

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

—
PROCEDURAL ORDER No. 3
—

MEMBERS OF THE TRIBUNAL

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

DATE: August 24, 2009

Considering that:

1. Procedural Order No. 2 required Respondent to inform the Tribunal and Claimant of any intention to raise preliminary objections not later than two weeks after the date of submission of Claimant's Memorial as agreed by the parties and communicated to the Tribunal on December 15, 2008.
2. Claimant filed its Memorial on July 10, 2009.
3. On July 24, 2009, Respondent informed the Tribunal and the Claimant of its intention to raise objections as a matter of law under Article 10.20.4 and also outside the parameters of this article under Article 41(1) of the ICSID Arbitration Rules as follows:
 - (a) to object to the advancement of Claimant's claims based on *ratione temporis* grounds because, according to Article 10.1.3, Chapter 10 does not bind any Party in relation to any act or fact that took place before the date of entry into force of CAFTA;
 - (b) to object because Claimant's claims are based "on alleged government actions with respect to an investment which does not qualify as a 'covered investment' within the meaning of CAFTA Article 10.1.1(b) as it is not an 'investment' within the meaning of Article 10.28"; and
 - (c) to object to the impermissible attempts of Claimant to advance claims based on the Republic's alleged failure to address the issue of "squatters" and the consequences flowing from such failure, and on the Republic's alleged failure to make payments in the Trust Fund as per Contract 820 because the Tribunal has previously ruled that such claims are not within the scope of this proceeding.
4. Respondent has reserved its right "to expand upon, change or add to the preliminary objections notified herein once the Tribunal has set the schedule for doing so."

5. Respondent has requested that all objections be decided at the same time by the Tribunal.
6. Respondent has further requested that the Tribunal “(i) suspend any proceedings on the merits; (ii) establish a schedule for considering the preliminary questions to be raised by the Republic that includes a full round of briefing by the parties and a hearing; and (ii) thereafter issue a decision or award on the objections, stating the grounds therefore.”
7. On July 27, 2009, the Tribunal invited Claimant to comment on Respondent’s intention to raise objections not later than August 4, 2009.
8. On August 4, 2009, Claimant requested that the Tribunal find that “Respondent is time-barred to raise any of its stated objections ‘as a matter of law’ or, in the alternative, that CAFTA Article 10.20.4 is not applicable to any of Respondent’s stated objections, and further, to use its discretion under ICSID Rule 41(1) to join Respondent’s objections to the proceedings on the merits under the previously agreed timetable.”
9. Claimant also proposed an expedited schedule of pleadings without a hearing should the Tribunal bifurcate the proceedings.
10. On August 10, 2009, the Tribunal received an unsolicited response from Respondent to Claimant’s communication of August 4, 2009 (a) re-affirming as a matter of law the three objections raised in its communication of July 24, 2009, (b) objecting to the expedited schedule of pleadings proposed by Claimant, and (c) objecting to the request that there be no hearing based on Rules 29 and 32 of the ICSID Arbitration Rules and Article 10.20.5.
11. At the invitation of the Tribunal, Claimant commented on such response on August 14, 2009.
12. Claimant argued that (a) Respondent ignores the Decision on Objection to Jurisdiction (CAFTA Article 10.20.5) dated November 17, 2008 (“Decision”), (b) it has not proven that the objections raised are a matter of

law, (c) the position taken by Respondent detracts any meaning from the phrase “as soon as possible” of Article 10.20.4(a), and (d) Rule 41(4) of the ICSID Arbitration Rules, and not Rules 29 and 32, is the applicable rule to preliminary objections.

13. At least some of the objections submitted by Respondent raise issues of fact and law and *prima facie*, as characterized by Respondent, if established, would not permit an award in favor of Claimant.
14. Under Article 10.20.4(b), the Tribunal is required to suspend the proceedings on the merits to consider an objection raised as a matter of law.
15. Article 10.20.4(a) requires that objections be submitted as soon as possible but permits their submission until the date the Tribunal fixed for filing the counter-memorial by Respondent, and the Tribunal fixed November 13, 2009 for this purpose.
16. Article 10.20.4(d) provides, *inter alia*, that Respondent does not waive any objection as to competence merely because Respondent did or did not raise an objection under paragraph 4 of Article 10.20 or made use of the expedited procedure under Article 10.20.5.
17. In the Decision the Tribunal recognized that “by filing an objection to jurisdiction under the expedited procedure, the Respondent is not foregoing its right under CAFTA to submit other objections in the future as permitted under Article 10.20.4, and the Respondent has expressly reserved its right in this respect.”
18. As noted by the Tribunal in the Decision, the use of the expedited procedure as just an additional jurisdictional layer by selectively raising objections as matters of law hardly fits with the stated objective of CAFTA to create effective procedures for the resolution of disputes.
19. According to Article 10.16.5 the ICSID Arbitration Rules shall govern the arbitration except to the extent modified by CAFTA.

20. Reference to the request for a hearing from a disputing party is limited to the expedited procedure under Article 10.20.5.
21. Arbitration Rule 41 of the ICSID Arbitration Rules on Preliminary Objections sets forth a specific procedure in case preliminary objections are raised. The third paragraph of this rule provides: “Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.”
22. The fourth paragraph of Rule 41 further provides: “The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.”
23. The terms of Article 10.20.4 modify Rule 41(3) and (4) only to the extent that, when preliminary objections are raised as a matter of law, CAFTA mandates that the proceeding be suspended and the objections be decided as preliminary questions but the Tribunal retains under such provisions discretion to decide the number of rounds of observations on preliminary objections to be afforded the parties and whether to hold a hearing on the preliminary objections.
24. Six weeks have elapsed since the filing of Claimant’s Memorial.

Therefore,

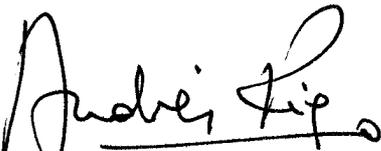
The Tribunal has decided:

1. That the intention to submit objections to jurisdiction has been filed within the deadline set forth by the Tribunal as agreed by the parties and, therefore, the Tribunal does not need to decide the significance of the phrase "as soon as possible" in Article 10.20.4(a) or address any of the other arguments made by the parties in respect of the timeliness of the objections raised by Respondent.
2. That *prima facie* at least some of the objections raised and characterized by Respondent as matters of law meet such requirement to the extent that, if established, an award in favor of the Claimant could not be made.
3. To suspend the proceedings on the merits.
4. To consider under the same schedule all objections raised or to be raised or expanded by Respondent.

As to timing the Tribunal further decides:

5. That Respondent shall submit its memorial on objections to jurisdiction by September 24, 2009, i.e. thirty days after the date of this procedural order.
6. That Claimant shall submit its counter-memorial not later than thirty days from receipt of the Respondent's memorial.
7. To reserve its decision on whether any further exchanges of observations are required and whether a hearing on preliminary objections is necessary after considering the Respondent's memorial and the Claimant's counter-memorial on preliminary objections.

On behalf of the Arbitral Tribunal



Dr. Andrés Rigo Sureda
President