



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Judgment Name and Date: Chevron Corporation (USA) and Texaco Petroleum Company v the Republic of Ecuador - Judgment of the District Court of The Hague (Case No C/09/477457 / HA ZA 14-1291) - 20 January 2016

Case Report by: Dimitrij Euler**, Editor Ignacio Torterola***

Summary:

The District Court of The Hague rejected Ecuador's set-aside claim in its judgement of 20 January 2016. In doing so, this court stated that the Ecuador-USA BIT is sufficiently broad to cover the dispute. In particular, Chevron may rely independently on the 1995 Settlement Agreement even though it was not a signatory at the time of the signing. Moreover, the District Court rejected Ecuador's second claim that the awards that ordered Ecuador to suspend its Lago Agrio judgments violate public policy under the Dutch Arbitration Act, as, firstly, Ecuador voluntarily, unambiguously, and unconditionally bound itself and its judiciary in the BIT and therefore may neither argue that these awards interfere with its sovereignty and independence nor with its judiciary, and; secondly, the awards did not interfere with the rights of Ecuadorian citizens since the claims against Ecuador entail that Ecuador is exclusively liable for the damages awarded to Lago Agrio claimants. Even if these claims interfere with their rights, serious indications exist that the judgements at the first instance in the Lago Agrio proceedings came into fraudulent and rendered under political pressure and therefore provide justification for (temporary) consequences for the Lago Agrio claimants. Finally, the District Court rejected Ecuador's last claim that the tribunal exceeded its power as the granted interim measures by their nature where not interim measures and therefore cannot be granted under the authority based on Art. 26 Arbitration Rules. Hence, all claims were denied and Ecuador was order to pay the costs.

Main issues: *Review of arbitral awards - Consent to jurisdiction through treaties - Public policy (Netherlands, Standard of Review)*

Judges: Mr. D. R. Glass, Mr. D. Aarts and Mr. J. W. Boekwinkel

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Digest:

1. Relevant Facts and Procedural Dates

On 6 June 1992 expired the concession (Concession Agreement) signed in 1973, whereby Ecuador granted TexPet and the Ecuadorian Gulf Oil Company (respectively later in time the State-owned PetroEcuador) the rights to explore and extract oil in the Amazonas' region (¶ 2.1). On 4 May 1995, Ecuador, PetroEcuador and TexPet agreed in the 'Contract for Implementing of Environmental Remedial Work and Release from Obligations, Liability and Claims' (1995 Settlement Agreement) *inter alia* in Clause 5.1 that 'the Government and PetroEcuador shall hereby release, acquit and forever discharge [TexPet] [...] of all the [Ecuador's] [...] claims against [them] for Environmental Impact arising from the Operations of the Consortium [...]' and in Clause 9.4 that '[...] [t]his Contract shall not be construed to confer any benefit on any third party not a Party to this Contract [...]' (¶ 2.3).

On 11 May 1997, '[t]he Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment' (BIT) entered into force, signed in 1992 (¶ 2.2). In the following year, on 30 September 1998, the Ecuador, PetroEcuador, and TexPet agreed in the 1998 Final Release that '[i]n accordance with that agreed in the [1995 Settlement Agreement] [Ecuador] proceed to release, absolve and discharge [...] [TexPet] forever from any liability and claims by [Ecuador] [...], for items related to the obligations assumed by TexPet in the aforementioned Contract, which has been fully performed by TexPet, within the framework of that agreed with [Ecuador] [...]' (¶ 2.4).

In May 2003, Ecuadorian citizens (Lago Agrio claimants) instituted proceedings before the Ecuadorian courts against Chevron contending that TexPet's activities polluted their environment (Lago Agrio proceedings). In 2011, the court ordered Chevron to pay USD 8.6 billion damages, USD 8.6 billion punitive damages, and to pay the legal costs. The order was upheld on appeal in 2012. Thereafter, the Supreme Court upheld damages but set aside the punitive damages in 2013 (¶ 2.6). In response, Chevron and TexPet commenced arbitration under the BIT in accordance with UNCITRAL Arbitration Rules (1976) (Arbitration Rules) on 23 September 2009.

The tribunal formed by V. V. Veeder QC (Presiding Arbitrator), Prof. Alan Vaughan Lowe QC and Dr. Horacio A. Grigera Naón, seating in The Hague (Tribunal) (¶¶ 2.7-2.8), ordered in the First and Second Interim Award on Interim Measure in 2012 that Ecuador shall suspend the enforcement of the Lago Agrio proceedings' judgements (¶¶ 2.9-2.10). In the Third Interim Award the tribunal commented on its jurisdiction (¶ 2.11). In the Fourth Interim Award the Tribunal decided that Ecuador violated the First and the Second Interim Award (¶ 2.12). In the First Partial Award, 17 September 2013, the Tribunal decided that Chevron and TexPet may derive rights from the 1995 Settlement Agreement and 1998 Final Release (¶ 2.13).

Previously in 2006, in different arbitration proceedings between Chevron and TexPet and, on the other side, Ecuador, a tribunal held Ecuador liable for delaying proceedings before Ecuadorian courts. Ecuador's set-aside claim, thereafter, was dismissed in 2012. The dismissal of that claim was upheld in appeal in 2013 and, thereafter, by the Supreme Court in 2014 (first setting-aside proceeding) (¶ 2.14).

