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6. Arbitrators decline Guatemala's request for clarification of jurisdictional ruling in CAFTA railway dispute; however, arbitrators make clear that claimants cannot pursue claims related to squatter interference with railway and dispute payments into railway trust fund; claimant may be able to claim denial of justice by virtue of local courts' failure to remedy alleged squatter and trust fund violations

An arbitral tribunal hearing a dispute between the Republic of Guatemala and a US railroad company has declined to clarify a November 2008 jurisdictional decision which had given rise to debate as to its implications.

In a decision* dated January 13, 2009, a tribunal at the International Centre for Settlement of Investment Disputes (ICSID) declined a request from Guatemala for clarification as to which claims advanced by the investor cannot be pursued further in the US-Central American Free Trade Agreement (CAFTA) arbitration.

As previously reported in *IAReporter***, a Guatemalan subsidiary of Railroad Development Corporation (RDC) had initiated certain domestic arbitration proceedings, prior to launching an international arbitration under the CAFTA. These domestic arbitrations dealt with an alleged failure by the government to defend the railway from squatters and a concomitant failure of the government to make certain financial contributions to a trust fund that was designed to support the railway concession.

Guatemala protested that similar claims were later raised by Railroad Development Corporation in the CAFTA arbitration proceeding, and that arbitrators in the CAFTA case should decline jurisdiction because of this overlap.

When claimants file for arbitration under the CAFTA, they are obliged to submit a waiver wherein they waive their rights to pursue their claims in other forums. In a November 2008 jurisdictional ruling in the RDC v. Guatemala case, arbitrators acknowledged that there was some overlap between the two sets of arbitration proceedings, and that a waiver submitted by the claimants in the CAFTA case was “partly defective”.

At the same time, the arbitrators signaled that they had jurisdiction over one particular (new) claim being advanced in the CAFTA arbitration: a challenge by RDC to a government ruling that the railroad concession should be cancelled on the grounds that it was ‘injurious’ to the state.

However, the jurisdictional decision was less explicit as to whether the partly defective waiver – and the overlap in some respects between domestic and CAFTA claims – meant that jurisdiction over other aspects of the CAFTA claim was being expressly declined.

For its part, Guatemala turned to the tribunal for clarification in the aftermath of the jurisdictional ruling, seeking a “detailed clarification regarding precisely what is excluded by the defect the Tribunal found in

the waiver as well as what is not excluded.”

Guatemala expressed a fear that a lack of clarity as to the import of the jurisdictional decision might permit the claimants to persist in the CAFTA arbitration in raising certain claims – related to the aforementioned squatters and trust fund contributions - that were already being pursued in the domestic proceedings.

In particular, Guatemala protested that the claimants might characterize certain government measures related to the squatters and trust fund as a “denial of justice”, thereby keeping these measures on the table in the CAFTA international proceeding (at the same time as the measures were being challenged in domestic arbitration.)

Tribunal sees no need for clarification, but offers glimpse of thinking

Ultimately, the tribunal declined to issue a clarification of its earlier jurisdictional decision, agreeing with the claimant that the original decision was neither vague nor internally inconsistent.

The tribunal goes on to stress that its jurisdictional decision had clearly excluded CAFTA claims based on the measures that were being challenged in domestic arbitration (i.e. the squatters and the trust fund). However, the tribunal also stressed that the “general and wide-ranging” nature of the minimum standard of treatment contained in Article 10.5 of the CAFTA might give rise to claims “based on other measures taken by Respondent beyond those at issue in the local arbitrations.”

Thus, it remains to be seen whether the claimants will claim in the CAFTA proceeding for a denial of justice – contrary to the Minimum Standard of protection set forth in Article 10.5 – and seek to raise the failure of local courts to resolve certain disputes over squatters and the alleged failure to pay into the trust fund.

It also remains to be seen whether Guatemala will raise other jurisdictional objections, apart from the preliminary objection on the grounds that RDC’s waiver was defective.

RDC must file a memorial in late spring, after which Guatemala could raise further jurisdictional objections.

Arbitrators in the case are Dr. Andres Rigo Sureda (President), Prof. James Crawford (Guatemala’s nominee), and the Hon. Stuart Eizenstat (claimant’s nominee).

View source: <http://www.iareporter.com/Archive/IAR-01-22-09.pdf>

* A copy of the January 13, 2009 decision is available here:
<http://ita.law.uvic.ca/documents/RDCJurisdictionClarification.pdf>

** Tribunal rejects Guatemala’s objection to jurisdiction in CAFTA railroad dispute; arbitrators rule that partly defective waiver of local claims is not grounds for denying jurisdiction over entire case”, *IAR Reporter*, Vol.1, No.15, November 25, 2008, <http://www.iareporter.com/Archive/IAR-11-25-08.pdf>

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