Kluwer Arbitration Blog

10 Investor-State Awards I Had Hoped to Read in 2010

Luke Eric Peterson (Investment Arbitration Reporter) · Thursday, December 30th, 2010

Last year, around this time, I offered a list of 10 investor-state arbitral awards I hoped to see in 2010.

If time permits, I may do another list for 2011. But, first I thought I'd take a look back at last year's list and offer a brief update on those cases. Rather, than do all of the heavy-lifting here, I'll direct readers of this blog to relevant reporting in my Investment Arbitration Reporter newsletter (not to be confused with Kluwer's ITA newsletter) where appropriate. (You won't need a subscription to view the articles that are referenced below, as we'll make them publicly available.)

Without further ado, here's a run-down of the ten cases from last year.

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

In August, decisions on liability were finally rendered, holding Argentina liable for breaching investment protections owed to a Who's Who of foreign investors in that country's water and sewage sector. However, for those interested in the running debate about the coherence or fragmentation of public international law, the decisions may be something of a disappointment. While the arbitrators found breaches of Argentina's bilateral investment treaty obligations, they gave short shrift to Argentina's invocation of international human rights law obligations in its defence of these claims. Check out our reporting for a fuller run-down of what happened.

Fraport v. Philippines

Next on last year's list was Fraport's bid to annul an ICSID jurisdictional decision which had grounded the company's bid for compensation over an expropriated airport terminal. In 2007, a divided tribunal ruled that the company's claim should fail due to the fact that the claimant had quietly circumvented local laws designed to limit foreign control of the terminal project.

Well, tell your friends that you read it on the internet: Fraport got an early Christmas present on December 23rd when an ICSID annulment committee annulled the 2007 ruling. The annulment paves the way for a new arbitration, and one imagines that this will land on ICSID's doorstep early in the new year. Keep an eye on the *IAReporter* newsletter for the fuller story on this one.

Brandes Investment Partners v. Venezuela

Last year, we noted that a decision should be forthcoming by a panel of arbitrators in a telecoms

nationalization claim whose viability hinges on the ambiguous-looking arbitration clause in a domestic investment protection statute. Yeah, that's a mouthful. But you've got time to digest it because, as of this writing, a decision in the Brandes case is still awaited.

Mind you, a different ICSID panel weighed in earlier this year with a notably restrictive interpretation of the same statute at issue in the Brandes case. Our report on that dimension of the Mobil v. Venezuela case is here. Now it remains to be seen what the Brandes tribunal makes of the ruling in the Mobil case.

El Paso v. Argentina

Nothing new to report here. El Paso turned to arbitration against Argentina back in 2003, alleging that the country's handling of an earlier financial crisis triggered breaches of protections owed to El Paso. Arbitrators are still dotting their 'I''s and crossing their 't''s on this long-anticipated decision. El Paso must be thoroughly demoralized given that the most likely outcomes are A) a dismissal of its case or B) a "victory" followed by a protracted annulment process.

AES v. Hungary

There is rather more to report in relation to another claim highlighted in last year's list. AES was one of three foreign power producers to sue Hungary for allegedly failing to respect the terms of long-term power purchase agreements. However, in September, arbitrators handed down a verdict in favour of Hungary, finding no breaches of the country's obligations under the Energy Charter Treaty. A fuller accounting of the case can be read here.

Foresti and others v. South Africa

A group of foreign miners drew international headlines when they alleged that South Africa's Black Economic Empowerment program – and the country's new BEE-inspired mining regime – had breached protections owed under South Africa's bilateral investment treaties.

As was noted last December, the politically contentious dispute seemed to be fizzling out after the claimants signaled that they were prepared to lay down their arms. However, the claimants and South Africa could not agree on the peace terms, so it fell to arbitrators to hold a hearing and issue an award which drew a line under the case. Read all about it here.

RosInvestCo v. Russian Federation

On December 19, 2010, we reported that an arbitral award in one of three pending Yukos-related arbitrations against Russia had been quietly rendered back in September. The ruling had remained under lock and key until the Russian Federation moved earlier this month to set aside the award. Here's our quick run-down of what happened, but keep an eye on our newsletter for a full accounting of the award's holdings.

Chemtura v. Canada

Canada walked away victorious after arbitrators ruled in August of 2010 that a U.S. chemical company had failed to make out any of its claims under the North American Free Trade Agreement (NAFTA). The case had been watched nervously by public health advocates as Chemtura was attempting to second-guess Canada's phase-out of the controversial agro-chemical, lindane. But, in

the end, Canadians were left only with a hefty legal bill – *not* an arbitral edict requiring them to put a teapoon of lindane on their morning oatmeal. See this report for the crux of the tribunal's ruling.

Chevron v. Ecuador (Round One)

While a bruising multi-front legal fight over liability for Amazonian oil pollution gathered pace last year, arbitrators also weighed in with a ruling on a less-publicized under-card battle between the two combatants: Chevron corporation and the Republic of Ecuador.

In what could be a hefty victory for Chevron, arbitrators ruled that Ecuador was liable for delaying the judicial resolution of a series of contract disputes. As we made clear in an analysis of the arbitral ruling, the tribunal appeared to break new ground in ruling that an international tribunal can step into the shoes of domestic courts that are failing to deliver justice in a timely fashion.

Libananco v. Turkey

Various claimants came out of the woodwork to sue Turkey following that country's winding up of the Uzan family business empire. Libananco, a Cyprus-based entity, has long maintained that it has the most credible claims. The off-shore company insists that it held stakes in two valuable electricity concessions prior to their being taken over by the government. With all of the other known arbitration claims brought by shell-companies now having been dispatched on jurisdictional grounds, a ruling in the Libananco case is the only thing left to be written.

However, if Libananco should prevail, it will have to contend with a recent ruling by a New York judge that any ICSID arbitration winnings must accrue to the benefit of those who suffered a Billion Dollar fraud at the hands of the Uzans. See our story here.

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