

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of the Arbitration between

RAILROAD DEVELOPMENT CORPORATION
Claimant

and

REPUBLIC OF GUATEMALA
Respondent

ICSID CASE No. ARB/07/23

—————
DECISION ON CLARIFICATION REQUEST OF THE DECISION ON JURISDICTION
—————

MEMBERS OF THE TRIBUNAL

Dr. Andrés Rigo Sureda, President
Honorable Stuart E. Eizenstat, Arbitrator
Professor James Crawford, Arbitrator

SECRETARY OF THE TRIBUNAL

Natalí Sequeira

DATE: January 13, 2009

Decision on Clarification Request of the Decision on Jurisdiction

1. On December 12, 2008, the Republic of Guatemala ('Respondent') filed a request for clarification ('Request') of the Decision on Jurisdiction of November 17, 2008 ('Decision'). The Railroad Development Corporation ('Claimant') filed comments on December 19, 2008 ('Comments').

I. Positions of the Parties

2. Respondent is 'gravely concerned' by the interpretation Claimant has given the Decision and requests a detailed clarification regarding precisely what is excluded by the defect the Tribunal found in the waiver as well as what is not excluded. According to Respondent, there is an inconsistency between the acknowledgement by the Tribunal that there are three specific claims in this arbitration and its conclusion that 'claims arising out of the Lesivo Resolution and the subsequent conduct of Respondent pursuant to that resolution' are permissible and not affected by the overlap in measures and the Claimant's defective waiver.

3. It is Respondent's contention that this seeming inconsistency can be likely reconciled 'when one considers the Tribunal's determination that, while all three claims reference the Lesivo Resolution, Claimant's Article 10.5 claim contains measures which create impermissible overlap with the claims in the local arbitrations,'¹ and, therefore, the Tribunal lacks jurisdiction over Claimant's Article 10.5 claim in accordance with Article 10.18.2.

4. Respondent finds that the Decision fails to state explicitly the consequences of holding Claimant's waiver defective and believes that its

¹ Request, para. 8.

understanding of the Decision as articulated in the Request ‘permits the Decision to be internally consistent.’²

5. As Respondent understands Claimant’s interpretation of the Decision, the Decision would permit the Claimant to recast the pre- and post-Lesivo measures related to squatters and payments to the Trust Fund in a denial of justice claim. According to Respondent, such interpretation would maintain an impermissible overlap of this proceeding with the two domestic arbitrations.

6. Respondent concludes by requesting the Tribunal to confirm that the Republic’s understanding of the Decision is correct or, if it is incorrect, to articulate what specific claims it understands Claimant to have brought before it and which of these specific claims are excluded from these proceedings because of the defect in the waiver.

7. Claimant does not find the Decision to be internally inconsistent or vague. Claimant considers that Respondent attempts to re-open the Decision and re-argue the case under the guise of a clarification. Claimant draws the conclusion from the Decision that its claim under Article 10.5 related to the failure to remove squatters and to make payments into the Trust Fund cannot proceed.

8. Claimant points out that these failures are the only measures identified by the parties to be at issue in the domestic arbitrations. According to Claimant, it can proceed to claim that Respondent has violated Article 10.5, for instance, by failure of the Guatemalan court system and police to afford redress and protection for injuries to the rights of Ferrovías Guatemala.

9. Claimant notes that it intends to press claims that relate to squatters that it believes are consistent with the Decision and provides an example of one such claim to show that the Tribunal is not in a position to

² Ibid., para. 9.

accommodate the request to articulate ‘precisely what specific claims it understands Claimant to have brought before it.’³

10. Claimant disagrees with the Respondent’s contention that affirmative actions of Respondent to deny Claimant access to its courts and due process are the same measures as those at issue in the local arbitrations. Claimant concludes by agreeing with Respondent that the parties have drawn opposing conclusions from the Decision but it ‘fails to see how this forms an adequate basis for compelling the Tribunal to address the self-serving and erroneous arguments that Respondent advances in its request for clarification.’⁴

II. The Views of the Tribunal

11. The Tribunal has reviewed the Decision in light of the Request and Claimant’s comments. For the reasons that are set forth below, the Tribunal considers that it is neither necessary nor appropriate to clarify the Decision on the terms requested.

12. It is unnecessary to clarify the Decision because it is not vague or internally inconsistent. The Decision clearly states that the waivers are valid ‘in respect of the claim arising from the Lesivo Resolution and from subsequent conduct of the Respondent pursuant to the Lesivo Resolution.’⁵ To reach this conclusion and as part of its considerations, the Tribunal found it difficult to accept the argument of Claimant that ‘references to removal of squatters and failure of payments to the Trust Fund are only references to facts to provide context to the Lesivo Resolution,’⁶ particularly, in view of paragraph 50 of the Arbitration Request.⁷ After this finding, the Tribunal proceeded to consider whether

³ Comments, para 3.

⁴ Ibid., para. 6.

⁵ Decision, para. 76(b).

⁶ Ibid., para. 52.

⁷ This paragraph reads as follows: ‘Since the Lesivo Resolution, the Government of Guatemala has made successive specific decisions not to pay into the Trust the funds required by Deed 820,

the entire waiver was defective. The Tribunal first observed that it had ‘previously concluded that measures concerning squatters and payments to the Trust Fund alleged to be related to the Lesivo Resolution are measures at issue in the local arbitrations under Deed 402 and Deed 820.’⁸ Then the Tribunal frames the question to be considered as follows: ‘The question for the Tribunal is whether, because of this overlap, the entire waiver is defective and affects the whole proceedings before this proceeding or whether the waiver is only partially defective in respect of those claims maintained in contradiction to the waiver requirements of Article 10.18.’⁹

13. It is the Tribunal’s view that the reasoning of the Tribunal leading to its decision clearly excludes claims based on the measures at issue in the local arbitrations under Deed 402 and Deed 820 irrespective of the article of CAFTA under which they would be advanced. On the other hand, Article 10.5 provides for the minimum standard of treatment under customary international law. This is a general and wide ranging standard of treatment that may cover claims based on other measures taken by Respondent beyond those at issue in the local arbitrations. It would be inappropriate for the Tribunal to exclude them *a priori* or to speculate on how Claimant may articulate its claims.

III. Decision

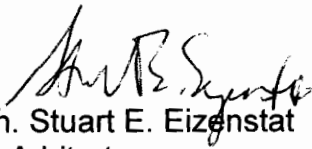
14. For these reasons, the Tribunal rejects the request for clarification of the Decision on Jurisdiction.

and, through FEGUA, has made successive specific decisions not to remove squatters from the railway right of way, stations and yards. These decisions are an integral part of the Lesivo Resolution and other affirmative actions by the Government of Guatemala to deny RDC and FVG the minimum standards of treatment required by international law and, thereby, to make it impossible for FVG to remain in business and thereby to appropriate FVG’s assets without compensation.’ The Tribunal emphasized the expression ‘integral part’.


⁸ Decision, para. 62.

⁹ Ibid.

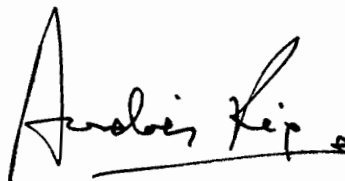
Done in Washington, D.C.



Hon. Stuart E. Eizenstat
Arbitrator



Professor James Crawford
Arbitrator



Dr. Andrés Rigo Sureda
President of the Tribunal