

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 PROVISIONAL MEASURES
—

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: October 15, 2008

TABLE OF CONTENTS

I. Background	3
II. Positions of the Parties	3
III. Considerations of the Tribunal	14
IV. Decision.....	19

Decision on Provisional Measures¹

I. Background

1. In its Request for Interim Measure of Protection Regarding Preservation of Evidence ('Request'), dated August 21, 2008, the Railroad Development Corporation ('RDC' or the 'Claimant') requests the Tribunal to order an interim measure of protection mandating that Respondent preserve certain categories of documents while the arbitration proceedings are pending. These documents, according to the Request, are 'unquestionably relevant and material to RDC's ability to have its claims and requests for relief fairly considered and decided by the Tribunal.'²
2. At the Tribunal's invitation, the Republic of Guatemala ('Respondent' or 'Guatemala') replied to the Request on September 12, 2008 ('Response'). The Claimant and the Respondent had a further opportunity to exchange comments. A Reply was filed on September 26 ('Reply') and a Rejoinder on October 3, 2008 ('Rejoinder').

II. Positions of the Parties

3. According to the Claimant, on July 3, 2008, it requested the Respondent to preserve listed documents in the Respondent's possession, custody or control that the Claimant believed should be preserved while the arbitration proceedings are pending. On August 7, 2008, the Respondent informed the Claimant that the request was premature because there is under consideration of the Tribunal Respondent's objection to jurisdiction, and that in any event it was too broad. The Claimant then requested the Respondent to identify the documents which it would be willing to preserve. The Respondent declined to identify them.

¹ The ICSID Convention uses the term 'provisional measures', CAFTA uses 'interim measures.' Both terms are used in this decision without any attempt to distinguish between them.

² Request, para. 1.

4. The Request classifies the documents to be preserved in the following four categories:

'a. Preservation Request No. 1: All documents referring or relating to the Usufruct Agreements, including (but not limited to): (i) documents referring or relating to the bidding, negotiation, awarding, performance or breach of any or all of the Usufruct Agreements; the public bidding process initiated by the Government of Guatemala ("GOG") on February 17, 1997 (the "RFP"); (ii) documents referring or relating to RDC's bid submitted to the GOG in response to the RFP; (iii) documents referring or relating to the award of the 50-year usufructary right to rebuild and operate the Guatemalan rail system made on June 23, 1997 by FEGUA; (iv) documents referring or relating to any analysis or evaluation of the preceding by the GOG; (v) documents referring or relating to royalty payments by FVG to FEGUA and the use of same by FEGUA; (vi) documents referring or relating to GOG's and/or FEGUA's compliance, efforts to comply and/or failure to comply with its or their obligations under the Usufruct Agreements; and/or (vii) documents referring or relating to the high level railroad commission that was established at the instruction of President Berger purportedly to support FVG's railroad operations, as described in paragraph 38 of RDC's Arbitration Request.

b. Preservation Request No. 2: All documents referring or relating to Government Resolution 433-2006, published in the Guatemala Official Gazette on August 25, 2006 (the "Lesivo Resolution") as described in paragraph 39 of RDC's Arbitration Request, including (but not limited to): (i) documents referring or relating to FEGUA's January 13, 2006 legal opinion (Opinion No. 05-2006) described in paragraph 37 of RDC's Arbitration Request; (ii) documents referring or relating to the March 7, 2006 meeting among RDC, FEGUA and the GOG described in paragraph 38 of RDC's Arbitration Request; (iii) documents referring or relating to FEGUA's request to the Attorney General of Guatemala on or

about June 22, 2005, to investigate the circumstances surrounding the award of the Usufruct to RDC and/or to issue an opinion on the validity of Deed 143 (as amended by Deed 158) as described in paragraph 35 of RDC's Arbitration Request; (iv) and/or documents referring or relating to the issuance of the Attorney General's lesion opinion dated August 1, 2005 (Opinion No. 205-2005) as described in paragraph 36 of RDC's Arbitration Request.

