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10 Investor-State Awards I Hope to Read in 2010

Luke Eric Peterson (Investment Arbitration Reporter) · Thursday, December 31st, 2009

Handicapping investor-state arbitration cases is a tough business. Indeed, it's difficult to predict *when* decisions will come down – much less what they will say.

The following somewhat-hastily-cobbled-together list constitutes my best guess as to the 10 most notable awards which may come down in 2010. I won't hazard a guess as to what's in these rulings.

Happy New Years to all readers of this blog.

Suez, Anglian Water Group, Agbar, Vivendi et.al. v. Argentina

It hasn't been 15 years, so we aren't in *Chinese Democracy* territory yet. But, the wait for the arbitral awards in these ICSID cases is starting to feel as protracted as that for the long-promised Guns n Roses album. Here's hoping it is not as anti-climactic.

Merits hearings were held in the cases in May and June of 2007. Even allowing for the 8 months taken up with successive arbitrator challenges lodged by Argentina, and the fact that several separate concessions are at issue, the awards are starting to feel overdue.

When the verdicts do materialize it will be fascinating to see what arbitrators make of Argentina's extensive reliance on international human rights law. Will arbitrators find that Argentina clamped down on foreign-owned water utility investments out of a genuine concern to meet its human rights obligations. And, if so, so what? In other words, does a compelling human rights rationale excuse breaches of bilateral investment treaties? Hopefully, we will find out in 2010.

Fraport v. Philippines

A divided tribunal declined jurisdiction over Fraport's BIT claim in 2007, having concluded that the claimant quietly circumvented local laws designed to limit foreign control. Dissenting arbitrator Bernardo Cremades' separate opinion offered something of a road map for annulment, and Fraport headed off down that path in late 2007. Final hearings in that annulment proceeding wrapped up earlier this year, and we should see an ICSID ad-hoc committee weigh in some time next year with their view as to whether the original tribunal should have upheld jurisdiction and weighed the claimant's failings as part of the merits phase.

Brandes Investment Partners v. Venezuela

With President Hugo Chavez seemingly bent on nationalizing anything that moves, it's easy to lose

track of the myriad resulting arbitrations. However, the Brandes case is worth watching because the claimant seeks to ground a claim for expropriation not on some contract or treaty, but on a domestic *statute* that purported to protect foreign investors.

Although the Venezuelan government, and its courts, have disavowed Brande's reading of the statute in question, it falls to a panel of three ICSID arbitrators to have their say – most likely next year – on a claim arising out of the nationalization of the country's largest telecoms company.

El Paso v. Argentina

Another contender for the *Chinese Democracy* award – merits hearings in this financial crisis claim were held in June of 2007. The long-running El Paso case – which was initiated in 2003, gives the appearance of dragging on past its due-date. I'm betting on a 2010 birth date. However, when you tack on the now *de rigeur* annulment challenge, don't expect a final resolution of this dispute before 2012.

AES v. Hungary

Hungary finds itself caught between foreign power producers, who insist that the country live up to the terms of earlier-signed Power Purchase Agreements, and European Union bureaucrats, who have ordered the country to tear up these sweetheart pacts. While several similar arbitrations have arisen against Hungary, the AES case at ICSID is the furthest advanced and should see an award in 2010.

Much to the consternation of many investment treaty purists, the European Commission argues that bilateral investment treaties should yield to the dictates of EU law. It will be fascinating to see what arbitrators make of this argument, and whether any such holding is embraced by subsequent tribunals to grapple with the same dilemmas.

Foresti and others v. South Africa

It remains to be seen whether arbitrators in this much-publicized ICSID arbitration will need to weigh in with an award of their own. However , if they do so, it is likely to come in 2010.

Although the claimants insist that elements of South Africa's new mining regime – including so-called Black Economic Empowerment obligations – have breached foreign investment treaty protections, they have recently signaled their desire to withdraw their case and to carry on with their investments in South Africa.

