



School of International Arbitration

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International Arbitration Case Law

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RAILROAD DEVELOPMENT CORPORATION V. THE REPUBLIC OF GUATEMALA (ICSID CASE NO. ARB/07/23) SECOND DECISION ON JURISDICTION

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A Second Decision on Jurisdiction rendered on May 18, 2010, under the Dominican Republic – Central America – United States of America Free Trade Agreement (or CAFTA) and in accordance with the ICSID Convention and Arbitration Rules.

Tribunal: Dr. Andrés Rigo Sureda (President), Honorable Stuart E. Eizenstat, and Professor James Crawford.

Claimant's counsel: Mr. C. Allen Foster, Ms. Ruth Espey-Romero, Ms. Regina Vargo, Mr. Kevin Stern, Mr. Nick Caldwell, Ms. Ha Jeang (Julie) Lee, Mr. Adam Wolfe-Bertling of Greenberg Traurig, LLP.

Respondent's Counsel: Mr. Guillermo Porras Ovalle and Mr. Estuardo Saúl Oliva Figueroa, from the Attorney General's Office of Guatemala.

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Digest

1. *Facts of the Case (¶¶ 22-34)*

On May 18, 2010, the tribunal established under CAFTA to resolve a dispute between Railroad Development Corporation (RDC, or the investor), a U.S. company, and the Republic of Guatemala (Respondent) issued a second decision on the objections to jurisdiction raised by the Respondent.

The dispute arose from a number of contracts executed from 1996 to 2003 between the investor and a Guatemalan State company for purposes of developing Ferrocarriles de Guatemala (FEGUA) to carry out railroad transportation services in Guatemala. As a consequence of those contracts, the investor, through its local company Ferrovias Guatemala (FVG) undertook to perform railroad services with a ten-million dollar investment and reserved the right to provide alternative uses to its right-of-way over 497 railroad miles. The parties agreed that certain payments would be made through a trust. An additional contract that would allow FVG to use certain equipment owned by FEGUA could not be concluded for lack of a specific administrative act. However, it was possible to use such equipment under other accessory contracts.

In June 2005, FVG initiated local arbitration proceedings against FEGUA alleging that it had breached its obligations by having failed to remove certain squatters who invaded the rights-of-way, and having failed to make certain payments to the trust. It also alleged that, in anticipation of the local arbitration, FEGUA asked the Attorney General's Office to investigate the circumstances of the contracts. The Attorney General deemed that a declaration of illegality (*lesividad*) had to be issued and recommended the Republic to declare some of the contracts null and void. Few days before the expiration of the period within which the contracts could be declared unconscionable, the Republic issued such declaration. Afterwards, a negotiation team was set up so that the parties would engage in talks, but the Attorney General's Office filed an application for a judicial declaration of illegality with the Court for Contentious and Administrative Matters. As of the date of the decision, that court had not issued a decision on the complaint.

2. *Legal Issues Discussed in the Decision*

(a) *First Objection to Jurisdiction - Ratione temporis*

The Respondent submitted – as an objection to jurisdiction – that CAFTA came into force after the contracts had been executed and, generally, after the

investment had been established and the dispute had arisen. RDC maintained that the dispute arose mainly from the declaration of illegality, which was issued after CAFTA came into effect, and that the dispute was separate from the events happening before the treaty came into effect. (¶¶ 36-70)

The tribunal decided that a dispute indeed arose after the declaration of illegality and, consequently, that it was not necessary to reach a decision as to the argument that the tribunal's jurisdiction could not extend to disputes that began before the treaty came into effect. (¶¶ 114 to 138)

(b) Second objection to jurisdiction – *Ratione materiae*

The Respondent argued mainly that the investment had not been made in accordance with Guatemalan law – in particular regarding certain inconsistencies during the pre-contractual phase, the lack of a specific administrative act sanctioning certain of the contracts, the subsequent declaration that certain contracts were null and void. RDC countered the tribunal ought to apply a broad interpretation of investment, and that, in any event, the investment did not incur in any illegalities, while FEGUA did. It also maintained that the authorities' acquiescence to the circumstances surrounding RDC's engagement and activities during nine years had given rise to expectations by the investor protected under international law which prevented the Republic from contradicting its own prior acts. (¶¶ 71-83)

The tribunal held that on several occasions the parties to the contracts had sought to remain bound under the terms and conditions of the initial contractual relationship in spite of the legal complications they faced, and that, in many cases, those changes benefitted the Republic of Guatemala. Under principles of justice, the State could not argue that there is no investment when the infringements of local laws had been committed in the face of its State-owned company – FEGUA. (¶¶ 139-147)

(c) Third objection to jurisdiction – parallel proceedings

The Respondent argued that the issues submitted to local arbitration, namely the claims related to squatters affecting the rights of way granted under the contracts, and those related to the failure to make certain payments to the trust accounts created thereunder, were beyond the scope of the tribunal's jurisdiction under CAFTA. RDC argued that its claims under CAFTA do not result from the issues submitted to local arbitration proceedings but, rather, from the declaration of illegality and the authorities' failure to protect the investment from squatters. (¶¶ 84-88)

The tribunal confirmed its first decision on the objections to jurisdiction in the sense that the complaints due to FEGUA's failure to make payments to the

trust accounts were not within the scope of its jurisdiction. With respect to the complaints relating to the squatters, the tribunal held that it did have *prima facie* jurisdiction over those complaints to the extent that they may involve the Respondent's conducts deriving from the declaration of illegality. (*paragraphs 148-154*)

(d) Intervention of El Salvador as non-disputing party

The Republic of El Salvador intervened under CAFTA article 10.20.2 and stated that, according to the language of the treaty, it can only be applied to disputes occurring after it had come into effect. Thus, controversies arising prior to that date and not yet resolved after the treaty came into effect cannot be covered by it, because the consent of the contracting parties would not be extended to those disputes. (*¶¶ 107-109*)

(e) Costs

The tribunal deferred a decision on costs for the occasion of the final award.

3. *Decision*

The tribunal rejected the *ratione temporis* and *ratione materiae* objections and partially accepted the objection on parallel proceedings, since it declared that it only had jurisdiction over any conduct deriving from the declaration of illegality, which might include conduct related to the squatter invasions.