful to the interests of the state;
- Dated April 3, 2006, a copy of the joint opinion issued by the Division of Public Procurement of the Ministry of Public Finances (*Dirección Normativa de Contrataciones y Adquisiciones del Estado*), the Division of the State Property of the Ministry of Public Finances (*Dirección de Bienes del Estado*), and the General Counsel of the Ministry of Public Finances (*Dirección de Asesoría Jurídica*), on the

foundations for the declaration that Contract 143 and Contract 158 are harmful to the interests of the state;

- Dated April 26, 2006, a copy of the opinion issued by the Office of the Counselor of the President of the Republic (*Cuerpo Consultivo de la Presidencia de la República*), on the foundations for the declaration that Contract 143 and Contract 158 are harmful to the interests of the state;
- Dated August 11, 2006, a copy of the Executive Decree 433-2006 (*Acuerdo Gubernativo 433-2006*) whereby the President of the Republic, together with the Cabinet Ministers, declares the usufruct agreement over railroad equipment between FEGUA and CODEFE, as harmful to the interests of the state and a copy of its "Explanatory Statement".

3. Constitutional framework.

3.1. In the constitutional tradition of The Republic of Guatemala ("Guatemala") the general notion of the "rule of law" has been explicitly affirmed numerous times in numerous ways. Since the promulgation of the "Cadiz Constitution" in 1812ⁱ, the notion that "the Administration" ⁱⁱ must not exercise powers other than those prescribed by law and only within the limits of the law, has been central.

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.

3.3. More specifically related to the matter that constitutes the object of this opinion, Article 221 of the Constitution regulates the Administrative Court (*Tribunal de lo Contencioso Administrativo*). This court is part of the Judiciary and is composed of several chambers (*salas*) each presided over by three judges acting together. Some chambers are competent in matters of administrative law, strictly speaking, others in matters of tax law.

3.4. The Administrative Court mainly exercises the power of judicial review over complaints arising in connection with the actions of the Administrationⁱⁱⁱ, including those concerned with administrative contracts or concessions.

3.5. Neither the Administrative Court, nor the specific kind of procedure (*Recurso de lo Contencioso Administrativo*), through which it takes cognizance of the matters submitted to its decision, are a novelty

in Guatemalan law since their establishment and authority dates back to 1928, with much the same characteristics.

4. Legal framework.

4.1. The Administrative Procedures and Judicial Review Act of 1996^{iv} ("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 (*Recursos administrativos*) 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.

4.4. Although, as mentioned above, the "normal" situation is for a private party to take action under the APRA in the manner briefly explained above, Article 20 allows for the possibility that the Administration may challenge the validity of its own decisions or actions.^v In order for this to happen,

however, it is required that the decision or the action in question be declared harmful or injurious (*lesivo*) to the interests of the state.

5. General background and comparative law regarding the nature and characteristics of the declaration of a harmful (*lesivo*) act.

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 Spain^{vi}, where it is considered to be a peculiarity of Spanish law^{vii}, of an exceptional character, and, today, a questioned legal institution^{viii}.

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 party^{ix}, 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 party^x.

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.^{xi} 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.

5.4. In Mexico, the *procedimiento de lesividad* is considered a special administrative procedure. Through this procedure, the Administration may seek from the competent court that its own actions or decisions be declared void or be revoked where they have been taken in error or to the detriment of the public treasury^{xii}.

5.5. Although Guatemalan law does not define it as such, by usage the declaration by the Administration of one of its own decisions or actions as being harmful to the interests of the state and the filing for an Appeal for Review, have been called *acción de lesividad*^{xiii}. Not only are these proceedings regulated extremely briefly by Guatemalan law, but there are very few instances where these powers have been exercised and no case law (*Doctrina jurisprudencial*) on the matter.

5.6. 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.^{xiv}

6. The lack of a substantive legal foundation for the declaration of *lesividad*.

6.1. Within the continental or civil law tradition, the distinction between "substantive" and "procedural" law basically bears on whether the legal rule grants a right or imposes an obligation to or on any given person, or whether the legal rule determines the ways—usually proceedings—in which such right might be exercised or such obligation might be claimed.

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.

6.3. So, what would be the material right or obligation concerning a declaration of *lesividad*? What would be the constitutional or legal provision that establishes such right? As I have indicated above (at 3.1. and 3.2.), the fundamental principle that the Administration—every public official and every civil servant—must act in accordance with the law and that he is subject to it does create an obligation, and the Administration is accountable and liable in case it would not act legally. But the subject matter of the declaration of *lesividad* is defined by the APRA as "the interests of the state".

6.4. I will deal with the question of whether the obligation to act in accordance with the law, on the one hand, and the notion of the "interests of the state", on the other, are or not the same thing, but for the purpose of this specific point it must be stated clearly that *there is no substantive provision in the Constitution or the law of Guatemala specifically referring to the "interests of the state."* Thus, there does not appear to be, in Guatemalan law, a substantive foundation to the procedural rules set forth in the APRA or Article 17, b) of the Executive Branch Act (*Ley del Organismo Ejecutivo*) regarding a declaration of *lesividad* on account of the "interests of the state".

6.5. Article 1 of the Constitution defines the "common good" as the supreme end of the state; Article 182 of the same declares that the President of the Republic must see to the interests of all the inhabitants of the Republic; Article 4 of the Executive Branch Act echoes Article 1 of the Constitution, declaring "the common good" as the supreme end of the state, and refers to efficacy and efficiency as two of the principles that the administrative functions of the Executive Branch must endeavor to achieve.

6.6. Notwithstanding the generality of all those terms and notions, it is, in my opinion technically impossible to maintain that: (a) they comprise or give concrete meaning to the idea of “the interests of the state”; or (b) the rules that refer to them can be considered as the substantive law that regulates the subject matter of “the interests of the state”.