c. Preservation Request No. 3: All documents referring or relating to third party interest in assuming or acquiring an interest in the Usufructs subsequent to their award to RDC, including (but not limited to): (i) documents referring or relating to the potential redistribution of the benefits of the Usufruct Agreements to the Guatemalan sugar, electricity or telecommunications industry sectors or the private sector companies and business representatives thereof; (ii) documents referring or relating to the sugar industry's interest in the use of the railroad; (iii) documents referring or relating to meetings between the GOG, its officials and Ramón Campollo, Héctor Pinto or other representatives of or persons related to the sugar industry; (iv) documents referring or relating to Ciudad Del Sur and/or the Empresa Eléctrica of Guatemala's (EEGSA) interest in the right of way and/or easement rights to distribute electricity; and (v) Presidential or Vice Presidential calendars or other records by their offices that indicate meetings with the above industry sectors, industry representatives or individuals.

d. Preservation Request No. 4: All declarations of lesivo by GOG since January 1, 1996 and the related judicial file.³

Since they have figured prominently in the exchanges between the parties, it will be useful to reproduce here the Claimant's definitions of 'documents', 'communications' and 'relating to':

³ Request, para. 12.

‘ “Documents” means each and every form of communication and each and every written, recorded or graphic matter of any kind, type, nature, or description that is or has been in the Republic of Guatemala's possession, custody, or control, including, but not limited to, all printed and electronic copies of emails, notes, correspondence, memoranda, work papers, calendars, registries of entrance to public or private offices/buildings, tapes, stenographic or handwritten notes, written forms of any kind, charts, blueprints, drawings, sketches, graphs, plans, articles, specifications, diaries, letters, telegrams, photographs, minutes, contracts, agreements, reports, surveys, computer printouts, data compilations of any kind, teletypes, telexes, facsimiles, invoices, order forms, checks, drafts, statements, credit memos, reports, summaries, books, ledgers, notebooks, schedules, transparencies, recordings, catalogs, advertisements, promotional materials, films, video tapes, audio tapes, brochures, pamphlets, spreadsheets, or any written or recorded materials of any other kind, however stored (whether in tangible or electronic form), recorded, produced, or reproduced, and also including, but not limited to, drafts or copies of any of the foregoing that contain any notes, comments, or markings of any kind not found on the original documents or that are otherwise not identical to the original documents.

“Communications” means any oral or written (including e-mail) communication or transmission of words or ideas between anyone.

“Relating to” means constituting, defining, containing, embodying, reflecting, identifying, analyzing, stating, concerning, substantiating, supporting, referring to, conflicting with, dealing

with, generated wholly or partly in response to or because of, or in any way pertaining to.⁴

5. The Claimant argues that the Tribunal is empowered to order the preservation of evidence as an *interim measure* of protection to preserve the rights of a party under Article 10.20.8 of CAFTA, Article 47 of the ICSID Convention, and Arbitration Rule 39(1) of ICSID. The Claimant adduces ICSID jurisprudence showing that arbitral tribunals have ordered interim measures when the requesting party has shown the need and urgency to avoid irreparable harm to a party's rights. The Claimant explains that the degree of urgency required 'depends upon the circumstances and may be satisfied where a party can show that there will be a need to obtain the documents at some point in the proceedings before the issuance of the award.'⁵
6. The Claimant specifies the reasons for each of the preservation requests. In substance, the Claimant argues that the documents are: (i) needed to understand the bidding, award, formation and performance of the contracts that comprise the Claimant's investment, and the Respondent's knowledge of the destructive effect that the Lesivo Resolution would have on the Claimant's investment, (ii) relevant to the Claimant's contention that the intent of the Respondent when it issued the Lesivo Resolution was to redistribute RDC's usufruct rights to Guatemalan private sector companies without paying compensation, and (iii) relevant to RDC's claim that the Lesivo Resolution and the law on lesivo do not meet the minimum standard of treatment under international law.
7. The Claimant justifies the need and urgency on the basis of a recent change of government in Guatemala, the fact that the proceedings on the merits have been suspended while the objection to jurisdiction is under the Tribunal's consideration, and the fact that, in case the objection is

⁴ Exhibit C-1 to the Request.

