

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RAILROAD DEVELOPMENT CORPORATION,)
)
)
 Petitioner,)
)
)
 v.)
)
 THE REPUBLIC OF GUATEMALA,)
)
 Respondent.)
_____)

Case No. 13-754

**VERIFIED PETITION TO CONFIRM ICSID ARBITRATION AWARD
AND ENTER JUDGMENT**

Petitioner, Railroad Development Corporation (“Petitioner” or “RDC”), by and through its undersigned counsel, pursuant to 22 U.S.C. §1650a and Article 54 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”), respectfully petitions this Court to confirm an arbitration award issued by a duly appointed arbitration tribunal pursuant to the Rules and Procedures of the International Centre for the Settlement of Investment Disputes (“ICSID”) against Respondent the Republic of Guatemala (“Respondent” or “Guatemala”) and to enter judgment thereon, including interest and attorneys’ fees incurred in connection with this Petition, and in support thereof respectfully shows, under oath:

Jurisdiction and Venue

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1330(a) because this is an action against a foreign state that is not entitled to foreign sovereign immunity due to the arbitration exception provided by 28 U.S.C. § 1605(a)(6). Subject matter

jurisdiction also exists pursuant to 22 U.S.C. § 1650a because this is an action to confirm an arbitration award rendered under the ICSID Convention.

2. This Court has personal jurisdiction over Respondent pursuant to 28 U.S.C. §1330(b) because subject matter jurisdiction exists and proper service was effected under 28 U.S.C. § 1608. and because Respondent has an embassy in and carries on business in this judicial district.

3. Venue is proper in this District pursuant to 28 U.S.C. §1391(f)(4) because this is an action against a foreign state.

Parties

4. Petitioner RDC, a privately owned international railway investment and management company, is a Pennsylvania corporation with its principal place of business and headquarters at 381 Mansfield Ave., Suite 500, Pittsburgh, PA 15220. Petitioner holds a favorable ICSID arbitral award against Respondent Guatemala in the case styled *Railroad Development Corporation (RDC), Claimant, and Republic of Guatemala, Respondent*, ICSID Case No. ARB/07/23 (the "Arbitration").

5. Respondent Guatemala is a foreign state as defined in 28 U.S.C. § 1603(a), a Contracting State of the ICSID Convention and a Party to the Treaty among the United States, Guatemala, Costa Rica, El Salvador, Honduras, Nicaragua and the Dominican Republic known as the Dominican Republic- Central America-United States of America Free Trade Agreement ("CAFTA").¹

¹ CAFTA entered into force as to different signatories at different times, depending upon the completion of the formal accession procedures. The Treaty entered into effect on August 8, 2005 for the United States and on July 1, 2006 for Guatemala, the latter date being the effective date for the purposes of the Arbitration between the Parties, the Award and this Petition.

The ICSID Convention

6. The ICSID Convention is designed to create a favorable investment climate between member countries by providing a forum for “conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.” ICSID Convention, Art. 1.

7. By willfully becoming Contracting States to the ICSID Convention, the United States and Guatemala have given jurisdiction over investment disputes to ICSID.

8. Each ICSID Convention Contracting State is obligated to recognize an arbitral award rendered pursuant to the Convention as binding and shall enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. ICSID Convention, Art. 54.

CAFTA

9. Chapter 10 of CAFTA allows “investors of a Party” who have “covered investments” to bring claims in international arbitration against another Party for “measures adopted or maintained by [another] Party” which violate the substantive investment protection provisions of CAFTA.

10. RDC was and is an investor of a Party to CAFTA, i.e., the United States.

11. Guatemala was and is another Party to CAFTA.

12. As set forth more fully hereinafter, RDC made a covered investment in Guatemala.

13. As described below, Guatemala adopted and maintained a measure which violated the substantive investment protections set forth in Article 10.5 of CAFTA.