6.7. Turning now to the rules that explicitly refer to the declaration of *lesividad*, namely Article 17, b) of the Executive Branch Act and 20 of the APRA, it is clear that both are of a procedural, not substantive, nature.

6.8. Article 17, b) of the Executive Branch Act merely states that one of the functions of the Ministers' Cabinet (*el Consejo de Ministros*), is to concur with the President of the Republic to declare the *lesividad* of administrative acts or contracts, for the purpose of filing for an Appeal for Review. Article 20 of the APRA only exempts from certain formal and procedural requirements the filing for an Appeal for Review when the claimant is the Administration, provided a declaration of *lesividad* has been made. This provision further limits to three years the term to make such declaration.

6.9. Therefore, and as it is the case in Spain as well^{xv}, the declaration of *lesividad* is a mere *procedural precondition* in order to bring the matter before the Administrative Court.

7. The basic procedure for a declaration of ‘lesividad’.

7.1. There is no specifically regulated procedure in order to issue a declaration of *lesividad*.^{xvi} Thus, on the basis of the provisions in the APRA and other pieces of legislation that regulate, in general, the administrative procedure, a certain “pattern” has been followed by various Administrations.

7.2. Usually, the administrative agency or entity whose own acts or decisions would be declared harmful or injurious to the interests of the state, requires a legal opinion (*dictamen legal*) from its own legal department (*Asesoría Jurídica*). This opinion is then submitted to the Office of the Attorney General for validation. If it were validated, the interested agency prepares a draft declaration of *lesividad* and submits it, together with the legal opinions, to the Office of the Secretary General of the President. Should this office find that the legal opinions and the draft declaration of the interested agency or entity are founded on valid grounds, the matter is then put to for decision to the President of the Republic and the Ministers' Cabinet. If made, the declaration of *lesividad* is then published in the Official Gazette.

7.3. A declaration of *lesividad* cannot be validly made after three years from the date of the administrative acts or decisions which nullification is sought, and the Appeal for Review must be filed no later than three months from the date of publication of the declaration.

8. The meanings of "harmfulness" ('lesividad') and of the notion of the "interests of the state".

8.1. Legal certainty versus lesividad.

8.1.1. As discussed above, there is no question that the Constitution emphatically protects legal certainty. The Constitutional Court has also clearly remarked the direct connection between legal certainty and the rule of law; the two principles are inseparable.^{xvi}

8.1.2. On the other hand, Article 20 of the APRA does provide a procedure for the Administration to make a declaration that **its own** acts and decisions are harmful or injurious to the interests of the state. This faculty can be exercised during a period of three years after the acts and decisions have been finalized, and it has a concrete end: to obtain a ruling by the Administrative Court that the acts or decisions so declared are null and void and should be revoked.

8.2. No right to be heard and no compensation.

8.2.1. As mentioned above (5.3), there is no provision or established practice under Guatemalan Law by which the affected party is given a fair opportunity to be heard prior to a declaration of *lesividad* even though, as discussed above, the mere declaration of *lesividad* affects the rights and can be very disruptive of the business of the affected party. This constitutes, in and of itself, a violation of the rights to the due process of law and to be heard guaranteed by Article 12 of the Constitution.^{xviii}

8.2.2. It is true that the declaration of *lesividad* leads to the review, by the Administrative Court, of the merits of the declaration. However, the judicial record shows that, out of the fourteen Appeals for Review of *lesividad* declarations that have been pursued during the last three decades or so, there is only one case in which a final decision was ever rendered; nine other cases remain open, and three others have been settled out of court.^{xix} Almost all these cases have dragged on for years.

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

8.2.4. Additionally, the mere concept of "legality" is not coextensive with that of the "interests of the state". Any governmental agency may proceed legally concerning any specific matter, and yet its decision may not be in the best interest of the state. As a matter of fact, Article 166 of the Constitution gives Congress the power to question the Government's ministers on the matters under their jurisdiction. These proceedings (*Interpelación*) may lead to a vote of "lack of confidence" that, according with Article

167 of the Constitution, may be challenged by the President of the Republic on the grounds that the actions of the questioned minister are in line with what is "convenient for the nation" (*de conveniencia nacional*). This challenge may be overridden by a 2/3 majority vote in Congress.

8.2.5. Thus, even if a ruling by the Administrative Court confirms that the Government actions or decisions be declared harmful to the interests of the state: (a) that does not necessarily imply that such actions or decisions were illegal; and (b) the affected party will still suffer a loss that, therefore, will not generate any liability for the state or the acting officials (whose actions or decisions were found to be harmful).

8.3. "Harmfulness" and the "interests of the state".

8.3.1. There are, then, only two options: either the declaration of *lesividad* is unconstitutional because it violates the principles of legal certainty and the rule of law, or the declaration of *lesividad* has to be so narrowly construed and exceptionally applied, so that it will not operate against the said principles.

8.3.2. The problem can also be posed in terms of whether the second option is practicable. Here the vagueness of the notion of "interests of the state" presents an almost insurmountable obstacle, both subjectively and objectively.

8.3.3. Subjectively, the views of any given team of public officials as to those goals or projects that the State should pursue depend on countless facts and circumstances. Administrations change over time and the same Administration may change its views as to any different number of goals and projects. In a period of three years, what might have been considered in the interest of the State at one point in time may be well deemed to be harmful at a later point due to a variety of factors.

8.3.4. And, moving forward to the objective obstacles: by what criteria should any specific situation be deemed to be harmful? What is more important from the perspective of the interests of the state: short term financial gains; long term economic stability; political factors...?

8.3.5. One answer to those questions might be that, since there are no specified legal criteria to be followed, it is the opinion of the several public officials who intervene in the process up to the President and his Cabinet that should prevail. But this would be definitely contrary to the notion of legal certainty and that of the rule of law. The certainty of the rights that originate for any person derived from an administrative act or decision cannot possibly depend on the subjective opinion of any public official, even if that were the President and his Cabinet.

