

U.S. rail management company Railroad Development Corporation, RDC, is pulling out of Guatemala, claiming the country's attempts to put its railway operations out of business are too much to bear.

Henry Posner III, chairman of RDC's Guatemalan affiliate Ferrovías Guatemala, issued a statement on 6 July claiming that despite Ferrovías Guatemala and RDC's desire to continue to do business in the country, it is no longer possible to do so.

Ferrovías Guatemala is committed to move rail traffic that will take some 12 weeks to complete. RDC has said it will support Ferrovías Guatemala in fulfilling these commitments, as well as help address any other customer and employee needs. But come 1 October Ferrovías Guatemala will suspend its rail operations until further notice.

RDC became the first company to launch arbitration proceedings under DR-CAFTA on 14 June, when it filed a formal request for arbitration with ICSID on behalf of itself and Ferrovías Guatemala, alleging indirect expropriation by the Guatemalan government.

RDC argues that a 'lesivo' decree issued by the government to de-privatise the rail industry in August 2006 has had a chilling effect on Ferrovías Guatemala's operations, and is contrary to the protection afforded to investors by the treaty.

Since filing the claim, Ferrovías Guatemala has attempted to continue operating but says the effects of the decree have become too much. It complains that an inability to obtain credit, squatters, judicial interference, police indifference and neglect, and difficulty attracting additional investment from its right of ways have all worsened and prevented it from carrying out its business.

RDC and Ferrovías Guatemala have retained international legal advice from Greenberg Traurig LLP, with a team headed by Regina Vargo, who was the chief US negotiator in the drafting process of the treaty, and from local law firm Diaz-Duran & Asociados Central Law.

Ruth Espey-Romero, a member of the Greenberg Traurig team, does not see how RDC's decision to pull out will affect its arbitration proceedings. "Ferrovías Guatemala has been placed in this position involuntarily by illegal actions of the government of Guatemala. Because of this reality, RDC has no reason to think that ceasing operations

will affect the legal proceedings under CAFTA at all," says Espey-Romero.

If anything, it goes to strengthen RDC's case, according to Juan Pablo Carrasco de Grootte of Díaz-Durán & Asociados Central Law. "This is a direct result of the lesivo declaration, and evidences the expropriation claim made by the RDC," he notes.

As the first DR-CAFTA claim, the case will be followed keenly by other foreign investors with operations in the region. Espey-Romero thinks the latest developments send out positive and negative messages. "While it is disheartening to see that the government of Guatemala continues to think that it can act with impunity and hide behind the judicial branch of government when dealing with foreign investment, there is the positive message that under the investor state provisions of DR-CAFTA, investors have a neutral forum to address grievances," she notes.

Ferrovías Guatemala is finding out for itself how slowly local courts work, having also filed claims there. The effects on these cases of RDC's decision to pull out are anyone's guess, according to Espey-Romero. "The Guatemalan courts have been consistently slow to react and missed - by many, many months - legally required deadlines for responding in the motions that Ferrovías Guatemala has filed in court," she notes, adding that neither RDC nor Ferrovías Guatemala expect a level playing field in Guatemala "as there has never been one in the past".

ICSID is in the process of reviewing RDC's arbitration request and a reply is expected soon. Should the response be positive, arbitration will be held at ICSID in Washington, DC. RDC has already nominated its arbitrator, Stuart Eizenstat.

Once the claim is accepted by ICSID, the government of Guatemala will have 75 days to appoint its own arbitrator, whereupon the third arbitrator who will join the arbitration panel will be nominated. — *Rosie Cresswell*

COUNSEL TO RDC AND FERROVIAS GUATEMALA

Guatemala

- [Díaz-Durán & Asociados Central Law](#)
Partner, Juan Pablo Carrasco de Grootte

U.S.

- [Greenberg Traurig LLP](#)
Sr. Director, Regina Vargo and
Partners, Allen Foster and Ruth Espey-Romero