

BEFORE
THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

Between
Railroad Development Corporation
Plaintiff

vs.
The Republic of Guatemala
Defendant

Case No. ARB/07/23

Affidavit by Héctor Rolando Valenzuela Flores

1. I render this deposition in the international arbitration case filed by Railroad Development Corporation (“RDC”) against Guatemala before the International Centre for the Settlement of Investment Disputes (ICSID).

2. This deposition is supported by my personal knowledge and recollection, and the statements are limited to my direct involvement in the facts to which I refer herein.

The Railroad Commission in 2005

3. My name is Hector Rolando Valenzuela Flores. I completed the curriculum of Industrial Engineering at *Universidad de San Carlos de Guatemala* and specialized in Industrial Engineering at the University of Akron in the State of Ohio, USA, in 1970. In January 2005, the Vice Minister of Housing, Architect José Luis Gándara, requested me to coordinate the duties that would be carried out by a “Railroad Commission”, through the CIAAP (the Inter-Institutional Coordinating Office for Deprived Settlements), an agency created in 2004 as a division of the Vice Ministry of Housing, Ministry of Communications, Infrastructure and Housing, where I acted as Chief Executive Officer. This commission held meetings from January through June 2005, and gathered representatives of FEGUA, the Ministry of Communications, Infrastructure and Housing (Ministry of Communications), the Inter-Institutional Coordinating Office for Deprived Settlements (CIAAP), the Unit for the Development of Affordable Housing (UDEVIPO), the Guatemalan Housing Fund (FOGUAVI), and Ferrovías Guatemala (Ferrovías). All the meetings of the Railroad Commission took place at the meeting room of the Ministry of Communications, Infrastructure and Housing, located on the 2nd floor of its main offices. Mr. Héctor Pinto also attended the meetings as of the second meeting that was convened.

4. The Government of Guatemala organized the Railroad Commission in order to promote the rehabilitation of the South Coast portion of railway to the Pacific coast, specifically the Puerto Quetzal-Escuintla-Santa Lucía Cotzumalguapa section, which seemed to be the most feasible section for freight transportation in that area of the country.

5. Upon the invitation of the Government of Guatemala, Mr. Héctor Pinto attended some commission meetings as a member of the sugar-industry sector of Guatemala, representing the interests of a group of the sugar sector related to the development of the railway for

sugar transport and, specifically, a development project adjacent to Puerto Quetzal named “*Ciudad del Sur*.”

6. After the commission meetings commenced in January 2005, discussions began with a number of proposals submitted by Ferrovías, all aimed at developing the South Coast railway. It was understood that the project to be developed in the southern region of the country was to restore railway operations using a broad-gauge rail. Most of the time, Mr. Pinto just listened to the proposals submitted to the commission, and focused his comments on how the railway could serve to benefit the *Ciudad del Sur* project. He also offered his support by facilitating a helicopter to fly over certain areas, as necessary, and provide satellite photographs to locate the railway areas occupied by squatters, in Santa Lucía Cotzumalguapa, the city of Escuintla, and Puerto de San José.

7. From the very beginning of the commission meetings, Ferrovías’s intent was to discuss and implement a plan to legally evict and relocate the thousands of squatters settled on the right-of-way, as Ferrovías’s representative, Mr. Jorge Senn, made clear that the rehabilitation of the railway in that area could not commence until this was accomplished. At the outset of the commission meetings, except for those of FEGUA, we, the Government representatives, were not aware of FEGUA’s obligation under its usufruct contracts with FERROVÍAS to evict squatters from the railway line for the purposes of planning the railway development of the corresponding railway sections. It was clear from the beginning that FEGUA had failed to even take the first steps of such task, as it would have required major planning, political will and resources in order to be carried out.

8. Dr. Gramajo, the acting Overseer of FEGUA at that time, served on the Railroad Commission as FEGUA’s representative. Dr. Gramajo maintained a defiant position from the first meeting and showed no intention to move the negotiations forward. He asserted that Ferrovías had breached its rehabilitation obligations under the usufruct contract with FEGUA, thereby diverting the attention from the purpose of the Railroad Commission. Dr. Gramajo revealed his position once it was agreed that the first step for rehabilitation of the South Coast railway was having the squatters evicted. In response to Dr. Gramajo’s allegations, Ferrovías’s representatives affirmed having letters issued by FEGUA confirming its compliance with the usufruct contract rehabilitation phases. Nevertheless, despite these compliance letters, Dr. Gramajo’s personal (not legal) opinion was that Ferrovías had failed to comply. As a result, after Dr. Gramajo revealed his position, it was decided to set the issues apart and focus the Railroad Commission’s work on coordinating the program to evict squatters from the railway line. Actually, during the meetings, “the” contract or contracts were neither produced nor subject to legal analysis; all parties, however, acknowledged the same single fact, which was that FEGUA –as a government entity- was bound by the contract to have the squatters evicted.

9. As the Chief Executive Officer of the CIAAP, I must say that my experience in cases of massive evictions let me know how difficult it would be to undertake a process like the one intended by the Railroad Commission. Such purpose requires sound legal support and the filing of eviction actions. Then, once the eviction procedures conclude, eviction court orders have to be sought. Nevertheless, enforcing such orders requires logistical planning and the relocation of the people, since the Government usually decides to provide evicted

squatters with a piece of land for housing, despite the fact that it is not the Government's obligation.

