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Fast-track arbitrations can be slow to get rolling

Luke Eric Peterson (Investment Arbitration Reporter) · Saturday, March 17th, 2012

It looks like The Amazing Kreskin can rest easy.

Last August, I tried my hand at forecasting the future, and I'm not sure I brought credit to the field of prognostication.

In my earlier blog post, I'd commented on a novel state-to-state arbitration initiated by the United States against the Republic of Guatemala.

(The U.S. accuses Guatemala of failing to enforce its own labour laws, thus placing the latter country in possible violation of its obligations under the labour chapter of the U.S.-Central American Free Trade Agreement (CAFTA).)

After looking at the fast-track arbitration sketched out in CAFTA Chapter 20, I predicted that the arbitral proceeding might be wrapped up in as little as eight months time. I also predicted that the case might outpace an (unrelated) investor-state arbitration that was brought against Guatemala in 2007, and has been running since then.

Well, seven months have elapsed since the U.S. announced its CAFTA arbitration with Guatemala, so I thought I'd update you on the proceedings.

Back in October, the arbitration was officially in motion – with a spokesperson at the Office of the U.S. Trade Representative indicating that arbitrators were being nominated – but the months slipped by with no further news on the constitution of the tribunal, or of progress in the case.

When I contacted the Office of the USTR in early February of this year, I was told that the arbitrators had not been selected yet, and that the U.S. Government was "engaging" with the newly-elected administration in Guatemala City.

Upon checking back last week, a spokesperson told me that there were no further updates.

So, seven months on, the U.S. request for arbitration has not set in motion a hurried dash to the finish line. Rather than settle their differences according to the tidy process found in CAFTA Chapter 20, the parties are still engaging in diplomacy.

The U.S.-Guatemala case is not the only state-to-state arbitration that has been sluggish out of the gates.

Last July, my news service revealed that a rare state-to-state arbitration had been launched by the Republic of Ecuador against the United States. The case is designed to lead to a definitive ruling on the meaning of a long-ignored investment treaty obligation that has lately loomed large in several arbitrations between foreign investors and states: the so-called "effective means" of justice obligation.

Unlike the U.S.A. v. Guatemala case, the Ecuador claim has seen meaningful strides taken to constitute a tribunal. However, the process of selecting three arbitrators was hardly a swift one.

Only on February 28th did we learn the identity of the presiding arbitrator, who was chosen more than seven months after Ecuador had requested arbitration.

Now that a tribunal is chosen, one might predict that the process will now gallop forward. After all, the U.S.-Ecuador investment treaty, like the U.S.-CAFTA, provides for an expedited form of state-to-state arbitration, with each step accorded a certain number of days to execute.

However, given that it took seven months to get even one of these two state-to-state arbitral tribunals into the saddle, I think I'll dispense with further predictions.

Instead, let's wait and see at what pace the U.S.-Ecuador case unfolds – and whether the parties elect to deviate from the ambitious timetable set forward in their treaty. Meanwhile, if the U.S. decides to press forward with its claim against Guatemala, I'll let you know.

Luke Eric Peterson is the Editor of Investment Arbitration Reporter, a news service that tracks and reports on legal and policy developments in the field of foreign investment arbitration. (https://www.iareporter.com)

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