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BIT Provisions That are Self-Executing But Do Not Confer a Private Right of Action

Roger Alford (General Editor) (Notre Dame Law School) · Friday, September 30th, 2011

Luke Peterson passed along a tip about this interesting declaration attached to the U.S.-Rwanda Bilateral Investment Treaty:

> Articles 3 through 10 and other provisions that qualify or create exceptions to these Articles are self-executing. With the exception of these Articles, the Treaty is not self-executing. None of the provisions in this Treaty confers a private right of action.

Articles 3 through 10 of the BIT address traditional substantive guarantees for investors, such as national treatment, MFN treatment, and compensation for expropriation. The other non-self-executing provisions deal with issues such as dispute settlement mechanisms, including dispute resolution of investor-state claims and state-to-state claims.

The Senate hearing on the treaty made clear that the purpose of this language was to respond to Medellin.

> "Following the Supreme Court's decision in Medellin v. Texas, 552 U.S. 491 (2008), the committee has taken special care to reflect in its record of consideration of treaties its understanding of how each treaty will be implemented, including whether the treaty is self-executing…. The resolution of advice and consent contains a statement reflecting the committee's understanding of the extent to which this Treaty will be self-executing. This provides that Articles 3-10 of the Treaty are self-executing and do not confer private rights of action enforceable in United States courts. The remaining provisions of the Treaty are not self-executing and do not confer private rights of action enforceable in United States courts."

I'm glad to see that the Senate is carefully addressing the issue of domestic implementation of treaties following Medellin. The dispute settlement mechanisms in the treaty are not self-executing and any arbitration award rendered pursuant thereto must be enforced using either the New York Convention or the ICSID Convention. Makes sense. But I'm curious what impact a treaty declaration will have in the future for substantive treaty guarantees that are self-executing but do not confer a private right of action. Beyond protecting the United States as a litigant, what does

self-execution achieve for the substantive provisions of the BIT that are designed to protect investors?

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