

The first ever arbitration proceedings under DR-CAFTA were launched on 7 March, against the government of Guatemala. A second case was announced two weeks later, against the Dominican Republic.

US rail management company Railroad Development Corporation, RDC, has announced an intention to take Guatemala to arbitration, accusing the government of indirect expropriation.

"This is the first case to test the new generation of free trade agreements, which also includes CAFTA and the Chile-US FTA," says Roberto Aguirre Luzi of King & Spalding LLP.

Two weeks later, a second case was launched under DR-CAFTA—by the TCW group against the Dominican Republic, related to the company's interests in the electricity sector. The company is claiming damages of US\$680 million.

Juan Pablo Carrasco de Groote of Díaz-Durán & Asociados—Central-Law, RDC's local counsel, sees these two cases leading to others. "The investment chapter of DR-CAFTA is quick and accessible, unlike agreements such as NAFTA, where claimants must exhaust all local procedures before turning to international treaties," he comments.

On 13 March, RDC filed a 'notice of intent' to submit a claim with Guatemala's Ministry of Economy, on behalf of itself and Guatemalan affiliate Ferrovias Guatemala. The company believes a decree issued by the government to de-privatise the rail industry is having a chilling effect on Ferrovias Guatemala's operations, and is contrary to the protection afforded to investors by the treaty.

Guatemala ratified the free trade treaty in 2005. "The difference now is that the government needs to realise that it will now be scrutinised by countries other than Guatemala," says Regina Vargo of Greenberg Traurig LLP, who is advising RDC. Vargo was the chief US negotiator in the drafting process of the treaty.

Carrasco of Díaz-Durán & Asociados—Central-Law agrees with Vargo: "In the short term this doesn't look good for Guatemala, but long term I think it will be a good thing—investors will see that they are protected here, unlike before. Guatemala needs to learn that by ratifying the treaty it is signing up to higher standards."

It was down to Carrasco to appoint international counsel. One of the reasons he chose Greenberg Traurig LLP was because of Vargo's participation in negotiating the treaty.

Ferrovias Guatemala won a concession to operate rolling stock in 1997 when the country's rail industry was privatised. But in 2006, the Guatemalan government issued a presidential decree claiming the privatisation is harmful to the state and declaring its intention to take back the rolling stock. National courts in Guatemala are considering the legality of the decree's aims.

But regardless of the court's ruling, RDC considers the decree to be in breach of the treaty because Ferrovias Guatemala has suffered losses since it was announced. The company believes that since the decree, it has been harder to obtain credit, freight transporters are reluctant to do business with it, and that revenue generation from railway-related business such as leasing of station facilities is impossible.

"The government wants to take possession of the rolling stock without paying RDC proper compensation. Under DR-CAFTA, expropriation is wrongful unless it is done for public purpose, if it pays prompt and fair compensation, is done in a non-discriminatory manner and provides for due purpose and minimum standard of treatment. We think Guatemala is guilty of indirect expropriation and violates the treaty's terms of minimum standard and national treatment," says Vargo.

RDC's chairman Henry Posner says other factors have cut into Ferrovias Guatemala's revenues. "Keeping an under-capitalised railroad in an environment like Guatemala's has proved supremely challenging for reasons that include outright theft of our right-of-way by private sector and public sector entities with the tacit encouragement of the central government," comments Posner.

Under the treaty, RDC was required to wait for a minimum 90 days after the decree was announced before filing the notice of intent—in fact, it waited 180 days. Having filed the notice, it must now wait a further 90 days before submitting any claim to arbitration.

RDC can submit the claim before ICSID, ICSID Additional Facility, or under UNCITRAL Arbitration Rules. Vargo thinks the arbitration could be held at ICSID. — *Rosie Cresswell*

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