

# International Centre for Settlement of Investment Disputes

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November 10, 2009

By courier (advance copy by e-mail)

Railroad Development Corporation  
c/o Mr. C. Allen Foster, Ms. Ruth Espey-Romero,  
Mr. Kevin Stern and  
Ms. Regina Vargo  
Greenberg Traurig, LLP  
2101 L Street, N.W., Suite 1000  
Washington D.C. 20037  
and  
c/o Mr. Juan Pablo Carrasco de Groote  
Díaz-Durán & Asociados Central Law  
15<sup>a</sup> Avenida 18-28, Zona 13  
Ciudad de Guatemala  
Guatemala

Republic of Guatemala  
c/o Mr. Estuardo Saúl Oliva Figueroa  
Procuraduría General de la Nación  
15<sup>a</sup> Avenida 9-69, Zona 13  
Guatemala C.A. 01013  
and  
c/o Mr. Rubén Morales Monroy,  
Mr. Óscar Erasmo Velásquez,  
Mr. Joaquín Romeo López Gutiérrez,  
Mr. Alexander Cutz Calderón  
Ministerio de Economía  
Dirección de Administración  
de Comercio Exterior  
8<sup>a</sup> Avenida 10-43, Zona 1  
Guatemala C.A.  
and  
c/o Mr. David Orta,  
Ms. Gaela Gehring-Flores,  
Mr. Patricio Grané  
Mr. Daniel Salinas-Serrano  
and Mr. Bonard Molina García  
Arnold & Porter LLP  
555 12<sup>th</sup> Street N.W.  
Washington D.C. 2004

Re: Railroad Development Corporation v. Republic of Guatemala  
(ICSID Case No. ARB/07/23)

Dear Mesdames and Sirs,

Enclosed please find a revised copy of the minutes of the first session held in Washington, D.C. on June 13, 2008 (as modified on August 25, 2008), incorporating the amendment of the second paragraph of Section 7, as proposed by the parties in their letter of November 4, 2009.

Sincerely yours,



Natalí Sequeira  
Secretary of the Tribunal

By e-mail:

Members of the Tribunal

c/o H.E. Francisco Villagrán De León  
Embassy of the Republic of Guatemala  
2220 R Street N.W.  
Washington D.C. 20008  
and  
c/o Mr. Mynor Castillo and  
Ms. Miriam Eugenia López M.

**RAILROAD DEVELOPMENT CORPORATION.**

**v.**

**REPUBLIC OF GUATEMALA  
(ICSID CASE NO. ARB/07/23)**

**MINUTES OF THE FIRST SESSION OF THE TRIBUNAL  
JUNE 13, 2008, WASHINGTON, D.C.**

The first session of the Arbitral Tribunal was held on June 13, 2008 at 1:30 p.m. at the seat of the Centre, in Washington, D.C.

The following persons attended the first session:

**Tribunal**

Dr. Andrés Rigo Sureda	President
Prof. James Crawford SC	Arbitrator
Hon. Stuart E. Eizenstat	Arbitrator

**ICSID Secretariat**

Ms. Natalí Sequeira	Secretary of the Tribunal
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**Assistant to Hon. Stuart E. Eizenstat**

Mr. Adam Smith	Covington & Burling LLP
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**Representing the Claimant**

Mr. Allen C. Foster	Greenberg Traurig, LLP
Ms. Ruth Espey-Romero	Greenberg Traurig, LLP
Ms. Regina Vargo	Greenberg Traurig, LLP
Mr. Kevin Stern	Greenberg Traurig, LLP
Ms. Julie Lee	Greenberg Traurig, LLP
Mr. Juan Pablo Carrasco de Groote	Díaz-Durán & Asociados Central-Law
Mr. Henry Posner III	Railroad Development Corporation and Ferrovías Guatemala

**Representing the Respondent**

Mr. Baudilio Portillo Merlos	Attorney General
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**Assisting in the Representation of the Government of Guatemala**

