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Arbitration Panel in First CAFTA-DR Investor-State Case Awaits Arbitrator

By Rossella Brevetti

An arbitration panel in the first case brought under the investor-state mechanism established by the U.S.-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) should be "up and running" as soon as a third arbitrator is appointed, Regina Vargo, senior director for global trade at Greenberg Traurig, said Feb. 29.

Vargo, a former official with the Office of the U.S. Trade Representative who helped negotiate the CAFTA-DR, spoke at a National Foreign Trade Council event on the increasing use by governments of their legal systems to the detriment of U.S. global corporations. NFTC said that trend is taking several forms: outright nationalization, uncompensated expropriation, and lawsuits asserting claims for injury related to past investments.

The CAFTA-DR signatories are the United States, Dominican Republic, Costa Rica, El Salvador, Guatemala, Nicaragua, Honduras. Costa Rica has yet to implement the pact. Chapter Ten of the CAFTA-DR establishes a mechanism for an investor of a party to submit to binding international arbitration a claim for damages against another party. The investor may allege that the party has breached a substantive obligation under the chapter or that the party has breached an investment agreement with, or an investment authorization granted to, the investor.

In the first investor-state claim brought under the CAFTA-DR, Railroad Development Corp. (RDC), a Pittsburgh based railway investment and management company, filed its claim to institute arbitration against Guatemala on behalf of itself and its Guatemalan affiliate, Ferrovias Guatemala (FVG), last June. The claim is before the International Centre for the Settlement of Investment Disputes (ICSID) in Washington, D.C., as provided for under the CAFTA-DR.

Wrongful Indirect Expropriation

Vargo, a member of RDC's legal team, said that RDC is bringing three claims under the CAFTA-DR: wrongful indirect expropriation, failure to accord a minimum standard of treatment, and failure to provide national treatment.

In August 2006, Guatemala issued a presidential decree declaring the rolling stock component of its 1998 privatization of the abandoned national railway to be "lesivo," or against the interests of the government. The rolling stock contract was formalized in 2003 as an element of the main railroad concession agreement entered into in 1998. The railroad concession to FVG was approved by the government at that time and ratified by the congress, according to an RDC press release.

RDC expressed the view that the lesivo decision was taken in response to FVG's initiation of arbitration under the concession agreement.

Eizenstat Picked as Arbitrator

The lesivo declaration had a really chilling effect on RDC's business, , Vargo said, as people who had been expressing interest in real estate leases backed off and banks declared that the company was not creditworthy.

"The pressure was quite intense on RDC," she said, leading RDC to file a notice of intent to go to CAFTA-DR arbitration.

After ICSID registered the claim, on Aug. 29, 2007, the government of Guatemala named its arbitrator, James Richard Crawford of Australia. RDC's arbitrator, Stuart Eizenstat, was named in June.

Guatemala asked ICSID to pick the third arbitrator. "We are still waiting for that arbitrator," Vargo said. There was one selection who was not deemed to be appropriate by either party. "We're back to the drawing board waiting," she said. "But the panel will get up and running as soon as that is done."