8.3.6. In many cases, as in the present, the holders of a license or a concession, or those who have entered into an administrative contract with the State or its agencies or other public entities, undertake substantial financial burdens to pursue their projects. Their returns on their investments depend largely

on the certainty of their rights and, from that perspective, it is certainly in the best interest of the State, over the long run, that those rights be honored and respected.

8.3.7. By way of synthesis, it is my opinion that the Guatemalan legal system does not provide enough constitutional, legal, or jurisprudential elements in order to construe a sufficiently narrow and concrete meaning to the notions of "harmfulness" and of "interests of the state", that may reasonably lead to expect that the constitutional principles of legal certainty and of the rule of law would be systematically respected.

9. Conclusion.

9.1. My comments and observations above should explain why it has not been necessary to consider at any length the specific details of the several administrative actions, proceedings, and decisions that took place leading to the execution of Contract 143, as amended by Contract 158, both between FEGUA and CODEFE. Nor is it required to examine in any depth the several decisions, opinions and proceedings that led to the declaration of *lesividad* of the said contracts.

9.2. Since it is my conclusion that there are insurmountable obstacles at a general or systematic level, that prevent the power to issue a declaration of *lesividad* from being made consistent with and subject to the constitutional principles of legality, the rule of law, and the due process of law, it is unnecessary to look into this —or any particular case— in order to determine whether the Administration has acted in accordance with the Constitution. Even if it could be argued that it has acted in accordance with the APRA and the Executive Branch Act, by the express mandate of Articles 44 and 175 of the Constitution, the Administration must act "constitutionally" first.

9.3. However, it is important to point to the fact that, in general, the legal opinions and the reasons given by the Administration in this instance, as the foundation to declare Contracts 143 and 158 harmful to the interests of the state, do exemplify the nature of the insurmountable obstacles I have alluded to.

9.4. Literally none of those legal opinions or reasons given by the Administration show how the interests of the state have been harmed by Contracts 143 and 158. The document called "Explanatory Statement", which bears the seal of the office of the President of the Republic, and synthesizes the reasons that justified the declaration of *lesividad*, contains five allegations.

9.5. The first allegation is that it is contrary to Article 19 of the Public Procurement Act (*Ley de Contrataciones del Estado*), to award the right to negotiate and execute an agreement with FEGUA. The second allegation is that the possibility that, at a later stage, items additional to the inventory of goods given in usufruct may be covered by Contract 143, is contrary to Article 90 of the Public Procurement Act. The third allegation is that there is a contradiction between one of the clauses of Contract 143 and one of the provisions in the Bidding Terms. The fourth allegation is that the parties, FEGUA and CODEFE,

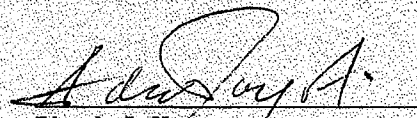
used the Bidding Terms that originated Contract 41 in order to execute Contracts 143 and 158, but that new bidding terms should have been prepared for this purpose. The fifth and final allegation is that the Receiver (*Interventor*) of FEGUA did not abide by the Public Procurement Act, because this Act did not exempt him from complying with the laws of the Republic.

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.

9.7. Again, the present case is a clear example of the nature and complexity of the obstacles that prevent the declaration of *lesividad* from operating consistently with the constitutional principles of legal certainty and of the rule of law.

9.8. It must be mentioned in closing that, to my knowledge, the Constitutional Court has not yet been asked to rule on the unconstitutionality of the legal provisions that grant the power to make a declaration of *lesividad*. Thus, I do not maintain here that the power is unconstitutional, but that on careful examination it should be declared unconstitutional.

Respectfully submitted,


Eduardo A. Mayora

June 18th, 2009

- ⁱ Generally considered the first written constitution of what today is Guatemala.
- ⁱⁱ Meaning mostly the Executive Branch of Government and the administrative bodies of local governments (the municipalities) as well as those of other state entities and governmental agencies.
- ⁱⁱⁱ Meaning mostly the Executive Branch of Government and the administrative bodies of local governments (the municipalities) as well as those of other state entities and governmental agencies.
- ^{iv} Ley de lo Contencioso Administrativo y sus reformas, Decreto 119-96 del Congreso.
- ^v The word *actos*, used in Article 20 is technically understood to comprise, *inter alia*, the act of entering into a contract.

^{vi} **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 dispuesto 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 imponga la naturaleza del término o plazo."

^{vii} **José Luis Albácar López, Magistrado del TS. LEY REGULADORA DE LA JURISDICCIÓN CONTENCIOSO-ADMINISTRATIVA, Doctrina y Jurisprudencia. Jurisprudencia.**

(Doctrina) "Como es bien sabido, esta institución (la lesividad), que constituye una *peculiaridad* del derecho administrativo español, equivale materialmente a que una Administración determinada vuelva contra sus propios actos, si bien lo hace rodeando la conducta de toda clase de garantías jurídicas, especialmente la principal, esto es, la de rogar al Tribunal de Justicia que confirme la declaración de nulidad de su propio acto." (Pp. 351-352)

^{viii} **Jose Luis Navarro Perez. LAS PARTES EN EL PROCESO CONTENCIOSO-ADMINISTRATIVO (Estudio sistemático de los arts. 18 a 24 Ley 29/1998, de 13 julio).**

"X.- La legitimación activa en el proceso de lesividad.

La doctrina ha señalado como una de las peculiaridades del Derecho procesal administrativo español la existencia de un proceso especial en el que adopta la posición de demandante la misma entidad administrativa que dictó el acto que constituye el objeto de la pretensión. El nombre con que tradicionalmente ha sido calificado este 'recurso Contencioso-Administrativo' es el de 'lesividad'. No se da, por tanto, proceso de lesividad siempre que una entidad pública, una de las Administraciones públicas (tal y como se enumeran en el art. 1º, 2, LRJCA), adopta la posición de demandante, sino solo cuando pretende la anulación del propio acto.