Mr. Rubén Morales Monroy	Vice-Minister of Integration and Foreign Trade, Ministry of Economy
Mr. Saúl Estuardo Oliva Figueroa	Chief of the Administrative Litigation Section, Office of the Attorney General

Mr. Joaquín Romeo López Gutiérrez	Deputy Director of the Legal Affairs Office, Ministry of Economy
Ms. Myriam López	External Counselor
Mr. Mynor René Castillo Castañeda	Counselor to Foreign Trade Administration, Ministry of Economy
Mr. Fernando de la Cerda	Legal Adviser Embassy of Guatemala in Washington D.C.
Mr. David Orta	Arnold & Porter LLP
Ms. Gaela Gehring Flores	Arnold & Porter LLP
Mr. Daniel Salinas-Serrano	Arnold & Porter LLP
Mr. Bonard Molina García	Arnold & Porter LLP

The session considered the matters listed on the Provisional Agenda, circulated by the Secretary of the Tribunal on May 7, 2008, and attached to these Minutes as Annex 1.

### **Opening of the Session**

The President of the Tribunal opened the session and welcomed the participants. The President introduced the Tribunal and the ICSID Secretariat and asked the parties to introduce their respective teams.

The President informed the parties of the attendance of Mr. Adam Smith, assistant to Hon. Stuart E. Eizenstat. The Republic of Guatemala inquired whether Mr. Smith had engaged in any work on behalf of or in relation to any of the parties involved in this arbitration, their parents, or subsidiaries, that could represent a conflict of interest. Mr. Eizenstat stated that no such conflict existed. The parties confirmed that they did not have any objections to Mr. Smith's assistance of Mr. Eizenstat in the matter.

## **I. Procedural Matters**

### **1. Constitution of the Tribunal and Tribunal Members' Declarations**

As indicated in the letter of the Centre dated April 14, 2008, the Tribunal is deemed to have been constituted and the proceedings to have begun on April 14, 2008. The President recalled that the Members of the Tribunal had signed the declarations required under Rule 6(2) of the Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"). Copies of the declarations and its attachments were transmitted to the parties on the above-mentioned date. Additional copies were distributed to the parties during the session.

The parties confirmed that they did not have any objections to the proper constitution of the Tribunal or to any of the Members of the Tribunal pursuant to Arbitration Rule 6 and CAFTA<sup>1</sup> Article 10.19.

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<sup>1</sup> The Dominican Republic-Central America-United States Free Trade Agreement.

2. **Representation of the Parties**

It was noted that the Claimant is represented in the proceedings by:

***Greenberg Traurig, LLP***

Mr. C. Allen Foster, Ms. Ruth Espey-Romero,  
Mr. Kevin Stern and Ms. Regina Vargo

***Tel:*** (202) 331-3102 / (202) 331-3172  
(202) 452-4878 / (202) 331-3141

***Fax:*** (202) 261-0102

**ADDRESS:**

2101 L Street, N.W., Suite 1000  
Washington D.C. 20037

***E-mails:*** fostera@gtlaw.com

Espey-romeror@gtlaw.com

sternk@gtlaw.com

VargoR@gtlaw.com

***Díaz-Durán & Asociados Central Law***

Mr. Juan Pablo Carrasco de Groote

***Tel:*** (502) 2383-6000

***Fax:*** (502) 2361-3317

**ADDRESS:**

Díaz-Durán & Asociados Central Law  
15 Avenida 18-28. Zona 13  
Ciudad de Guatemala  
Guatemala

***E-mail:*** jpcarrasco@diazduran.com

It was also noted that the Respondent is represented in this proceeding by:

***Procuraduría General de la Nación***

Mr. Baudilio Portillo Merlos  
Attorney General  
(*Procurador General de la Nación*)

***Tel:*** (502) 2248-3200

***E-mail:*** bportillom@pgn.gob.gt

**ADDRESS:**

Procuraduría General de la Nación  
15ª Avenida 9-69, Zona 13  
Guatemala C.A. 01013