⁵ Request, para. 17.

- sustained, the Respondent has indicated that it would not object if the Tribunal would allow an opportunity to cure the jurisdictional defect and, therefore, ‘there is little chance that these documents will not be the subject of document production requests in the near future.’⁶ Furthermore, the fact that the Respondent has not recognized the obvious need to preserve the evidence ‘or to make an offer to assist in that regard only underscores the “urgency” of an evidence preservation order from this Tribunal.’⁷
8. The Claimant further argues that the level of urgency required depends upon the measure requested: the more intrusive the measure requested, the greater the degree of urgency required. The Claimant considers that what its request involves is ‘largely a ministerial task that can hardly be deemed intrusive or burdensome.’⁸
 9. In the Response, the Respondent first corrects certain affirmations of the Claimant which the Respondent considers erroneous and reserves its right to further dispute any characterization of fact or law in the Request. The Respondent then explains that, when it first received the request of the Claimant to preserve documentation, it invited the Claimant to reformulate the request because of its breadth. The Claimant dismissed the offer and took the position that the Republic was free to reformulate Claimant’s own request for the Claimant to consider. The Respondent declined to do so.
 10. The Respondent further explains that it is not its position that it would have no objection to the Tribunal permitting the Claimant to cure its defective waiver pursuant to CAFTA Article 10.18, but it ‘acknowledged that the Tribunal might, for efficiency purposes, seek to grant the Claimant an opportunity to cure its defective waiver.’⁹ If the Tribunal would choose

⁶ Ibid. para. 25(c)

⁷ Ibid. para. 27.

⁸ Ibid. para. 26.

⁹ Response, para. 7

such option, the Respondent confirms that it has not waived any further objections it may have.

11. The Respondent also observes that the Claimant seems to understand incorrectly that the current jurisdictional objection is the totality of the jurisdictional phase. The Respondent explains that the current jurisdictional objection has been submitted under the special mechanism provided in Article 10.20.5 of CAFTA and reserves its right to raise any other objections to the Tribunal's jurisdiction at the appropriate time as permitted under the ICSID Convention and CAFTA.
12. It is the Respondent's view that the Claimant has failed to establish that protection is urgently required, and that there is a right to be protected. The Respondent recalls that provisional measures under the ICSID Convention are intended to be used only in situations of absolute necessity. The Respondent argues that a change of government is not *per se* evidence of any potential threat to documents; that, if it would be sufficient to demonstrate a need that potentially relevant evidence not be lost or destroyed, preservation orders would always be needed; and that the intention to request documents in the future does not demonstrate a need for protection.
13. The Respondent characterizes the Request as a US-style pre-trial discovery 'fishing expedition' which has no place in international arbitration. The request for preservation should be tailored to issues relevant to the determination of the merits of the case and there must be a reasonable belief that the documents exist by specifying the presumed author or recipient, the date or time frame of the document and the presumed content.
14. The Respondent argues that it did not consent to broad common-law-style discovery by becoming party to CAFTA or the ICSID Convention anymore than did other civil law countries. The Respondent points out that the request includes four broad categories of documents starting with the