14. Claims by an investor that a Party has violated CAFTA may be brought, *inter alia*, under the ICSID Convention and the ICSID Rules and Procedures for Arbitration Proceedings (the “ICSID Rules”) if both the Respondent and the Party of the investor are parties to the ICSID Convention. CAFTA Art. 10.16(3)(a). Both Guatemala and the United States are parties to the ICSID Convention.

15. Pursuant to CAFTA Article 10.17(1), Guatemala consented to the submission of a claim to arbitration of claims by investors of the United States under the ICSID Convention and pursuant to ICSID Rules.

16. Pursuant to the above provisions, RDC is a disputing party under CAFTA.

17. A disputing party may not seek enforcement of a final ICSID award until 120 days have elapsed from the date of the award and no disputing party has requested revision or annulment of the award. CAFTA Art. 10.26(6). Subject to this provision, CAFTA obligates a disputing party to abide by and comply with an award without delay. CAFTA Art. 10.26(5).

The Dispute

18. In 1997, the Government of Guatemala awarded RDC a 50-year concession (“usufruct”) to revive, develop and operate and the State-owned national railway system. RDC, through its local majority-owned subsidiary, Compañía Desarrolladora Ferroviaria, S.A., also known as Ferrovías Guatemala (“FVG”), subsequently invested millions of dollars in the usufruct, renovated the railroad and reestablished commercial service.

19. After RDC had successfully operated the railway for a number of years, disputes arose between the parties over Guatemala’s failure to remove squatters from the railway line and to make agreed payments to a railway trust fund, as well as over RDC’s alleged contractual obligation to invest in and reopen the railway’s Pacific corridor. These disputes led the President

of Guatemala to issue an executive decree on August 25, 2006 stating that the usufruct contract allowing RDC to use the State-owned rolling stock and railway equipment was “*lesivo*,” or “harmful to the interests of the State,” based upon alleged technical illegalities in the contract’s execution and ratification by the Government (the “*Lesivo Declaration*”). The *Lesivo Declaration* was issued after RDC refused to give into the Government’s demands that RDC renegotiate or surrender several of its key economic and legal rights under the usufruct contracts.

20. The *Lesivo Declaration* caused RDC’s railway business to collapse due to the environment of commercial and political uncertainty it created with the railway’s customers and potential business partners. RDC was ultimately forced to shut down its operations in Guatemala in the fall of 2007.

The Arbitration

21. On June 14, 2007, RDC brought the Arbitration against Respondent under CAFTA and the ICSID Convention, alleging breaches of CAFTA’s foreign investment protections, including the “minimum standard of treatment,” which requires each CAFTA state party to provide, among other things, “fair and equitable treatment” to investors of the other CAFTA parties.

22. Pursuant to CAFTA and the ICSID Rules, a Tribunal was constituted, consisting of Dr. Andres Rigo Sureda, President, Hon. Stuart E. Eizenstat and Professor James Crawford. After resolving numerous jurisdictional objections posed by Guatemala, the Tribunal entertained extensive pleadings from the parties and held public hearings on the merits of the dispute in Washington, D.C. from December 8 through 16, 2011. At the hearings, RDC presented 11 fact and four expert witnesses and Guatemala presented eight fact and two expert witnesses. The parties submitted over 500 exhibits during the proceedings and the merits hearing transcript

extends to 2,179 pages. Subsequent to the hearings, the parties filed further pleadings and Honduras, El Salvador and the United States filed submissions concerning issues of treaty interpretation.

