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7. Investor in Guatemala railway dispute outlines details of CAFTA claim

The claimant in the first investor-state arbitration initiated under the US-Dominican Republic-Central American Free Trade Agreement (CAFTA) has filed its first in-depth legal pleading outlining its case against the Republic of Guatemala.

On June 26, 2009, US-based Railroad Development Corporation (RDC) filed its memorial on the merits in a dispute arising out of a 50 year concession to operate Guatemala's national railway.*

RDC claims that Guatemala has violated several provisions of CAFTA Chapter 10, including those related to expropriation; the minimum standard of treatment; and national treatment.

Background to the case

In 1997 RDC won a tender to operate Guatemala's newly-privatized national railway. A concession agreement concluded with RDC's local affiliate, Ferrovias Guatemala (FVG), required FVG to rehabilitate and operate various sections of the seriously dilapidated railway system.

In its pleading, FVG contends that it was required to rehabilitate the various sections of the railway system in tranches – with the first tranche to be repaired promptly, and subsequent sections repaired as, and when, it was commercially viable. Under the terms of its deal with Guatemala, FVG was required to pay the state a portion of the revenues earned as railway traffic increased.

For its part, Guatemala – through its State-owned enterprise Ferrocarriles de Guatemala (FEGUA) – was required to keep the railways clear of squatters. FEGUA was also required to make payments into a trust fund to finance further rehabilitation of the railways. RDC claims that FEGUA failed to abide by these obligations.

In 2005, FVG initiated local arbitrations against FEGUA. (Indeed, the ongoing nature of these local arbitrations led Guatemala to object that RDC had not waived its local claims when pursuing CAFTA arbitration. For full details on those objections and their disposition by the tribunal, see our previous reporting.)**

RDC claims that over the course of the concession agreement it was subjected to persistent attempts by a powerful Guatemalan oligarch to coerce it into divesting its interests in the concession agreement to him. RDC consistently refused to do so and claims that this incited the oligarch to leverage his political influence with the Guatemalan government to take care of his interests for him.

In August 2006, the President of Guatemala effectively nullified the concession agreement with FVG

under Guatemalan law by declaring it “injurious to the interests of the State”. RDC claims that this declaration provided a strong signal to FEGUA and the market that FVG was in dire straits, thereby placing an enormous strain on its business. RDC claims that as a result FVG was forced to cease its operations in September 2007.

Legal claims advanced by RDC

Among RDC’s claims is one for expropriation of its investments. In its pleadings, the company acknowledges that the CAFTA sets out unusually detailed guidance for arbitrators dealing with expropriation claims. (This language was included in recent US treaties in an effort to provide greater clarity that certain state measures will not be construed as expropriation).

RDC engages squarely with the clarificatory language on expropriation set out in a separate Annex to the CAFTA, and claims that Guatemala’s actions had an immediate, devastating impact; interfered with the company’s reasonable expectations; could have been framed in a less trade and investment restrictive manner; and deprived the US company of the benefits, use, and enjoyment of its investments in Guatemala.

RDC further claims that, contrary to Article 10.5.1 of the CAFTA, Guatemala failed to provide it the minimum standard of treatment under international law, including fair and equitable treatment and full protection and security.

In support of its fair and equitable treatment claim, RDC contends that the process by which Guatemala nullified the concession contract was motivated by improper and discriminatory goals, lacked due process and transparency, and denied RDC a stable and predictable business environment.

As to its full protection and security claim, RDC argues that after the declaration by the Guatemalan President that the concession contract was injurious to the interests of the State, local police’s efforts to protect FVG’s property and assets became practically nonexistent. RDC asserts that, as a result, squatting and looting activities drastically increased, and that the police actively participated in such activities. RDC claims that the government and local law enforcement authorities consistently ignored its complaints.

Finally, RDC claims that, contrary to Article 10.3.1 of the CAFTA, Guatemala failed to accord it national treatment. In particular, RDC asserts that it was accorded less favorable treatment than the local oligarch with whom it claims to have been in direct competition, and who it claims was the intended beneficiary of the nullification of its concession agreement.

RDC claims damages in the amount of \$64,035,859 plus compound pre-award interest at the average interest rate paid by Guatemala on its private commercial debt.

The panel is comprised of Dr. Andrés Rigo Sureda (President) (Spain), Hon. Stuart E. Eizenstat (U.S.), and Prof. James R. Crawford (Australia).

For its part, Guatemala will file its counter-memorial later in 2009. The Government is understood to contest the various allegations by RDC, and contends that the claimants failed to comply with their own plan for restructuring, refurbishing and reopening the country's railway system.

Guatemala may raise further jurisdictional arguments in the case, including in an effort to ensure that matters at issue in the above-mentioned contractual arbitrations (relating to alleged failures by the Government to remove squatters and to make payments into a trust fund) cannot be dealt with in the

CAFTA arbitration as well.

IAREporter will report more fully on Guatemala's counter-arguments once they are filed later this year.

* RDC's Memorial in its CAFTA claim is available on the company's website:

http://www.rdc.com/RDC_Memorial_on_Merits_26062009.pdf

**See item 6 in the November 25, 2008 edition of *IAREporter*:

<http://www.iareporter.com/Archive/IAR-11-25-08.pdf>

and item 6 in the January 22, 2009 edition:

<http://www.iareporter.com/Archive/IAR-01-22-09.pdf>

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