10. I read Dr. Gramajo's second testimony and I understand that he asserts that, by February 2005, the Railroad Commission had come up with a detailed plan to remove all of the squatter families that were occupying the right-of-way along the South Coast corridor. The detailed plan is purportedly set forth in the Commission's February 17, 2005 meeting minutes, which states that the Government was going to begin execution of its plan four days later, on February 21, by FEGUA's obtaining eviction orders from the court and the identification of a relocation site for the squatter families.¹ This is not true. At that point in time, the Government was by no means in a position to implement such a plan. One of the initial steps in implementing the plan required conducting a census of the estimated 4,000 families occupying the South Coast corridor. In this regard, FEGUA was only willing to contribute Q.150,000.00 to the cost of the census and wanted the other entities to pick up the remaining cost. On the other hand, even after a census was performed and the necessary eviction orders had been obtained (which the Government never did), the Government still needed a large amount of land away from the right-of-way to relocate and house the squatter families. However, by February 17, 2005, the Government had not even identified a proper relocation site for the squatters, and it certainly did not have the financial wherewithal to acquire such a site and build the necessary housing, facilities and utility infrastructure.

11. I also understand that Dr. Gramajo has asserted that, during the commission meetings, it was discussed and determined that the Government would only be willing to proceed with removing squatters if Ferrovías demonstrated that it had secured sufficient investment and financing to proceed with immediately rebuilding and reopening the entire South Coast corridor. I certainly do not recall any such condition being placed on the Government's commitment, as it was always said that the first necessary step was filing the eviction actions for the purposes of obtaining the eviction orders from the court, so Ferrovías could establish a rehabilitation plan once the enforcement of the eviction orders was certain. Furthermore, during the meetings, it was never discussed if Ferrovías had to obtain financing prior to the commission's coordinating and filing the court actions and carrying out the relocation of squatters. As it had been evidenced since the outset of the meetings, FEGUA was contractually obligated to remove the squatters regardless of Ferrovías' obtaining the necessary investment and financing for the South Coast project.

12. On April 13, 2005, Mr. Pinto sent a letter to me that was addressed to the Deputy Minister of Communications, Mr. José Luis Gándara, informing him that negotiations between the company he represented and Ferrovías had concluded without success and, therefore, he requested that he be excused from further meetings of the Railroad Commission.² The copy of the letter he sent to me included a handwritten note to request that I destroy the letter and any other proof of communication between us, which seemed

¹ Ex. R-181, Agenda and Minutes from Squatter Commission Meeting, 17 February 2005.

² Ex. R-189.

quite strange to me. Evidently, I did not accept to do so, since I gave instructions to have the note filed. Mr. Pinto stopped attending the commission meetings after he sent this letter.

13. I understand that Dr. Gramajo has stated that the Government decided, immediately upon receiving Mr. Pinto's April 13 letter, that it would no longer move forward with its plan to remove squatters from the South Coast corridor because the sugar industry support had been withdrawn, including that of the company represented by Mr. Pinto. According to Dr. Gramajo's statement, it was not worth it for the Government to comply with its contractual obligations if Ferrovías was not going to start rehabilitation works immediately.³

14. Contrary to Dr. Gramajo's testimony, after receipt of Mr. Pinto's April 13, 2005 letter, the Railroad Commission continued to meet to discuss the implementation of a squatter removal plan. In May 2005, the Ministry of Communications, the CIAAP, and FEGUA gave a joint presentation at a commission meeting which described and documented in detail the widespread extent of the squatter problem throughout the South Coast railway and set forth a different timetable for the execution of a removal plan.⁴ The presentation estimated that there were approximately 2,000 squatter families occupying the Santa Lucía-Puerto Quetzal segment of the South Coast section which had been targeted for restoration; furthermore, according to the presentation, the Government estimated that the total cost to relocate and resettle these squatters would be Q.140,000,000.00, which was an amount of money that the Government did not have and could not afford.⁵ Thus, Mr. Pinto's written communication actually influenced the Government's decision to abandon its squatter removal plan, because the Government had been counting on the sugar sector to pick up expenses for implementing the plan, as it had been clearly discussed that the project would mainly benefit the sugar sector and *Ciudad del Sur*, which was also clearly agreed with Mr. Hector Pinto. Ferrovías was never given an ultimatum over the continuance of the eviction plan, subject to the immediate commencement of rehabilitation works. As I stated above, major coordination and preparation were required, not only by the central government but also by the corresponding courts, to allow Ferrovías to undertake these works.

15. As a result of the circumstances described above, the Railroad Commission weakened to the extent that it was eventually dissolved in June 2005. The Commission's only achievement was the initial planning of the aforesaid census, which was never conducted. No legal action to evict the squatters was ever filed by the Government of Guatemala and no plan to relocate squatters was actually defined. It all was limited to a plan that was never carried out.

³ Second Statement of A. Gramajo ¶ 20.

⁴ Ex. C-96, CIAPP-FEGUA Presentation, "Deprived Human Settlements in the Guatemalan Railway Infrastructure," May 2005.

⁵ Ex. C-96, CIAPP-FEGUA Presentation, "Deprived Human Settlements in the Guatemalan Railway Infrastructure," May 2005, slides 28-29, 35.

I am in total conformity with the contents of this document, which I attest by setting my signature, and I solemnly declare upon my honor and conscience that the facts herein stated are the truth, the whole truth and nothing but the truth.

Guatemala City, Republic of Guatemala, March 11, 2011.

(Illegible signature)

Héctor Rolando Valenzuela Flores