The Award

23. On June 29, 2012, the Tribunal issued an Award, holding that the Respondent had breached the minimum standard of treatment guaranteed to RDC's investment by Article 10.5 of CAFTA. It ordered Respondent to pay RDC (a) \$6,576,861 on account of its sunk investment; (b) \$1,350,429 for RDC's expenses incurred in an orderly shutdown of the railroad after the *Lesivo* Declaration; and (c) \$3,379,450.93 for its 82% share of the net present value ("NPV") of the FVG real estate leases existing as of the date of the *Lesivo* Declaration, minus RDC's 82% share of rents paid to FVG under those leases since the *Lesivo* Declaration.² It also ordered that Guatemala pay RDC interest on those sums from the date of the *Lesivo* Declaration (i.e., August 25, 2006) at the rate of six-month LIBOR plus two percent until the date of payment and to reimburse RDC for its ICSID administrative expenses related to Guatemala's jurisdictional objections in the amount of \$192,427, plus interest thereon at the above rate.³ Upon Guatemala's payment of the foregoing sums, RDC is obligated by the Award to renounce all its rights under the usufruct and to transfer to Guatemala all of its shares in FVG. A certified copy of the Tribunal's Award is attached as **Exhibit A**.

Rectification of the Award

24. On August 10, 2012, RDC filed a Request for Supplementation and Rectification of Award under Article 49(2) of the ICSID Rules, asserting that the Tribunal had made errors in

² Award ¶¶ 277, 283(2). Because the date on which Guatemala would comply with the Award was unknown, the Tribunal noted that the computation of the credit for rents received by FVG and for interest owed by Respondent would have to await a subsequent determination between the parties.

³ Award ¶¶ 283(4), 283(5).

the Award. The parties again submitted briefings on the issues raised and, on January 18, 2013, the Tribunal issued its Decision on Claimant's Request for Supplementation and Rectification of Award ("Rectification Decision"). A certified copy of the Rectification Decision is attached as **Exhibit B**.

25. In its Rectification Decision, the Tribunal corrected a computational error in the Award to increase the amount of RDC's share of the NPV of real estate leases existing at the time of the *Lesivo* Declaration from \$3,379,450.93 to \$5,591,469.30.⁴ All other aspects of the Award remained unchanged.

26. The Arbitration proceedings are now fully concluded and Guatemala's obligation to pay RDC under the Award has been final and binding since, at the latest, January 18, 2013.

Compensation Owed RDC

27. As explained in the attached Declaration of RDC Vice President and Chief Financial Officer John F. Hensler (**Exhibit C**), the following are the current amounts due RDC under the Award, as corrected by the Rectification Decision:

Awarded Compensation and Expenses	Amount (\$)
RDC Investment	6,576,861
Post- <i>Lesivo</i> Shutdown Costs	1,350,429
RDC share of NPV of FVG Leases	5,591,470
Less: RDC share of FVG Net Rental Income through May 31, 2013	<u>(1,456,332)</u>
	12,062,428
Accrued interest through May 31, 2013	<u>3,812,297</u>
Subtotal	\$15,874,724
Awarded ICSID Administrative Expenses	192,427
Accrued interest through May 31, 2013	<u>23,448</u>
Subtotal	\$215,875

⁴ Rectification Decision § IV, ¶ 3.

TOTAL	\$16,090,599
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Guatemala's Recognition of the Award but Failure to Pay

28. Over ten months have passed since the Award was issued. The deadlines for Guatemala to seek revision or annulment of the Award have passed. Guatemala has no further legal recourse to challenge the Award.

29. Guatemala has both publicly and privately acknowledged its obligation to comply with the terms of the Award on several occasions. A copy of one official communication from the Government of Guatemala to Petitioner acknowledging its obligation to comply with the Award is attached as **Exhibit D**.

30. At no time has Guatemala challenged RDC's computation of the sums due under the Award.

31. Despite acknowledging its obligation to pay and its failure to challenge RDC's computation of its compensation owed, Guatemala has made no payment of the Award nor has it proposed any definite date or terms for payment.

32. RDC has expended attorneys' fees and costs in attempting to confirm the Award. Pursuant to *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 665 F.3d 1091, 1104 (9th Cir. 2011), and *Concesionaria Dominicana de Autopistas y Carreteras, S.A. v. The Dominican State*, ___ F. Supp. 2d ___, 2013 WL 646475 (D.D.C. Feb. 22, 2013) (Wilkins, J.), RDC is entitled to recover those fees and costs in addition to the amounts due and owing under the Award because Respondent has unjustifiably refused to abide by the Award.