- words 'All documents referring or relating to' or 'All declarations' and they include sixteen broad document sub-categories. According to the Respondent, the expansive nature of the Request becomes overbearing when added to the definitions of the terms 'documents', 'communications' and 'relating to'.
15. The Respondent affirms that the Claimant's right is only to those documents which can reasonably be produced. The Respondent considers that the IBA Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Rules') are a useful guide to evaluate the Request and considers the Request under their requirements. Under the IBA Rules the Request would qualify as imposing an unreasonable burden because compliance would require significant resources and innumerable persons. The documents lack sufficient relevance or materiality by the simple fact that the great number of documents that fall in the broad categories of the Request cannot be relevant. The Request violates 'considerations of fairness and equality of the Parties' because it asks the Respondent to identify all possibly relevant evidence and much evidence that is not relevant. Effectively the burden of identifying evidence would be shifted unfairly to the Respondent.
 16. The Respondent distinguishes the provisional measures order in the case of *Biwater Gauff (Tanzania) v. United Republic of Tanzania (ICSID Case No. ARB/05/22)*, on which the Claimant has significantly relied in its presentation. The Claimant observes that in that case the parties to the dispute were common law parties; nonetheless the tribunal recognized the overly broad and potentially burdensome nature of the original request and circumscribed it to clearly identified documents.
 17. In its Reply to the Response, dated September 26, 2008, the Claimant emphasizes that Article 10.20.8 of CAFTA, as compared to ICSID Arbitration Rule 39(1), identifies evidence preservation as a specific right to be protected. In this respect, the Claimant recalls that, as provided in

Article 10.16.5 of CAFTA, the ICSID Arbitration Rules govern this arbitration unless modified by CAFTA.

18. As to the need and urgency of the request, the Claimant points out that there are precedents in Guatemala of theft, looting and destruction of government property and documents in connection with a change of government. The Claimant submits press reports in support of its allegations related to the changes in government of 2004 and 2008. The Claimant reasons that since its 'preservation requests will likely be the subject of RDC document requests once the Republic's jurisdiction objection is resolved, it is, as a matter of logic, *necessary* that these documents be preserved in the interim.'¹⁰
19. The Claimant agrees with the Respondent that broad US-style discovery is not the norm in international arbitration and that the extent of the discovery is entirely within the discretion and control of the Tribunal. The Claimant disputes that its requests for document preservation would go beyond the normal limits of permissible discovery in ICSID proceedings. The Claimant observes that the ICSID Convention and CAFTA place few limits on the Tribunal's power to recommend any provisional measures and the Tribunal may at its own initiative recommend a provisional measure or make a recommendation that is different from what was requested.
20. The Claimant points out that the IBA Rules on which the Respondent extensively relies are related to the production of evidence and not to its preservation. In any case, it is the view of the Claimant that the Request meets the requirements of the IBA Rules. The Claimant affirms that the Request is confined to specific categories of documents purposely broken down into sub-categories to enable the Respondent to identify the precise documents to be preserved, and confirms that the documents to be preserved are only those currently in the Republic's possession, custody

¹⁰ Reply, para. 12.

or control and not those in the public domain or already in RDC's possession.

21. The Claimant re-affirms the 'extremely limited' nature of RDC's request, and therefore that it is not unduly burdensome. It only requires from the Respondent that 'it order that the requested relevant documents be preserved and take reasonable steps to communicate and effectuate such order to relevant government entities and officials.'¹¹
22. The Claimant contends that the expectations of the Respondent regarding the conduct of discovery are irrelevant since it signed a treaty where the special importance of evidence preservation is recognized and, in any case, the expectations from a party hailing from a common law country are equally deserving of respect. The Claimant argues that a denial of an order of preservation in light of the historical chaos when governments change in Guatemala and constant changes in the current administration of the Respondent would send the message that preserving records in the face of alleged substantial treaty violations is not required in international arbitration.
23. In its Rejoinder, dated October 3, 2008, the Respondent re-asserts that the Request be dismissed. The Respondent points out that the evidence submitted with the Reply concerns mostly the 2004 government transition, only one newspaper report concerns the disorderly state of government offices when President Colom took office in January 2008. The Respondent argues that 'the state of affairs at the initiation of the Colom administration—or that of past Presidents, for that matter—has nothing to do with the management of information during times other than transitions from one party to another, and no inference should be drawn that President Colom or any of his cabinet members has or will engage in behavior that would result in the loss or destruction of evidence.'¹² The

¹¹ Ibid. para. 25.