El proceso de lesividad surge — empleando el texto de la Ley — cuando la propia Administración autora de algún acto pretendiere demandar su anulación ante la Jurisdicción Contencioso-Administrativa. (art. 43 LRJCA).

Se trata de un proceso, porque en él interviene el órgano jurisdiccional como tal, ejerciendo funciones jurisdiccionales.

Es un proceso *especial*. La aparición de una entidad pública como demandante frente a uno de sus propios actos supone derogaciones importantes de las normas procesales comunes. El proceso de lesividad constituye, por un lado, una

excepción a los principios característicos del régimen administrativo —dentro del cual la Administración goza del privilegio de actuar por sí las pretensiones-, y, por otra, una *excepción* a otro principio tradicional del Derecho administrativo —la *irrevocabilidad* de los actos administrativos declarativos de derechos-. Nada tiene de extraño, que desde perspectivas bastante distintas, se haya abogado por su *supresión*.”

^{ix} Ibid, supra at viii

^x José María Álvarez-Cienfuegos Suárez, Juan José González Rivas, Gloria Sancho Mayo. **ANÁLISIS TEÓRICO Y JURISPRUDENCIAL DE LA LEY DE LA JURISDICCIÓN CONTENCIOSO-ADMINISTRATIVA. Ley 29/1998, de 13 de julio. Segunda Edición.**

“La declaración de lesividad, como **presupuesto objetivo** para que la propia Administración autora del acto lo impugne ante la Jurisdicción Contencioso-Administrativa, venía regulada en el artículo 56 de la Ley derogada. Dicho precepto tenía una regulación más detallada del contenido, motivo y momento para la declaración previa de lesividad.

Hoy día, el artículo 43, ciertamente lacónico, debe ser completado con el contenido del artículo 103 de la Ley 30/1992, de 26 noviembre (LRJ-PAC) que en su apartado segundo precisaba que: ‘En los demás casos —se está refiriendo a la revisión de oficio de los actos anulables—, la anulación de los actos declarativos de derechos requerirá la declaración previa de lesividad para el interés público y la ulterior impugnación ante el orden jurisdiccional contencioso-administrativo’. Esta exigencia de la previa declaración de lesividad es mantenida por el Tribunal Supremo en su Sentencia de 30 diciembre 1996 (RJ 1996, 9346) y en la nueva redacción del artículo 103.1 por Ley 4/1999, de 13 enero, señala que: ‘Las Administraciones públicas podrán declarar lesivos para el interés público los actos favorables para los interesados que sean anulables conforme a lo dispuesto en el artículo 63 de esta Ley, a fin de proceder a su ulterior impugnación ante el orden jurisdiccional contencioso-administrativo’.

(...)

La importancia de la modificación por Ley 4/1999, como presupuesto de la correcta y posterior impugnación de los actos administrativos ante la jurisdicción contencioso-administrativa por la propia Administración autora del acto, aconseja resaltar los aspectos más relevantes de esta reforma: a) Se reconoce a las Administraciones Públicas la facultad de declarar lesivos para el interés público los actos favorables para los interesados que sean anulables conforme al artículo 63 de la Ley 30/1992, a fin de proceder a su ulterior impugnación ante la jurisdicción contencioso-administrativa; b) La declaración de lesividad no podrá adoptarse una vez transcurridos cuatro años desde que se dictó el acto administrativo, **exigiéndose la previa audiencia** de cuantos aparezcan como interesados en el mismo; c) Transcurridos tres meses desde la iniciación del procedimiento, sin que se hubiese declarado la lesividad se producirá la caducidad del mismo; d) Si el acto proviniera de la Administración General del Estado o de las Comunidades Autónomas, la declaración de lesividad se adoptará por el órgano de cada Administración competente en la materia, y e) Si el acto proviniera de las Entidades que integran la Administración Local, la declaración de lesividad se adoptará por el Pleno de la Corporación o, en defecto de éste, por el órgano colegiado superior de la Entidad.

Sobre esta materia, la STS de 23 de abril de 2002, de la Sala 3ª, Sección 7ª, recuerda que **la declaración de lesividad**, regulada anteriormente en el artículo 110 de la Ley de Procedimiento Administrativo y actualmente en el artículo 103 de la Ley 30/1992 (modificado por la Ley 4/1999) **constituye un mero presupuesto procesal** para la interposición del recurso contencioso-administrativo por parte de la Administración contra sus propios actos favorables o declarativos de derechos, siendo en el proceso que se promueva con base en esa declaración de lesividad donde se dilucidará **si efectivamente concurre causa de anulabilidad** en el acto declarado lesivo. (p. 197-199)

^{xi} See endnote “x” supra.

^{xii} Andrés Serra Rojas Beltri. **DERECHO ADMINISTRATIVO, Segundo Curso. Doctrina, Legislación y Jurisprudencia. Vigésima Edición, Corregida y Aumentada. México.**

“El procedimiento de lesividad en la doctrina administrativa es un procedimiento administrativo especial, iniciado por la Administración pública para revocar o nulificar un acto administrativo dictado por la misma autoridad, por error o que perjudique al Fisco.

En términos generales, el acto debe provenir de la misma autoridad administrativa y debe fundarse en serias razones legales que demanden se deje inoperante el acto reclamado.

