



Guatemala's objection to jurisdiction dismissed in DR-CAFTA arbitration

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The first investment arbitration to be launched under the Dominican Republic – Central America – United States Free Trade Agreement (DR-CAFTA) is moving forward after the Tribunal dismissed Guatemala's objection to jurisdiction in November.

Railroad Development Corporation (RDC), a U.S. company that won a public bid through its subsidiary, Compañía Desarrolladora Ferroviaria (FVG), to renovate and operate a railway line that had fallen into disuse, is suing the government of Guatemala for some US\$65 million in damages and lost profits

The firms charge that the state-owned company responsible for managing Guatemala's railway services broke its agreement with FVG when it missed trust-fund payments and failed to remove squatters from the railway tracks. In 2005, FVG launched two local arbitrations in Guatemala in response to the alleged contractual breaches. Soon after, the government of Guatemala introduced the so-called Lesivo Resolution, which declared the contract with FVG injurious to the state.

In July 2007, RDC filed a claim with ICSID claiming breaches of DR-CAFTA. Meanwhile, however, the local arbitration proceedings launched by FVG remain pending.

Guatemala complains of overlapping proceedings

At the root of Guatemala's objection to the Tribunal's jurisdiction is the fact that the local arbitration proceedings have not been discontinued. Under DR-CAFTA rules, the RDC "waived any right to initiate or continue ... other dispute settlement procedures" that pertain to the same measures alleged to constitute of breach of DR-CAFTA.

It fell to the Tribunal, therefore, to determine whether the local arbitrations dealt with the same measures as concerned the DR-CAFTA claim.

For its part, the RDC maintained that its DR-CAFTA claim only concerned measures that occurred after the local arbitration proceedings were initiated. Specifically, the RDC said the DR-CAFTA claim begins with the Lesivo Resolution: the resolution introduced in 2006 which declared that FVG's contract was injurious to the state.

Nonetheless, the Tribunal found that there was some "ambiguity" in terms of the measures that the RDC complained of in its DR-CAFTA arbitration request. The request, for example, referenced the failure to make trust fund payments and remove squatters, which are the same grievances that are the focus of the local arbitration proceedings.

As such, the Tribunal asked if itself whether, "because of this overlap, the entire waiver is defective and affects the whole proceeding before this Tribunal or whether the waiver is only partially defective ..."?

In taking the latter approach, the Tribunal concluded that the RDC DR-CAFTA claim was, in effect, a package of multiple claims, not all of which overlapped with those submitted to local arbitration in Guatemala. Therefore, the RDC's waiver was deemed to be valid for the claims that referred to the Lesivo Resolution, and the acts that followed.

Having affirmed its jurisdiction, the Tribunal has ordered that the proceedings move to a consideration of the merits of RDC's claims.

The decision on objection to jurisdiction in *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 is available at:

<http://ita.law.uvic.ca/documents/RDC-GuatemalaDecisiononObjectiontoJurisdictionCAFTA.pdf>

<http://www.investmenttreatynews.org/cms/news/archive/2008/11/26/guatemala-s-objection-to-jurisdiction-dismissed-in-cafta-arbitration.aspx>