¹² Rejoinder, para. 8.

- Respondent reaches the conclusion that the evidence submitted by the Claimant is historical and irrelevant and that the Claimant has not provided evidence to suggest that 'it will be denied access to any reasonably tailored set of documents to which the Tribunal might grant discovery.'¹³
24. The Respondent confirms its view that the Request is excessive and argues that the Claimant misunderstands the import of arbitration with a sovereign under ICSID and CAFTA. The Tribunal, contrary to what Claimant seems to believe, has not an unlimited power to grant provisional measures. The power of the Tribunal is bounded by 'the precise scope of the consent given by the State in the ICSID Convention as well as in any relevant treaty. The Republic's relevant expectations and understanding of this consent at the time of signing these treaties is thus essential for any determination by this Tribunal regarding the exercise of its power.'¹⁴
25. The Respondent emphasizes once more that the definition of 'documents' in the Request is so broad as to be incongruous; it encompasses sixty different types of materials without limitation of time in three of the four categories of documents and in the fourth the time limitation spans twelve years. This broad scope of time and type of documents places an undue burden on the resources that Respondent would have to dedicate to comply with the order requested. The Respondent gives as an example of the burden the fact that it would have to try to identify and locate documents spanning five administrations from five different political parties.
26. The Respondent concludes by requesting the Tribunal to deny the Request.

¹³ Ibid. para. 11.

¹⁴ Ibid. para. 14.

III. Considerations of the Tribunal

27. It will be convenient to reproduce here the provisions of CAFTA, the ICSID Convention and the ICSID Arbitration Rules setting forth the power of the Tribunal to recommend provisional measures:

28. Article 10.20.8 of CAFTA provides in relevant part:

‘A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal’s jurisdiction.’

29. Article 47 of the ICSID Convention states:

‘Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.’

30. Rule 39 of the Arbitration Rules reads in relevant part as follows:

‘(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(...)

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.’

31. There is no question between the parties that the Tribunal has the power to grant provisional measures under the ICSID Convention and CAFTA.

Articles 47 and 10.20.8 of the ICSID Convention and CAFTA, respectively, could not be more explicit in this respect. Nonetheless, in its Response the Respondent argued that the Request was premature because the proceeding is still at its jurisdictional phase. Both treaties governing this arbitration are clear in stating that the power of the Tribunal to grant provisional measures is not limited to any particular phase of a proceeding. Article 47 of the ICSID Convention provides for the power to recommend any provisional measures without reference to any particular phase of the proceeding. Rule 39(1) is more specific in stating that such power may be exercised 'At any time after the institution of the proceeding...' Art. 10.20.8 of CAFTA provides, *inter alia*, that a tribunal may order an interim measure 'to ensure that the tribunal's jurisdiction is made fully effective.' Therefore, if the circumstances that require the measures are present, in the view of the Tribunal the phase of the proceedings in which the request is formulated is not relevant.

32. In its arguments, the Claimant has relied substantially on the precedent of the provisional measures ordered by the tribunal in the ICSID case of *Biwater Gauff v. Tanzania* and the Respondent on the IBA Rules. The Claimant has observed that the IBA Rules are not applicable in this arbitration and are not relevant since they concern the production rather than the preservation of evidence, while the Respondent has attacked the relevance of the *Biwater* precedent. *Biwater* is one of many examples of provisional measures requests in ICSID arbitral practice, which tend to be case-specific. The IBA Rules are used widely by international arbitral tribunals as a guide even when not binding upon them. Precedents and informal documents, such as the IBA Rules, reflect the experience of recognized professionals in the field and draw their strength from their intrinsic merit and persuasive value rather than from their binding character.