Toda esta doctrina se enlaza en nuestro derecho con los capítulos relativos a la nulidad y revocación de los actos administrativos, porque aún no disponemos de un tribunal administrativo de plena jurisdicción.”

xiii. **Ballbé y Franch, Editores. MANUAL DE DERECHO ADMINISTRATIVO. Una perspectiva desde los ordenamientos jurídicos de Guatemala y España:**

a) *Concepto de lesividad.* Entendemos por lesivo: lo que causa daño, lesión, lo que perjudica. CABANELLAS define *la acción de lesividad* como la cualidad que hace anulable por los tribunales de la jurisdicción contencioso-administrativa, un acto de la Administración que lesiona los intereses públicos de orden económico o de otra naturaleza. CASTILLO, al referirse a la acción de lesividad, indica que es el derecho de petición que ejercita la propia Administración con el objeto de revocar una resolución administrativa que no puede revocarse de oficio.

En Guatemala, por costumbre se ha utilizado la expresión “*acción de lesividad*”, aunque la Ley solamente habla de acto o resolución que haya sido declarado lesivo. No obstante, y a pesar de su importancia, es regulada con notoria deficiencia en la LCA y, de hecho, llama la atención que solamente dos artículos hagan referencia a ella. Por un lado, el art. 20 LCA, cuyo último párrafo establece que si el proceso contencioso-administrativo es planteado por la Administración por sus actos o resoluciones, no será necesario que concurren los requisitos siguientes: a) que la resolución haya causado estado y b) que vulnere un derecho del demandante, reconocido por una Ley, Reglamento o resolución anterior. Se establece, además, en esta norma, que el acto o resolución lesivo para los intereses del Estado debe así ser declarado en acuerdo gubernativo emitido por el Presidente de la República en Consejo de Ministros. Dicha declaración sólo podrá hacerse dentro de los tres años siguientes a la fecha de la resolución o acto que la origina. Por su parte, el art. 23 LCA hace referencia al plazo para iniciar el proceso contencioso-administrativo, indicando que es de tres meses contados a partir de la fecha de la publicación del acuerdo gubernativo que declaró lesivo el acto o resolución.”

xiv. The Constitutional Court has made, among others, the following remarks:

“...El principio de **seguridad jurídica** que consagra el artículo 2° de la Constitución, consiste en la confianza que tiene el ciudadano, **dentro de un Estado de Derecho**, hacia el ordenamiento jurídico; es decir, hacia el conjunto de leyes que garantizan su seguridad, y demanda que dicha legislación sea coherente e inteligible; en tal virtud, las autoridades en el ejercicio de sus facultades legales, deben actuar observando dicho principio, respetando las leyes vigentes, principalmente la ley fundamental...” Gaceta N° 61, expediente N° 1258-00, página N° 13, sentencia: 10-07-01.

“... debe señalarse que el principio de **seguridad jurídica** es manifestación **fundamental** del Estado Constitucional de Derecho, ya que mediante su observancia se concreta la estabilidad del cuerpo social; la certeza e inmutabilidad de los fallos son manifestaciones del principio aludido. ...” Gaceta N° 82, expediente N° 883-2006, sentencia: 31-10-06.

xv. See endnote “x” supra.

xvi. See **MANUAL DE DERECHO ADMINISTRATIVO. Una perspectiva desde los ordenamientos jurídicos de Guatemala y España:**

“Procedimiento de lesividad. Como hemos indicado, la regulación de la lesividad de actos o resoluciones es deficiente en nuestra legislación, no hay un procedimiento administrativo establecido...” (P.275)

xvii. See endnote “xiii” above.

xviii. Although Article 12 refers to the right to the due process of law in the context of judicial proceedings, the Constitutional Court has declared that it extends to any kind of proceeding where the rights of any person may be affected, in the following terms:

“...Los derechos de audiencia y al debido proceso reconocidos en el artículo 12 de la ley fundamental, al provenir de una norma general prevista en la parte dogmática, deben tener plena observancia en todo

procedimiento en que se sancione, condene o afecten derechos de una persona...” Sentencia del 06/07/00, Expediente No. 272, Gaceta No. 57.

^{xix} See chart below.

No.	Case	Date Filed	Plaintiff	Defendant(s)	Current Status
1	140-1991	11/15/1991	State of Guatemala	<i>Fundación para el Ecodesarrollo y Conservación (FUNDAECO) and Instituto Nacional de Transformación Agraria (INTA)</i>	Pending Final Judgment
2	168-1995	11/07/1995	State of Guatemala	<i>Ferrocarriles de Guatemala (FEGUA) and Poliproducos del Pacífico, S.A.</i>	Judgment for the Plaintiff confirmed administrative lesion
3	186-2000	09/12/2000	State of Guatemala	<i>Empresa Guatemalteca de Telecomunicaciones (GUATEL)</i>	Out-of-Court Settlement
4	271-2000	12/05/2000	State of Guatemala	<i>Instituto de Comercialización Agrícola (INDECA); Silo Central, S.A. and Grupo Thronos, S.A.</i>	Dismissed for Extinguished Action
5	206-2002	09/26/2002	State of Guatemala	<i>Mayoreo de Computación, S.A. (MAYCOM)</i>	Out-of-Court Settlement
6	126-2003	05/19/2003	State of Guatemala	<i>Concreto Preesforzado de Centroamérica, S.A. (COPRECA)</i>	Out-of-Court Settlement Pending
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>	Judgment Hearing Pending
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>	Hearings Pending
12	360-2006	11/09/2006	State of Guatemala	<i>Bodegas Fiscales de Carga, S.A.</i>	Hearings Pending

13	361-2006	11/09/2006	State of Guatemala	<i>Bodegas Fiscales de Carga, S.A.</i>	Hearings Pending
14	389-2006	11/14/2006	State of Guatemala	<i>Ferrocarriles de Guatemala (FEGUA) and Compañía Desarrolladora Ferroviaria, S.A. (COFEDE)</i>	Hearings Pending

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Education:

2004 Doctor in Pluralist, Public and Private Law, Universidad Autonoma de Barcelona, Spain July 2004.
2004 Master in Pluralist, Public and Private Law, Universidad Autónoma de Barcelona, Spain July 2004.
1997 Doctor of Laws, Universidad Francisco Marroquin, Guatemala November, 1997.
1992 Diplomado en análisis económico (Economic Analysis Diploma), Universidad Francisco Marroquin, Guatemala May 1992.
1991 Diplomado en fundamentos económicos (Economic Foundations Diploma), Universidad Francisco Marroquin, Guatemala December 1991.
1982 Master of Laws (Common Law Studies), Georgetown University, Washington, DC.
1980 Attorney at Law and Notary Public, Universidad Rafael Landivar, Guatemala.
1978 Certificate of achievement of the III degree of the "French Language and Civilization Studies", Alliance Française, Paris.
1974 Certificate of attendance to the "English Language, Advanced Level", Angloschool, London.
1974 High school diploma, Liceo Javier, Guatemala.