There is, however, the small matter of some 5 Million Euros expended thus far by South Africa in the defence of this landmark international claim.

Under ICSID rules, South Africa must give its assent to any withdrawal of the claim. Unless the parties can agree how to apportion the government's legal costs, it could fall to arbitrators decide – and to draw a line under this case.

RosInvestCo v. Russian Federation

You need a *Let's Go* guide to disentangle the flurry of lawsuits and arbitrations filed around the world by shareholders in the bankrupted Yukos oil company. However, of several treaty-based arbitrations pursued by blocs of Yukos Spanish, UK and Cypriot shareholders, the claim by UK-based RosInvestCo Ltd appears closest to generating an award on the merits. Arbitrators took jurisdiction over the case in October of 2007, and in 2010 we may see a tribunal at the Stockholm Arbitration Institute weigh in on the question of Russia's liability for breach of the UK-Russia

bilateral investment treaty.

Chemtura v. Canada
Hearings in this North American Free Trade Agreement (NAFTA) claim were held in September of 2009, so we may see an award before the new year is out. Canada's phase-out of a controversial agro-chemical, lindane, is at issue in the Chemtura arbitration, with a US chemical company contending that Canadian regulators denied them due process.

The award is sure to be closely watched as arbitrators may weigh in on the conservative interpretations taken in another prominent NAFTA case, Glamis Gold v. United States, where arbitrators were asked to elucidate the so-called minimum standard of treatment owing to foreign investors under customary international law. Indeed, the fate of another stalled NAFTA claim against Canada – this one filed by Dow Chemicals following provincial bans on certain lawn pesticides – could hinge on the outcome of the Chemtura case. More generally, depending upon the tribunal's ruling, the Chemtura award could encourage – or discourage – other companies looking for a way to challenge more stringent health or environmental regulation.

Chevron v. Ecuador (Round One)
Ostensibly a fight over a series of antiquated contract disputes, the BIT arbitration filed by Chevron in 2006 for denial of justice could loom large in the context of a much-broader fight over environmental pollution in the Ecuadorian Amazon. Indeed, Ecuador insists that any arbitral finding of denial of justice would be used by Chevron as ammunition against the enforcement of a forthcoming Ecuadorian court ruling in a multi-Billion Dollar environmental clean-up suit against Chevron.

If you're confused, so are most of the journalists covering this drama. But stay tuned for the American Lawyer magazine's astute International Correspondent Michael Goldhaber to bring some clarity to the murk in a forthcoming issue of the American Lawyer. In the mean time, keep your eyes out for the Chevron v. Ecuador arbitral ruling, which may emerge from the Permanent Court of Arbitration in 2010.

(The arbitration is the first of two treaty arbitrations filed by Chevron against Ecuador; the other was discussed earlier this year on this blog.)

Libananco v. Turkey
Of the various claims filed against Turkey by members (or surrogates) of the embattled Uzan family, the Libananco case is the one that really matters. Turkey has beat back several claims by entities which claimed to have owned shareholdings in a pair of contested electricity companies, however Libananco, a Cyprus-based entity controlled by an Uzan family member, claims that its shareholding *bona fides* are unimpeachable. Forensic experts have pored over the claimant's ownership documents, and arbitrators have heard from both sides. In 2010, the ICSID tribunal is expected to weigh in.

Giovanna a Beccara v. Argentina (Wild Card Pick: #11 for 2010, or #1 for 2011?):
Anyone holding sovereign debt in this uncertain new world may be interested to see how a group of Italian bondholders fare in their efforts to sue Argentina for losses arising out of that country's bond default earlier this decade. This class-action style claim is one of three brought by blocs of foreign bondholders, who claim that their investments enjoy protection under Argentina's foreign investment treaties. The Beccara case is the largest of the three pending claims at ICSID, with at

least $4.4 Billion at stake. Arbitrators will convene in 2010 to hear jurisdictional arguments, so there's an outside chance that we'll see a jurisdictional verdict before year's end. If not, put this one on your 2011 reading list.

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