33. The Tribunal considers that, in the instant case, it does not need the guidance of the IBA Rules to appreciate that the categories of documents requested and reproduced above are excessively broad and their relevance difficult to assess. The breadth of the Request is particularly compounded by the definition of the terms 'documents', 'communications' and 'relating to' which have also been reproduced. As broken down by the Respondent, the term 'documents' includes sixty types of documents, in most cases without time limits. The Tribunal is doubtful that such all-encompassing requests, if recommended, can realistically be put in practice. In this respect, the Tribunal fails to see how the measures requested would suppose a merely 'ministerial task' for the government. Compliance with the Request would not entail simply a communication from a Minister to those in the administration who are the actual holders of the documents to be preserved. The documents would need to be identified by an undetermined number of government officials across the administration.
34. The Tribunal turns now to the question of whether the circumstances which would justify provisional measures exist. Article 47 of the ICSID Convention does not specify any particular circumstances and neither does Article 10.20.8 of CAFTA. The parties have discussed the circumstances in terms of need and urgency of the measures requested. They disagree on whether the need and the urgency that would justify the provisional measures are present and on the standard to be applied by the Tribunal. As to the standard, the Respondent has argued, quoting Professor Schreuer, that provisional measures would only be used in 'situations of absolute necessity and that tribunals would exercise self-restraint in their application'. The Tribunal observes that this quote refers to the history of the preparation of the ICSID Convention and, as reported by Professor Schreuer in the same paragraph, a proposal to include in

Article 47 'a reference to urgency and imminent danger' was defeated.¹⁵ The conclusion of Professor Schreuer is that 'provisional measures will only be appropriate where a question cannot wait the outcome of the award on the merits.'¹⁶ This seems a reasonable conclusion but it does not imply that the necessity must be 'absolute' or that the Tribunal not act unless such a high threshold of necessity exists. Since no qualifications to the power of an ICSID tribunal to recommend provisional measures found their way in the text of the ICSID Convention, the standard to be applied is one of reasonableness, after consideration of all the circumstances of the request and after taking into account the rights to be protected and their susceptibility to irreversible damage should the tribunal fail to issue a recommendation. Based on this standard and as explained below, the Claimant has not shown that circumstances exist which would justify a recommendation of provisional measures.

35. To prove the need and urgency of the provisional measures, the Claimant relies on destruction or loss of documentation during the 2004 and 2008 changes of administration in Guatemala and the frequent changes in high positions in the administration of President Colom. As evidence, the Claimant has presented mainly news reports which refer to document destruction in 2004. As regards the change of government in 2008, the evidence presented refers to the disorder found in government offices when the new administration took over. No evidence has been presented that during the course of 2008 documents have been destroyed or lost by the current government of Guatemala or that the destruction of relevant documents is imminent because of the existence of this arbitration. A change of government in the normal course of constitutional transfer of power from one administration to another does not justify the recommendation of provisional measures for preservation of documents.

¹⁵ Exhibit R-5, para. 14.

¹⁶ Ibid.

In any case, the next change of government in Guatemala would not take place until January 2012.

36. Therefore, the Tribunal concludes that the Request would place an unfair burden on the Government because of its excessive breadth and that no need or urgency has been proven to justify the recommendation. In reaching this conclusion, the Tribunal is mindful that the Respondent has affirmed in the Rejoinder that Claimant has not provided evidence to suggest that it will be denied access to any reasonably tailored set of documents to which the Tribunal might grant discovery, and it is also mindful of the statement of the Respondent that 'no inference should be drawn that President Colom or any of his cabinet members has or will engage in behavior that would result in the loss or destruction of evidence.'¹⁷

¹⁷ Rejoinder, para. 8.

IV. Decision

For all the above reasons the Tribunal,

1. Affirms its power to recommend provisional measures at any stage of the proceeding.
2. Denies the request of provisional measures of the Claimant.

Done in Washington, D.C.

The Tribunal

[Signed]

Hon. Stuart E. Eizenstat

[Signed]

Professor James Crawford

[Signed]

Dr. Andrés Rigo Sureda