Work experience:

1998 - 01/2000 Member of the Board of the Superintendence of the Tax Administration of Guatemala.
1996/1998 and 02/2000.... Member of the Editorial Board and columnist of the daily newspaper "Siglo Veintiuno"
1989 - 02/2000 Dean of the School of Law, Francisco Marroquin University.
1982 -- Mayora & Mayora, S.C. (Attorneys at Law), Senior Partner.
1980 -- 1981 Mayora & Mayora (Attorneys at Law), Junior Partner.
1976 -- 1979 Mayora & Mayora (Attorneys at Law), paralegal.

Affiliations and organizations:

1997 - Member of the "Mont Pelerin Society"; presently member of the Board of Directors.
1996 - President of the "Privatization Committee" of the Guatemalan Bar Association.
1996 - Guatemalan representative of the "Association Henri Capitant des Amis de la Culture Juridique Francaise".
1995 - 1996 Member of the Board of Directors of "Banco Americano" (commercial bank).
1994 - Member of "The Philadelphia Society"; Second Vice President, (2002-2003) .
1992 - Member of the "Asociación de Amigos del País" and its "Fundación para la Cultura.
1989 - Member of the Guatemala Country Club.
1988 - 1996 Member of the Board of Directors of "Financiera de Inversión, S.A." (Investment bank).
1988 - Member of the Board of Trustees, Francisco Marroquin University.

- 1987 - Legal adviser to the Board of Directors of "Bolsa de Valores Nacional, S.A." (Securities exchange).
- 1980 - Member of the Guatemalan Bar Association.
- 1979 - Barrister Member of the legal fraternity *Phi Delta Phi*, Landivar Inn.
- 1985 - 1986 Vice President of the Ethics Board of the Guatemalan Bar Association.
- 1978 - 1979 Member of the Rotaract Club (Past-president).
- 1977 - 1978 Secretary of the Law Students Association
- 1988 - 1994 Member of the Board of Directors of "Seguros Alianza, S.A. (insurance company).
- 1983 - 1990 Member of the Rotary Club (Past-president).

Teaching experience:

- 2002 - 2003 Associate Professor in the University of Droit, d'Economie et des Sciences D'Aix-Marseille. Paris France.
- 1998 - Director of the Seminar on Law and Economics for the program of Doctor of Jurisprudence, Francisco Marroquin University.
- 1995 - 1996 Visiting Professor in the University of Montpellier , Paris, France.
- 1994 - 1999 Professor of Jurisprudence, Francisco Marroquin University, School of Law.
- 1993 - 1994 Professor of Securities Law, Francisco Marroquin University, School of Law.
- 1988 - 1994 Professor of Constitutional Law, Francisco Marroquin University, School of Law.
- 1985 Professor of Notarial Law (summer course) Rafael Landivar University.
- 1984 - 1987 Professor of Legal Foundations, Francisco Marroquin University, School of Economics.
- 1984 - 1986 Professor of Business Law, Francisco Marroquin University, School of Economics.
- 1984 Assistant Professor, Notarial Law, Rafael Landivar University, School of Law.

Teaching experience abroad:

- Visiting Professor in the University of Pantheon-Assas (Paris II), France, October 2005
- Certified Lecturer (Certificado de Ministrante) of the extension course "Direito & Economia para Magistrados", by Instituto Liberdade -RS and the Universidade do Vale do Rio dos Sinos. Porto Alegre, Brasil. 2004.
- Certified Lecturer (Certificado de Ministrante) of the extension course "Law and Economics for Judges", by the Universidade do Vale do Rio dos Sinos, San Leopoldo, Río Grande do Sul, Brazil, Abril, 2003.
- Certified Lecturer (Certificado de Ministrante) of the extension course "Law and Economics for Judges", by the Universidade do Vale do Rio dos Sinos, San Leopoldo, Río Grande do Sul, Brazil, November, 2001.
- Certified Lecturer (Certificado de Ministrante) of the extension course "Law and Economics for Judges" by Instituto Liberal *RS, Porto Alegre Brasil, May, 2000.
- Certified Lecturer (Certificado de Ministrante) of the extension course "Law and Economics for Judges", by the Universidade do Vale do Rio dos Sinos, San Leopoldo, Río Grande do Sul, Brazil, 8 - 11 July, 1999.
- Lecturer at the "Université d'Été de la Nouvelle Economie", program in Aix en Provence, France September 1999.
- Lecturer at the seminars on Liberalism organized by the Institute of Economic Studies Europe at Lauhemburg, Germany, and Oxford, England; July 1998.
- Certified Lecturer (Certificado de Ministrante) of the extension course "Law and Economics for Judges", by the Universidade do Vale do Rio dos Sinos, San Leopoldo, Río Grande do Sul, Brazil, June, 1998.

