

Corporate Attacks: Essential Services

Case Study: Transportation

Investor-State Dispute Settlement (ISDS) grants corporations shocking powers to attack the laws we rely on for a clean environment, financial stability, affordable medicines, safe food and decent jobs. The cases are decided by tribunals composed of three private attorneys, some of whom rotate between serving as “judges” and bringing cases against governments. The tribunalists are paid by the hour and are unaccountable to any court system or electorate. Under U.S. trade and investment pacts alone, corporations have already won more than \$3.6 billion in taxpayer money, with \$34 billion still pending.

RDC v. Guatemala *Investor Win (awarded \$18.6 million)*

U.S.-based Railroad Development Corporation (RDC) [launched an investor-state claim in 2007 under the U.S.-Central America Free Trade Agreement \(CAFTA\)](#) after the government of Guatemala initiated a legal process to consider revoking a disputed railroad contract with the firm. RDC was engaged in the domestic legal process but still alleged that it had been denied fair and equitable treatment.

Guatemala privatized its railroad system in 1997. RDC’s contract in that privatization provided for rehabilitation of the entire railway network in five phases and significant investment in rolling stock and rail lines. After its first eight years of operation, RDC had [only completed the first phase](#). The Guatemalan government initiated a review of an RDC contract in a process that could result in its termination, and after multiple assessments concluded that it [did not comply with Guatemalan law](#). This process, called lesivo, provided RDC the opportunity to present its case before an administrative court, and then [appeal the resulting decision](#) to the country’s Supreme Court. Most lesivo actions taken by the Guatemalan government pertained to domestic firms.

While taking advantage of this domestic due process and continuing to earn money from its investment, RDC launched its CAFTA claim. [It alleged](#) that the lesivo itself was an indirect expropriation and a violation of CAFTA’s national treatment and “minimum standard of treatment” rules. The tribunal not only allowed the ISDS claim to move forward despite the unresolved domestic process,

but opined that in such instances of parallel ISDS claims, [investors should be allowed to access extrajudicial investor-state proceedings](#) before the conclusion of domestic legal processes.

In 2012 the tribunal ruled in favor of RDC, ordering the government to pay the firm \$18.6 million. The tribunal [upheld the allegation](#) that Guatemala's initiation of the lesivo process had failed to afford RDC a "minimum standard of treatment." In doing so, the tribunal ignored the definition of that standard found in a CAFTA Annex that was ostensibly designed to limit tribunalist discretion. CAFTA governments had inserted the annex after a series of investor-state tribunals had interpreted the "minimum standard of treatment" obligation to mean that [investors must be guaranteed a stable regulatory framework](#) that does not frustrate the expectations they held at the time they established their investment. In defending itself against an investor-state challenge that tried to invoke this sweeping interpretation, the U.S. government stated, "[if States were prohibited from regulating in any manner that frustrated expectations – or had to compensate for any diminution in profit – they would lose the power to regulate.](#)" By defining "minimum standard of treatment" in the CAFTA Annex as derived from customary international law that "[results from a general and consistent practice of States that they follow from a sense of legal obligation,](#)" the U.S. and other CAFTA governments attempted to constrain "minimum standard of treatment" to an obligation to afford such basic rights as due process and police protection. But the RDC tribunal [ignored the annex](#) and [rejected the official submissions](#) of four CAFTA governments, including the U.S. government, arguing that the foreign investor right was limited. Instead, the tribunal borrowed a broad interpretation of "minimum standard of treatment," one that included protection of investors' expectations, from another investor-state tribunal and [used it to rule against Guatemala](#).

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