Enforcement of ICSID Awards against Foreign States by the Courts of the United States

33. The ICSID Convention is clear in stating that an ICSID award “shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” ICSID Convention, Art. 53(1). Further, “each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” ICSID Convention, Art. 54(1).

34. The United States Congress implemented the ICSID Convention, thereby making ICSID awards fully enforceable in the United States, by enacting 22 U.S.C. § 1650a. Specifically, awards issued pursuant to the ICSID Convention “shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.” 22 U.S.C. § 1650a.

35. CAFTA provides that each State Party shall provide for enforcement of an award rendered under the Treaty in its territory. CAFTA Art. 10.26(7).

36. Foreign states are afforded immunity from the jurisdiction of U.S. courts under the Foreign Sovereign Immunities Act, 28 U.S.C. §1604, unless the matter falls within one of the exceptions enumerated in 28 U.S.C. §§1605-1607. 28 U.S.C. § 1604.

37. This case falls within the arbitration exception to immunity under 28 U.S.C. § 1605(a)(6).

38. Guatemala has no other defenses to prevent this Court from recognizing and entering judgment on RDC’s final and binding ICSID Award.

COUNT I

Action to Confirm ICSID Award and Enter Judgment

39. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 38 as if fully set forth herein.

40. Awards issued pursuant to the ICSID Convention are subject to automatic recognition and enforcement as a final judgment in the United States under Article 54 of the ICSID Convention and pursuant to 22 U.S.C. § 1650a.

41. An ICSID Tribunal has issued a final, binding Award in RDC's favor certified by the ICSID Secretary General.

42. Guatemala has not paid the Award.

43. Guatemala is not immune from the jurisdiction of U.S. courts due to the arbitration exception in the Foreign Sovereign Immunities Act. 28 U.S.C. § 1605(a)(6).

44. Guatemala was properly served in accordance with 28 U.S.C. § 1608.

45. RDC is entitled to an order confirming the Award as a final judgment rendered in this Court, and entering judgment thereon in the amount of \$16,810,148, as of May 31, 2013, plus continued interest at the rate of six-month LIBOR plus 2 percent, compounded every six months.⁵

Prayer for Relief

WHEREFORE, Petitioner respectfully requests this Court to enter judgment against Respondent the Republic of Guatemala, as follows:

⁵ The Award establishes compound interest but does not state the interval for compounding. Because the interest rate used – six-month LIBOR – is recomputed every six months, Petitioner has compounded the interest in six-month tranches.

(a) Confirming and recognizing the Award, as corrected by the Rectification Decision, in favor of RDC against Guatemala as if it were a final judgment rendered in this Court, pursuant to Article 54 of the ICSID Convention and 22 U.S.C. § 1650a.

(b) Awarding RDC the sum of \$16,090,599, plus continued interest from and after May 31, 2013, at the rate of six-month LIBOR plus 2 percent, compounded every six months until payment.⁶

(c) Awarding RDC its reasonable attorneys' fees and costs in this action; and

(d) Granting such other and further relief as to the Court may seem just and proper.

A Memorandum of Points and Authorities is attached as **Exhibit E** and a proposed Order is attached as **Exhibit F**.

Dated: May 23, 2013

Respectfully submitted,



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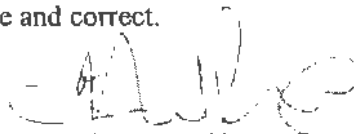
Counsel for Petitioner Railroad Development Corporation

⁶ Interest included in the proposed judgment is computed through May 31, 2013, as is the credit for rents received. Subsequent to May 31, 2013, interest will accrue on the total amount of the judgment and, when the judgment plus interest is paid, Petitioner will give Respondent credit for rents received after May 31, 2013.

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: May 23, 2013

A handwritten signature in black ink, appearing to read "H. Posner III", written over a horizontal line.

Henry Posner III
Chairman
Railroad Development Corporation