**Assisting in the Representation of the  
Government of Guatemala**

***Procuraduría General de la Nación***

Mr. Estuardo Saúl Oliva Figueroa  
Director of Administrative Litigation Proceedings  
(*Jefe de la Sección de lo Contencioso Administrativo de  
la Procuraduría General de la Nación*)

***Tel:*** (502) 2248-3200

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**ADDRESS:**

Procuraduría General de la Nación  
15ª Avenida 9-69, Zona 13  
Guatemala C.A. 01013

***Ministry of Economy***

Mr. Rómulo A. Caballeros Otero  
Minister of Economy  
(*Ministro de Economía*)

***Tel:*** (502) 2412-0200  
***E-mail:*** racaballeros@mineco.gob.gt

Mr. Rubén Morales Monroy  
Vice-Minister of Integration and Foreign Trade  
(*Vice-Ministro de Integración y Comercio Exterior*)

***E-mail:*** rmorales@mineco.gob.gt

Mr. Óscar Erasmo Velásquez  
Vice-Minister of Investment and Competition  
(*Vice-Ministro de Inversión y Competencia*)

***E-mail:*** ovelasquez@mineco.gob.gt

Mr. Joaquín Romeo López Gutiérrez  
Deputy Director of the Legal Affairs Office  
(*Sub-Director de Asuntos Jurídicos*)

***E-mail:*** rolopez@mineco.gob.gt

**ADDRESS:**

Ministerio de Economía  
Dirección de Administración de Comercio Exterior  
8ª Avenida 10-43, Zona 1, Guatemala C.A.

***Embassy of Guatemala***

Mr. Francisco Villagrán De León  
Ambassador to the United States of America

***Tel:*** (202) 745-4953  
***E-mail:*** ambassadorfv@guatemala-embassy.org

**ADDRESS:**

Embassy of the Republic of Guatemala  
2220 R Street NW  
Washington, D.C. 20008

***Dirección de Administración de Comercio Exterior***

Mr. Alexander Cutz Calderón  
Director of Foreign Trade Administration  
(*Director de la Dirección de Administración de Comercio Exterior*)

***Tel:*** (502) 2412-0200  
(502) 2412-0337  
***Fax:*** (502) 2412-0327  
***E-mail:*** acutz@mineco.gob.gt

Mr. Mynor Castillo  
Counselor, Foreign Trade Administration  
(Asesor de la Dirección de Administración de  
Comercio Exterior)

**E-mail:** mrcastillo@mineco.gob.gt

Ms. Miriam Eugenia López M.  
External Counselor  
(Asesora Externa)

**E-mail:** mel@sercomi.com.gt

**ADDRESS:**

Ministerio de Economía  
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8ª Avenida 10-43, Zona 1  
Guatemala C.A.

**Arnold & Porter, LLP**

Mr. David M. Orta  
Mrs. Gaela K. Gehring Flores  
Mr. Daniel Salinas-Serrano  
Mr. Bonard Molina García

**Tel:** (202) 942-5000

**E-mails:** David.Orta@aporter.com  
Gaela.GehringFlores@porter.com  
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Bonard.MolinaGarcia@aporter.com

**ADDRESS:**

Arnold & Porter LLP  
555 12<sup>th</sup> Street N.W.  
Washington D.C. 20004

Unless otherwise specified, all notifications and communications in connection with the proceeding shall be sent to the above addressees.

**3. Applicable Arbitration Rules**

It was agreed, pursuant to CAFTA Articles 10.16.3 and 10.16.5 and Article 44 of the ICSID Convention, that the proceeding shall be conducted in accordance with the ICSID Arbitration Rules in force since April 10, 2006, as modified by the provisions of CAFTA.

**4. Apportionment of the Procedural Costs and Advance Payments to the Centre**

It was recalled that, in accordance with Administrative and Financial Regulation 14 and Arbitration Rule 28, the parties shall defray the expenses of the proceeding in equal parts (i.e., Claimant shall defray 50% and Respondent shall defray 50% of the expenses), without prejudice to the final decision of the Tribunal with respect to costs.