- Certified Lecturer (Certificado de Ministrante) of the extension course “Law and Economics for Judges”, by the Universidade do Vale do Rio dos Sinos, San Leopoldo, Río Grande do Sul, Brazil, June 1997.
- Lecturer at the conference “The Reception of Centesimus Annus”, sponsored by the Ethics and Public Policy Center, New York City, February 1997.
- Certified Lecturer (Certificado de Ministrante) of the extension course “Law and Economics for Judges”, by the Universidade do Vale do Rio dos Sinos, San Leopoldo, Río Grande do Sul, Brazil, September 1996.
- Visiting Professor at the Université de Montpellier School of Law, Montpellier, France 1995, lecturing on Law and Economics.
- Certified Lecturer (Certificado de Ministrante) of the extension course “Law and Economics for Judges” by the Universidade do Vale do Rio dos Sinos, Sao Leopoldo, Río Grande do Sul, Brazil 1995.
- Visiting Professor at the Pontificia Universidade Católica de Porto Alegre, Río Grande do Sul, Brazil, 1994, teaching the course of Law and Economics at the graduate level.

Conferences: Various short conferences on topics related with Constitutional Law, Law and Economics, Jurisprudence and Securities Law in Guatemala, Argentina, Brazil, France, Mexico, Venezuela, Peru, Ecuador, Estados Unidos de America and Panama.

Works and publications:

- 2005 “EL IMPERIO DEL DERECHO Y EL CONTENCIOSO ADMINISTRATIVO EN EL DERECHO GUATEMALTECO Y COMPARADO”, book published by the Editorial Artemis Edinter, S.A., Guatemala, (ISBN 84-89452-87-3).
- 2004 ¿Why doesn't the Capitals Market take off?, published by the Institute for the Promotion of Social Responsibility.
- 2004 “The Cafta, an overview”. Paper delivered at the Regional Meeting of the International Bar Association, held in Panama, March 2004.
- 2004 “The Cafta, an overview”. Article prepared for the Bomchil Group Newsletter, volume 15, January 2004, Buenos Aires, Argentina.
- 2001 “Mergers and acquisitions in Guatemalan legislation” published by the *Latin Lawyer, magazine* V. Nov/Dec. 2001, Londres.
- 2001 “In honor and memory of Frederic Bastiat's the Law” published by the *Journal des Economistes et des Etudes Humaines*, París.
- 1998 Doctoral Thesis: “IUSNATURALISMO Y ORDENES ESPONTANEOS”, published by the Universidad Francisco Marroquin, Editorial de Amigos del País, Guatemala.
- 1997 “TEORIA CONSTITUCIONAL, Para la sociedad libre” Book published by the *Fundación República*, Buenos Aires, Argentina [ISBN 987-95328-2-1].
- 1997 “The Capital Markets”, lecture given for the *Guatemalan Notarial Institute*, and edited and published by them.
- 1996 “Droit privé, droit public, et liberté”, *Revue de la recherche juridique droit prospectif* (1996-1 N° XXI - 64) *Faculté de droit et de science politique d'Aix-Marseille*.
- 1996 “Derecho privado, derecho público y libertad”, published by the *Revista del Colegio de Abogados y Notarios de Guatemala*, January-June 1996, N° 43.
- 1995 “La Bolsa de Valores, su regulación jurídica y otros aspectos”, published by the Guatemalan Bar Association and the Francisco Marroquin University Law Journal.
- 1995 “Algunos comentarios sobre la Teoría Pura del Derecho de Hans Kelsen”, published by the *Revista de la Facultad de Derecho de la Universidad Francisco Marroquin* (Law Faculty Journal).
- 1995 “Derecho Privado, Derecho Público y Libertad”, published by the *Revista de la Facultad de Derecho de la Universidad Francisco Marroquin* (Law Faculty Journal).

- 1994 "El Poder", published by the *Revista de la Facultad de Derecho de la Universidad Francisco Marroquin* (Law Faculty Journal).
- 1993 "El drama de la arena movediza", published by the *Revista de la Facultad de Derecho de la Universidad Francisco Marroquin* (Law Faculty Journal). This essay was awarded the first price of the "Charles Stillman" annual academic contest, sponsored by Universidad Francisco Marroquin.
- 1993 "La cultura de los privilegios", published by the *Revista de la Facultad de Derecho de la Universidad Francisco Marroquin* (Law Faculty Journal).
- 1992 "El tamaño del Estado", published by the *Revista de la Facultad de Derecho de la Universidad Francisco Marroquin*.
- 1992 "Las instituciones del marco constitucional para una economía de mercado", published by the *Revista de la Facultad de Derecho de la Universidad Francisco Marroquin*. This article was awarded the first price of the "Charles Stillman" academic contest, sponsored by Universidad Francisco Marroquin.
- 1992 "Cómo pasar a una economía de mercado democráticamente", jointly with Manuel Ayau C., part of the collection "El desafío neoliberal", edited by Barry B. Levine, Grupo Editorial Norma.
- 1990 "The qualifying function of the Stock Market" published by the *Guatemalan Notarial Institute*.
- 1990 "The deposit in Bonded Warehouses", published by de *Guatemalan Notarial Institute*.
- 1990 "The Rule of Law and the concept of Law", published by the *Guatemalan Bar Association Journal*, the *Universidad Autónoma de Centroamérica of Costa Rica "Acta Académica"* magazine, and the *Francisco Marroquin University Law Journal*.
- 1990 "Common Law, Civil Law and Freedom" (paper presented to the Mont Pelerin Society's regional meeting, Antigua 1990).
- 1986 "Comparative Analysis of Notarial Law", published by Rafael Landivar University.
- 1981 "The Sources of Law in the Common and Civil Law Systems" (term paper).
- 1980 "The License Agreement" (graduation thesis published by Rafael Landivar University).

