IA REPORTER
INVESTMENT ARBITRATION REPORTER

By Luke Eric Peterson, Editor
www.iareporter.com

27 June 2010

5. Tribunal finds that railway company's dispute with Guatemala arose after CAFTA entered into force and is arbitrable

In a May 18, 2010 Decision on Jurisdiction, arbitrators under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) have rejected several objections raised by the Republic of Guatemala to a claim by a US railway company.

In a nod to Guatemala, however, arbitrators also reiterated that they will not entertain certain claims which overlap with a pair of ongoing domestic arbitration proceedings.

The developments come in the Railroad Development Corporation (RDC) v. Republic of Guatemala case, wherein RDC alleges that its railway concession was harmed in violation of the US-Central American Free Trade Agreement (CAFTA).

The May 18, 2010 jurisdictional ruling is noteworthy insofar as arbitrators rejected an argument by Guatemala that RDC was seeking to arbitrate a dispute which had arisen *prior* to the CAFTA's July 1, 2006 entry into force.

Arbitrators acknowledged that certain government actions directed at RDC's investments occurred *prior* to the entry into the force of the CAFTA, however they held that a critical "Lesivo" resolution – declaring the concession to be "injurious" to the interests of the state – was a measure taking place on the date of its publication, August 25, 2006, thus taking place when the CAFTA had entered into effect.

Of equal comfort to the claimant, arbitrators held that if the "Lesivo" Resolution could be considered as part of an ongoing *process* – rather than a discrete one-time measure – then the resolution could be said to have gestated prior to CAFTA's entry into force, but to have "continued" after that pivotal date.

On either view, the measure can (and will) be reviewed for its compliance with Guatemala's CAFTA obligations.

When it came time to defining the notion of a "dispute" under the CAFTA, the tribunal chose to define the term as follows: "a conflict of views in points of law or fact which requires sufficient communication between the parties for each to know the other's views and oppose them."

Again, the tribunal conceded that certain facts may have occurred prior to the CAFTA's entry into force, but a dispute could not be said to have "crystallized" until the publication of the August 25, 2006 Lesivo Resolution.

In taking this view, the tribunal was able to side-step the question as to whether the CAFTA could apply to disputes originating prior to the treaty's entry into force (but continuing thereafter). Moreover, in obviating this question, the tribunal did not need to engage with arguments made by the Republic of El Salvador, which had intervened in the case as a so-called Non-Disputing Party so as to present arguments on that particular legal question.

(Also of note: in its analysis of the "dispute" in the RDC v. Guatemala case, the tribunal appeared to apply a looser test than that seen in an earlier ICSID decision, Viera v. Chile, which took what the tribunal characterized as "arguably the strictest definition of such term in arbitral practice".)

Tribunal rejects Gov't argument that contracts were illegal and not investments

Guatemala also objected to jurisdiction on the grounds that certain "equipment usufruct" contracts were not "investments" because they had not met the requirements for such agreements to be legal under Guatemalan law. Accordingly, Guatemala cited Article 10.28 (g) of the CAFTA whereunder protected investments include "rights conferred pursuant to domestic law".

The tribunal rejected this objection and simply noted that the reference in Article 10.28(g) "is not a characteristic of the investment to qualify as such but a condition of its validity under domestic law." Indeed, on the facts of the case, the tribunal laid great emphasis upon the fact that the Guatemalan authorities had acted as if certain contracts were in force. In this vein, the tribunal nodded to the arbitral award in the earlier Fraport v. Philippines arbitration at ICSID for the proposition that a government cannot raise violations of its own law as a jurisdictional defense when the state had knowingly overlooked them earlier.

Arbitrators reiterate that squatters and trust fund claims are to be heard domestically

Notably, the tribunal chided the claimant for continuing to refer to a Guatemalan agency's alleged failure to make payments into a project trust fund – a matter over which the tribunal had earlier declined jurisdiction on the grounds that it is currently pending before a domestic arbitral process.

The tribunal also reiterated that it would not hear allegations that RDC's Guatemalan counter-party had failed to remove squatters from the railway right-of-way contrary to its obligations under the project contracts. Again, these questions are also pending before domestic arbitral process. Arbitrators reaffirmed, however, that they would hear a separate claim for breach of Guatemala's CAFTA obligation to provide "full protection and security" in the period after the Lesivo Resolution (and when RDC alleges that the local police failed to act to remove such squatters).

For general background on RDC's claim, see our earlier reporting:
http://www.iareporter.com/articles/20090719_4

For discussion of El Salvador's Non Disputing Party intervention in the RDC v. Guatemala case see:
http://www.iareporter.com/articles/20100425_3

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