Pursuant to Administrative and Financial Regulation 14(3)(a), on May 7, 2008 the Centre had requested each party to make an advance payment of US\$80,000 (eighty thousand United States dollars) to cover the costs of the proceeding during its first three to six months. It was noted that the Claimant made its advance payment of US\$80,000 (eighty thousand United States dollars) on time and that the Centre acknowledged receipt of such payment on June 11, 2008. The

Respondent informed during the session that its payment will soon be made.

**5. Fees and Expenses of the Tribunal Members**

It was confirmed that, in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of the Tribunal shall, in accordance with the Centre's Schedule of Fees and the Memorandum on the Fees and Expenses of ICSID Arbitrators, receive:

- (i) a fee of US\$3000, or such other fee as may be set forth from time to time in the Centre's Schedule of fees, for each day of participation in meetings of the Tribunal, or eight hours of other work performed in connection with the proceedings or pro rata; and
- (ii) subsistence allowances and reimbursement of travel and other expenses within the limits set forth in Rule 14 of the ICSID Administrative and Financial Regulations.

**6. Place of Arbitration**

Pursuant to CAFTA Article 10.20.1, ICSID Convention Articles 62 and 63 and Arbitration Rule 13(3), it was agreed that the place of arbitration will be Washington, D.C.

The hearings will take place in Washington D.C., unless, after consultation with the parties, the Tribunal determines an alternate location for the hearing.

The Tribunal might hold meetings among its Members and without the parties at any other location as it may consider convenient.

The parties agreed that the Members of the Tribunal might agree on the text of the award by correspondence or other means of communication and sign the final text without meeting. They also agreed that wherever the award was signed it shall be deemed to have been made in Washington, D.C.

**7. Procedural Language**

It was agreed that the procedural language shall be English. The parties shall submit their requests, pleadings, applications, written observations or communications in English, including any supporting documentation accompanying a pleading (i.e. exhibits, witness statements, expert reports).

In the event the original supporting documents are in Spanish or any other language a translation into English will be provided, if possible at the same time of the submission of the pleading, and in any event no more than two weeks after the respective date of submission. Upon receipt of the translation into English, the other party may apply, if necessary, for an extension of the deadline agreed for the submission of its forthcoming written pleading.

Any translations submitted need not be official or certified - as set forth in Regulation 30(3) of the Administrative and Financial Regulations - unless the translation concerned proves controversial and an official certified translation is requested by the other party or the Tribunal.

The Tribunal will issue its daily communications, resolutions, procedural orders, decisions and/or award in English. The communications from the Secretariat to the parties will be made in English.

The parties agreed that each party and its counsel and representatives will determine whether they will use English or Spanish to conduct their oral arguments and examination of witnesses and experts.

The Secretariat will arrange for simultaneous interpretation from and into English and Spanish for all hearings and sessions.

The parties agreed to share equally in the costs of document translations and in the costs of simultaneous interpretation, without prejudice to the final decision of the Tribunal with respect to costs.

#### **8. Records of Hearings**

It was agreed that complete sound recordings will be made of this and any subsequent sessions, copies of which will be sent to the parties and to the Members of the Tribunal.

It was also agreed that the Secretary will prepare summary minutes of this first session and of other procedural meetings.

The parties further agreed that verbatim transcripts will be made in English and Spanish of any hearings (other than sessions on procedural issues).

The parties agreed to have a period of two weeks - after the receipt of the transcripts from the court reporters- in order to review them and to agree on the modifications they consider should be incorporated into the final version.

The parties will be provided with electronic copies of the transcripts by e-mail at the end of each day of the hearings.

#### **9. Means of Communication and Copies of Instruments**

The President reminded the parties of Regulation 24 of the Administrative and Financial Regulations according to which the Centre is the channel for written communications among the parties and the Tribunal.

Routine, administrative or procedural communications and its supporting documents will be transmitted to the ICSID Secretariat and the other party only by e-mail, to the addresses specified under item 2.