Seminars and other activities:

- "Liberty and Rule of Law" seminar sponsored by Liberty Fund Inc., Bariloche, Río Negro, Argentina, December, 2005.
- "Liberty and Property in the 21st Century" Regional Meeting of the Mont Pelerin Society, Reykjavik, Iceland, August 2005.
- "Liberty and Market in the Future of the Mont Pelerin Society" seminar sponsored by Liberty Fund, Reykjavik, Iceland 2005.
- "Taller de Telecomunicaciones, ¿Convergencia o Competencia? La administración del espectro eléctrico en Guatemala y Latinoamérica". Speaker. Seminar sponsored by the Universidad Francisco Marroquín, June 2005
- "The Legal Environment in Guatemala: Consequences and possible Improvements" Panelist at the seminar sponsored by Centro para el Análisis de las Decisiones Públicas - CADEP, Guatemala, March 2005.
- "The Rule of Law and Liberty" seminar sponsored by Liberty Fund Inc., New Orleans, January 2005.
- "Code Civil. Colloque du Bicentenaire" sponsored by Cour de Cassation, Ordre Des Avocats Au Conseil D'Etat et a la cour de Cassation, Association Henri Capitant Des Amis de la Culture Juridique Française. Paris, Marzo 2004.
- "Freedom, Change, and the Conservative Mind" (Conference Director) seminar sponsored by Liberty Fund Inc., Antigua Guatemala, October 2003.
- "Freedom, Entrepreneurship and Prosperity", The Mont Pélerin Society Regional Meeting (guest and speaker), Chattanooga, Tennessee, USA, September 2003.
- "Hope, Imagination and Liberty in *Don Quixote*", seminar sponsored by Liberty Fund Inc., Antigua Guatemala, January 2003.

- "Spontaneous Order and Institutional Development" seminar sponsored by Liberty Fund Inc., London England, October 2002.
- "John Stuart Mill and John Henry Newman on Liberty and Liberal Education" seminar sponsored by Liberty Fund Inc., Cuernavaca, Mexico, January 2002.
- "A New Century: Challenges for an Open Society" (guest and speaker), Santiago de Chile, November 2000.
- "Freedom, Development, and Legal Institutions in Latin America", Punta del Este Uruguay, October 2000.
- "Liberty, Morality, Reason and Social Change", Angra dos Reis, Brasil, August 2000.
- "Polycentric Law, Liberty and Justice", seminar sponsored by Liberty Fund Inc., Tallahassee, Fl. March 16-19, 2000.
- "Neoliberal Policies for Development: Analysis and Criticism", seminar sponsored by Yale Law School and Universidade de Sao Paulo Brasil, March 13-14, 2000.
- "The Scottish Civilian Tradition and Liberty", Guatemala City, February 3-5, 2000.
- "A Etica de Uma Sociedade Livre", seminar sponsored by Liberty Fund Inc., Rio de Janeiro, Brasil, Novembre 1999.
- "Liberty and Technology", seminar sponsored by Liberty Fund Inc., Guatemala City, November 1998.
- "Liberty and Law", Gramado, Brazil, September 1998.
- "Liberty, Law, and Justice", seminar sponsored by Liberty Fund Inc., Antigua, Guatemala, January 1998.
- "Liberty and Communitarianism", seminar sponsored by Liberty Fund Inc., Cuernavaca, México, October 1997.
- "Liberty in American State Constitutions", seminar sponsored by Liberty Fund Inc., San Antonio, Texas 1996.
- "Ideas and Change in the Modern World", The Mont Pelerin Society General Meeting, Vienna, Austria, 1996.
- "EC Competition Law", Horsley, England, organized by "The Study Group", July 14-19, 1996.
- "The civilization of Liberty in the thought of F.A. Hayek", seminar sponsored by Liberty Fund Inc., Toronto, 1996.
- "Liberty and Responsibility in the recent Teachings of the Roman Catholic Church", seminar sponsored Liberty Fund Inc., Antigua Guatemala, 1996.
- "This Hemisphere of Liberty", The Mont Pelerin Society regional meeting, Cancun, Mexico 1996 (guest and commentator).
- "Liberty and Responsibility in the Thought of Oliver Wendell Holmes", seminar sponsored by Liberty Fund Inc., Savannah, Georgia, 1995.
- "The Legacy of Hayek", Mont Pelerin Society meeting, Cannes, France 1994 (guest and commentator).
- "Constitutional Interpretation, Liberty, and the Rule of Law", seminar sponsored by Liberty Fund Inc., Panajachel, Guatemala 1994.
- "Constitutionalism in the Americas", seminar sponsored by Liberty Fund Inc., San Antonio, Texas 1993.
- The Mont Pelerin Society 1993 Regional Meeting, Rio de Janeiro, Brazil (guest and alternate commentator).
- "Liberty, Justice and the Limits of Knowledge", seminar sponsored by Liberty Fund Inc., Teresópolis, Brazil 1993.
- "Constitutionalism in the Americas", seminar sponsored by Liberty Fund Inc., San Antonio, Texas 1992.
- "Liberty and Constitutionalism", seminar sponsored by Liberty Fund, Teresópolis, Brazil 1992.
- "Raíces del liberalismo en pensadores latinoamericanos", seminar sponsored by Liberty Fund Inc., Antigua Guatemala 1992.
- "The Western Legal Tradition", seminar sponsored by "Liberty Fund Inc." Panama City Fla. 1991.
- The Mont Pelerin Society 1990 regional meeting, Antigua Guatemala (guest and speaker).

- "European Corporate Legal Advisers Seminar", organized by "Euroconference", Brussels, October 1990.
- "Freedom and Constitutionalism", seminar sponsored by "Liberty Fund Inc." Crystal City Va., 1989.
- "Liberty and the Rule of Law", seminar sponsored by "Liberty Fund Inc.", Antigua Guatemala, 1989.
- "The English Legal System", seminar organized by "Euroconference", Robinson College, Cambridge, England 1988.
- "The Ratifying Conventions", seminar sponsored by "Liberty Fund Inc.", Savannah, Georgia 1988.
- "John Locke, Two Treatises of Civil Government", seminar sponsored by "Liberty Fund Inc.", Indianapolis, 1988

Languages:

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