

Tribunal rejects Guatemala's objection to jurisdiction in CAFTA railroad dispute; arbitrators rule that partially defective waiver of local claims is not grounds for denying jurisdiction over entire case

By Luke Eric Peterson, Editor

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Quick on the heels of a recent ruling on provisional measures*, an arbitral tribunal hearing a dispute between a US railroad company, Railroad Development Corporation (RDC) and the Government of Guatemala has rejected a jurisdictional objection raised by Guatemala. At the same time, the tribunal's decision may limit the scope of the CAFTA claim advanced by RDC.

For its part, Guatemala had insisted that the failure of the claimants to halt certain local arbitration proceedings should prove fatal to their bid to sue under the Central American Free Trade Agreement (CAFTA). Attorneys for Guatemala sought an expedited ruling from the tribunal on this question.

In a decision dated November 17, 2008, a tribunal consisting of Dr. Andres Rigo Sureda (President), Hon Stuart Eizenstat (claimant's nominee) and Prof. James Crawford (Guatemala's nominee) found some fault with the waiver** submitted by the claimant but upheld jurisdiction in the case.

The arbitrators noted that domestic arbitration proceedings had been initiated by RDC's local subsidiary, Ferrovias Guatemala (FVG) for the alleged failure by Guatemala to remove squatters from railroad property, as well as an alleged failure by the authorities to make payments into a trust fund dedicated to the restoration and rehabilitation of the railway. These proceedings remain ongoing and Guatemala argued that these proceedings ran contrary to a waiver tabled by the claimant in the CAFTA case – raising the spectre of double-jeopardy, double-recovery or contradictory rulings from different bodies.

Meanwhile, RDC countered that the local proceedings deal with different – contract-based – claims, and that the CAFTA claim pertains to a different measure, the so-called Lesivo Resolution (a measure which seeks to seize the railroad's rolling stock on the grounds that the earlier-agreed deal with RDC was "injurious" to the state).

It fell to the tribunal to determine whether the measures in the two sets of proceedings are indeed the same, and, if so, what effect this would have on the validity of the waiver and the jurisdiction of the tribunal.

Indeed, the tribunal would go on to determine that some of the same measures – specifically an alleged failure to remove squatters and to make payments into a trust fund – were complained of in the local arbitrations and in the CAFTA claim.

However, the tribunal then asked whether this rendered the entire waiver ineffective – perhaps undermining the jurisdiction of the tribunal – or whether a waiver could only be "partly" defective. (One thing was clear:

Guatemala did not wish to grant the claimants any opportunity to remedy any defects in the waiver, so that the case might proceed expeditiously).

Ultimately, the tribunal had to interpret a CAFTA provision which stipulates that “no claim may be submitted to arbitration” unless certain waivers have been made.

The tribunal would hold that the term “no claim” as used in this CAFTA provision could refer to multiple claims (forming part of a given arbitration). As such, even if the waiver of certain claims were defective, this should not derail the entire arbitration. In particular, the waiver with respect to RDC’s challenge to the so-called Lesivo Resolution (and actions following it) was deemed valid, and the tribunal affirmed its jurisdiction over that claim.

In adopting this interpretation, the tribunal emphasized that it was “more in consonance with the objective of CAFTA to introduce effective procedures of dispute settlement.” Conversely, to adopt Guatemala’s construction of the CAFTA waiver requirement would require that the entire arbitration be dismissed, but that the claimants could initiate a new arbitration along with a revised waiver. The tribunal contended that such an outcome would be a “procedurally inefficient result”.

Oddly, the tribunal does not expound upon the implications of its having found certain portions of the waiver to be defective. (In particular, the tribunal does not explicitly state that it is declining jurisdiction over certain claims; rather it notes, without further elaboration, that the waiver by RDC is defective insofar as there is certain overlap between the domestic arbitration proceedings and certain of the claims advanced in the CAFTA claim).

On a different point, it bears notice that the tribunal did not find fault with the claimant’s apparent hedging of its bets in its waiver, where RDC reserved the right to pursue any local remedies that might be ordered by the tribunal “in order for RDC to avoid the contention by Guatemala that RDC had failed to exhaust local remedies.” Here, the tribunal noted that Guatemala had not raised such an objection^{***} and, moreover, the tribunal lacked any authority to order RDC to pursue local remedies. Thus, RDC’s hedging of its bets on local remedies did not undermine the waiver or deprive the tribunal of jurisdiction.

Unless Guatemala raises additional jurisdictional objections, the case will proceed to a hearing on the merits.

* See “Tribunal in CAFTA railway arbitration denies broad request for evidence preservation”, *Investment Arbitration Reporter*, Vol.1, No. 14, November 12, 2008

** The claimant had submitted a waiver pursuant to Article 10.18.2(b) of the CAFTA attesting that it waived “any right to initiate or continue before any administrative tribunal or court under the law of any party to CAFTA, or other dispute settlement procedures, any proceeding (‘local remedies’) with respect to any measure alleged to constitute a breach referred to in CAFTA Article 10.16.”

*** In this context, the tribunal signaled that it might look dimly on certain additional jurisdictional objections from the Guatemalan Government. While conceding that the request for an expedited ruling on the waiver issue did not preclude Guatemala from raising other jurisdictional objections at a later date the arbitrators opined that “the use of the expedited procedure as just an additional jurisdictional layer would hardly fit with the stated objective of CAFTA to create effective procedures for the resolution of disputes.”

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