It was agreed that any written pleadings and supporting documentation from the parties will also be sent by international courier as indicated below:

##### **To ICSID:**

- On the same date of the electronic filing by e-mail, the parties will send 1 [one] signed original for the Centre, 3 [three] additional hard copies (one for each member of the Tribunal), and 5 [five] CD-ROM disks (one for each member of the Tribunal and two for

the Centre), containing an electronic copy of the pleading itself and the supporting documentation (witness statements, expert reports and all exhibits). These documents and CD-ROMs will be sent according to the instructions indicated below:

*For mail and courier/ parcel deliveries:*

Ms. Natalí Sequeira  
ICSID – The World Bank  
MSN U3-301  
Dulles Commerce Center, Bldg. 100  
23760 Pebble Run Drive  
Sterling, VA 20166 U.S.A.  
Tel. +(202) 458-1534 or 202 458-8575

*For hand deliveries:*

Ms. Natalí Sequeira  
1800 G Street, NW (known within the World Bank as the U Building)  
3rd Floor (MSN U3-301)  
Washington, D.C. 20433 U.S.A.  
Tel. +(202) 458-1534 or 202 458-8575

**Between the parties:**

- On the same date of the electronic filing by e-mail, the Claimant will send 2 [two] hard copies and 2 [two] CD-ROM disks containing the pleading itself and the supporting documentation (witness statements, expert reports, and all exhibits), to the Respondent (1 copy for the Ministry of Economy and 1 copy for Arnold & Porter LLP at the addresses specified under item 2).
- On the same date of the electronic filing by e-mail, the Respondent will send 2 [two] hard copies and 2 [two] CD-ROM disks containing the pleading itself and the supporting documentation (witness statements, expert reports, and all exhibits), to the Claimant's counsel (Greenberg Traurig, LLP and Díaz-Durán & Asociados Central Law at the addresses specified under item 2).

The Secretary will arrange for the appropriate distribution to the Members of the Tribunal of the communications and pleadings submitted by the parties either by e-mail or courier.

The electronic version of the parties' memorials, witness statements, and expert reports will be sent to the Centre in MS Word or in a PDF searchable and printable format.

It was noted that the date of receipt of an official instrument or a communication shall be the date of receipt of its electronic version by the Centre. A written pleading will be considered to have been submitted in a timely fashion if the submission is transmitted according to the above-mentioned deadlines.

The parties will meet their filing obligations by delivering the hard copies and CD-ROM copies to a courier service for next-day delivery on the date set as the deadline for filing, however, the hard copies and CD-ROM copies need not be physically delivered to the Centre or

the opposing party's counsel on the date set as the deadline for filing.

Unless otherwise provided for in the Arbitration Rules, the decisions of the Tribunal will be communicated to the parties through instructions to the Secretariat.

**10. Presence and Quorum**

As provided in Arbitration Rule 14(2), unless the parties agree otherwise, the quorum for sittings of the Tribunal will be constituted by the majority of its Members.

**11. Decisions of the Tribunal by Correspondence (or by any other appropriate means of communication)**

It was agreed that the Tribunal may take decisions by correspondence among its Members, or by any appropriate means of communication, provided that all Members are consulted. As provided by Arbitration Rule 16, all decisions of the Tribunal will be taken by the majority of its members, and all Members must be consulted and have a reasonable opportunity to cast their vote before a decision may be taken by the majority of the Members of the Tribunal. Abstention shall count as a negative vote.

**12. Delegation of power to Fix Time Limits and Sign Procedural Orders on behalf of the Tribunal**

It was agreed that pursuant to Arbitration Rule 26(1) the President of the Tribunal will have the power to fix and extend time limits for the completion of the various steps in the proceeding. As a general rule, the President will exercise this power only after consulting the other Members of the Tribunal to the extent possible.

**13. Written and Oral Procedures**

The parties agreed that, in accordance with Arbitration Rule 29, the proceeding shall consist of two distinct phases, written and oral.

It was noted that pursuant to CAFTA Article 10.21 the Tribunal shall conduct hearings open to the public and shall determine in consultation with the parties the appropriate logistical arrangements.

