IWP INSIDE WASHINGTON PUBLISHERS
Exclusive, in-depth reporting on the federal policy process since 1980

Inside U.S. Trade
March 23, 2007

RDC Files First Investor-State Case Under CAFTA Against Guatemala

Jamie Strawbridge, ***Associate Editor*****, INSIDE U.S. TRADE**

The Railroad Development Corporation (RDC) last week filed a notice of intent to submit claims to international arbitration against Guatemala under the Central America Free Trade Agreement (CAFTA) for indirect expropriation of company assets. This is the first investor-state case filed under CAFTA.

According to the notice filed March 13 on its own behalf and on behalf of its Guatemala affiliate, Ferrovias Guatemala (FVG), RDC alleges that the government of Guatemala has violated three articles of the CAFTA investment chapter. Specifically, RDC claims Guatemala violated Article 10.3 which deals with national treatment, 10.5 which deals with a minimum standard of treatment, and Article 10.7 which deals with expropriation and compensation.

RDC, based in Pittsburgh, PA, is seeking $15 million in compensation for current losses to the date of the filing, and an additional $50 million for anticipated loss of revenue due to the actions taken by Guatemala, according to the notice.

A source close to the Guatemalan government this week said the Ministry of Economy is still analyzing the notice of intent, and could not provide further comment.

Under Chapter 10 of CAFTA, RDC must wait three months after filing the notice of intent before filing a claim to arbitration. It plans to do so in the International Center for Settlement of Investment Disputes (ICSID), according to Juan Pablo Carrasco, a lawyer with Diaz-Duran & Asociados Central-Law, who is representing RDC in the case.

After filing the claim, RDC and Guatemala will each choose one of three panelists that will hear and decide the case, and those two panelists will choose a third, according to Carrasco. Based on the past experience of cases in ICSID, Carrasco estimated it could take two years to reach a verdict on the case, but that verdict will be final. If the panel decides in favor of RDC and Guatemala does not comply with the panel findings, Guatemala would be in violation of CAFTA and could face trade sanctions from the U.S., according to Carrasco.

At issue is a resolution issued August 11, 2006, by the Guatemalan government declaring that a 2003 contract providing for the lease of Guatemala’s rolling stock to FVG is *lesivo*, or against the interests of the state. Guatemala believes the contract is against the interests of the state because of its various technical deficiencies, such as the lack of a plan detailing how railroad equipment would be maintained, and the lack of an obligation in the contract to return certain discarded materials to the state after repairs, according to Regina Vargo, senior director for global trade for Greenberg Traurig, who is representing RDC in the case.

According to Vargo, the *lesivo* resolution is "outrageous" because "while making no allegations against RDC, the Government of Guatemala charges itself with writing a less than exemplary contract and on that basis seeks to take back the investment without paying any compensation to the investor."

Under Guatemalan law, the government may declare that recently signed contracts are against the interest of the state, but must prove its case in an administrative court in order to nullify the contracts and, in this case, return control over the operation of the rolling stock to the government of Guatemala, according to Carrasco.

While this court proceeding has yet to progress in Guatemala, RDC claims that the mere issuance of the *lesivo* resolution constitutes an indirect expropriation of its assets and is a CAFTA violation.

The central allegation of RDC is that the resolution amounts to an indirect expropriation of RDC's assets because it has had a chilling effect on the company's business. Local suppliers, investors, customers, and creditors of FVG are all more reluctant to do business with FVG now that the company is in legal battle with the state and, pending action in the administrative court, could have their contract revoked by the state, Carrasco argued. According to the notice, freight transported by FVG decreased from 125,466 tons in 2005 to 92,566 tons in 2006.

RDC argues that the resolution therefore violates Article 10.7 of CAFTA, which states that no party "may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization," except in special circumstances.

RDC also alleges that once the resolution was issued, basic protection for FVG property by local police "all but melted away," according to the notice. It said this lack of basic protection, combined with a perception that FVG is no longer a viable entity because of the resolution, encouraged people to steal the rails and other parts from the railroad tracks to sell for scrap. The resolution is therefore also in violation of CAFTA Article 10.5, which provides that a country must accord to covered investments "full protection and security," according to Carrasco.

In addition, RDC argues that the effects of the *lesivo* resolution on the judicial process in Guatemala are also a violation of Article 10.5, which requires "fair and equitable" treatment in accordance with principles of due process as embodied in the world's basic legal systems, according to the notice.

Because of the perception that the *lesivo* resolution will cost FVG its control of the railways, courts in Guatemala are imposing preliminary measures on FVG without waiting to hear FVG's arguments, Carrasco said. This is for fear that if too much time elapses, FVG will not be able to compensate the plaintiffs when necessary, according to Carrasco. Due to one such case, FVG has been forced to keep $20,000 in an account in case this money is needed to compensate plaintiffs, and the FVG general manager still cannot leave Guatemala, Carrasco said. Carrasco argued that this violates the judicial standard established by Article 10.5.

Finally, RDC alleges that the government of Guatemala issued the *lesivo* resolution in the interest of certain private-sector interests that would benefit from the return to state control over the railroad through gaining access to real estate contained within the "right of way" of FVG, defined as 50 feet on either side of the railroad track. RDC claims this is contrary to the spirit and intent of CAFTA Article 10.3, which deals with National Treatment and requires Guatemala to afford treatment to international investors equal to that afforded to its national investors, according to the notice.

Diaz-Duran & Asociados Central-Law represents RDC in Guatemala.

[END]