**14. Pleadings: Number, Sequence and Time Limits**

*Number and Sequence*

Should the proceeding continue after the decision of the Tribunal on the Respondent's objection pursuant to CAFTA Article 10.20.5, the parties written phase shall consist of the following pleadings (i) a Memorial; (ii) a Counter-Memorial; (iii) a Reply; and (iv) a Rejoinder.

Pursuant to CAFTA Article 10.20.2, the President of the Tribunal noted that the procedural calendar shall consider the possibility that non-disputing CAFTA parties have the right to make oral and written observations to the tribunal regarding the interpretation of CAFTA.

*Time limits for the submission of pleadings related to the Respondent's objection pursuant to CAFTA Article 10.20.5*

After consideration of the parties' views and due deliberation, the Tribunal fixed the following schedule for the exchange of submissions with respect to the objection raised by the Respondent pursuant to CAFTA Article 10.20.5:

1. Claimant will file by July 11, 2008, its response to the Respondent's objection;
2. Respondent will file by August 11, 2008, its reply to the Claimant's response; and
3. Claimant will file by September 11, 2008, its rejoinder to the Respondent's reply.

It was agreed that the schedule for the filing of further pleadings - if any - will be decided once the Tribunal has issued its decision or award on the objection raised by the Respondent pursuant to CAFTA Article 10.20.5.

**15. Production of Evidence**

It was agreed that the parties will include with their written submissions all the facts, legal arguments, and documentary evidence on which they intend to rely, including written witness statements, expert opinions and any other documentary evidence.

It was also agreed that exhibits will be numbered consecutively throughout the proceedings. All documents submitted as evidence will be assigned an exhibit number.

**16. Witnesses: Written and Oral Testimony**

The parties will submit their witness statements and expert reports together with their memorials.

Witnesses can be called by either party for examination. Before any oral hearing and within time limits to be announced by the Tribunal, a party may be called upon by the Tribunal or the other party to produce at the hearing, for examination and cross-examination, any witness whose written testimony has been advanced with the written submission.

Each party will be responsible for producing its witnesses and experts for purposes of cross-examination, which will be limited to the matters contained in the written testimony. Each party is also responsible for producing its witnesses and experts to answer any questions the Tribunal may have.

It was agreed that if a witness called by one party is not made available for examination at the oral hearing, his/her statement will remain on record and the Tribunal will assess the probative value of that statement taking into account the record and all relevant circumstances, including the fact that the statement was not confirmed orally and that the witness was not cross-examined.

**17. Dates and Nature of Subsequent Sessions**

The parties agreed to make their best effort to inform the Tribunal after the first round of pleadings related to the objection raised by the Respondent pursuant to CAFTA Article 10.20.5,

whether they consider necessary to hold a hearing. The parties and the Tribunal agreed to reserve October 10, 2008 as of 11:30 a.m. to hold a hearing in case either party requests it.

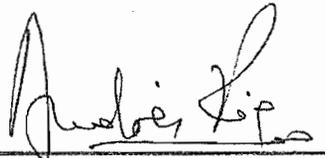
**18. Publication of the Award and the Decisions Related to the Proceedings**

The parties agreed to the application of CAFTA Article 10.21 and will inform the Centre on whether they agree on the publication of the award by the Centre pursuant to Arbitration Rule 48(4).

**II. Other Matters**

The President asked the parties if they wished to raise any other issues to be discussed during the session. The parties mentioned they will try to reach agreement with respect to the application of CAFTA Article 10.20.8 and will duly inform the Tribunal on any agreement in this respect.

There being no further business, the President thanked the participants for their cooperation on behalf of the Tribunal. Sound recordings were made of the session, and deposited in the archives of the Centre.



Dr. Andrés Rigo Sureda  
President of the Tribunal  
Date: November 5, 2009  
Place: Washington, D.C.



Natali Sequeira  
Secretary of the Tribunal  
Date: November 5, 2009  
Place: Washington, D.C.