2. Dispute

Ecuador is seeking an immediately enforceable order from the District Court setting aside the First to Fourth Interim Awards and the First Partial Award and ordering Chevron and TexPet to pay the subsequent costs plus statutory interests from the fourteen days of the date of this judgement (¶ 3.1). Firstly, the Tribunal lacked jurisdiction as the disputes does not ensue from the investment pursuant to the 1992 Concession Agreement terminated in 1992 but from the 1995 Settlement Agreement and 1998 Final Release, both fall outside the scope of the BIT (Arts. VI(1) and temporal XII(1)) (¶ 3.2.1). Secondly, the awards violate public policy as they interfere with Ecuador's sovereignty and independence, intervene in its judicial system, and deprived Ecuadorian citizens of the right to live in a non-polluted area as well as unjustified infringed their third-party rights (¶ 3.2.2). Lastly, the tribunal breached their mandate by granting interim measures not qualifying as interim measures under Art. 26(2) Arbitration Rules (¶ 3.2.2).

3. The District Court's Analysis

a) Jurisdiction and applicable law

The Hague is seat pursuant to Art. 1073 Dutch Code of Civil Procedure (DCCP) and applies to this procedure (Arts. 1020 – 1073 DCCP). Thereof, the District Court derives its jurisdiction (Art. 1064(2) DCCP) (¶ 4.1).

b) Assessment framework

Ecuador bases its setting-aside claim on Arts. 1064 and 1065(1) DCCP (¶ 4.2). The District Court states that it should observe restraint in its investigation of whether there are grounds for setting aside (¶ 4.3). However, an exception to this restraint exists for the question whether a valid arbitration agreement was concluded. Unlike Chevron argued, this exception remains available for States and not solely private (legal) persons as the question of whether a State waived its sovereignty by concluding an arbitration agreement is of fundamental nature (¶ 4.4).

To what extent it is permissible for a party to rely on new facts or legal assertion concerning the substantiation of the setting-aside claim decides the District Court in the light of due process and depends, among other things, on whether these assertions are in line with previous positions, the reason for not submitting them any sooner, and whether the relevant party was represented or not by an attorney in the arbitration proceedings (¶ 4.5).

c) Art. 1065(1), opening words and under (a) of the DCCP

The District Court rejects TexPet and Chevron's argument that the first setting-aside proceeding has a *res judicata* effect. The District Court states that they had a different claim in mind in these proceedings compared with the claim submitted in the framework of first

setting-aside proceeding. However, this does not detract from the fact that the District Court will (be able to) take the findings from the first proceedings. (¶ 4.6)

The District Court must answer if the open offer in Art. IV BIT covers the dispute submitted to the Tribunal (¶ 4.7). It interprets this article in accordance with Arts. 31-32 of the 1969 Vienna Convention (¶¶ 4.8-4.9). Unlike Ecuador argued, the District Court agrees with the Tribunal that there is an investment. Art. I(1)(a) BIT contains a broad definition of investment ('means every kind of investment' and provides a non-exhaustive list. Additionally, on the basis of Art. I(3) BIT an investment does not end because the form changes. Moreover, it is inferred from Arts. II(3)(b) and II(7) BIT that the term investment encompasses the full settlement of an investment. The District Courts decision regarding a broad interpretation of this term is identical to the judgment of the appeal court in the first setting-aside proceeding (¶¶ 4.10-4.11).

Interpreting the wording of the 1995 Settlement Agreement, the District Court is of the opinion that an inextricable link exists between the 1995 Settlement Agreement and Concessions Agreement. The Lago Agrio claimants have based their claims against Chevron on alleged breaches of the Concession Agreement by TexPet. Differently, the 1998 Final Release, which closely linked both agreements together, established that TexPet satisfied its obligations ensuing from the 1995 Settlement Agreement. As Ecuador insufficiently disputed this obligation's fulfilment, the District Court assumes this to have been established (¶ 4.12). Hence an investment existed at the time when the BIT entered into force on 11 May 1997. Thus, the tribunal may accept jurisdiction (¶¶ 4.13-4.14).

It was undisputed that Chevron qualifies as an indirect investor under Art. VI(1), opening words and under (c) BIT. After all Chevron relied on its own (release) rights ensuing from the investment and not on behalf of its subsidiary, TexPet, on (release) rights that merely protect that subsidiary. Hence, the District Court must determine whether it has jurisdiction in the dispute between Chevron and Ecuador under Art. IV(1), opening words and (a) BIT (¶ 4.15). The District Court finds that the decisive question is whether Chevron may independently rely on Clause 5.1 of the 1995 Settlement Agreement as Releasee. The Tribunal answered this question in the affirmative in the Third Interim Award and First Partial Award (¶ 4.17). The District Court rejects Ecuador's narrow interpretation that the only party that was a party from the very beginning of the investment agreement and also signed it may rely on this clause (¶ 4.18). Additionally, it states Ecuador may not switch position in this proceeding previously relying on a different interpretation in the arbitral proceedings (¶ 4.19). Moreover, the District Court rejects Ecuador's narrow interpretation of 'investment agreement' (¶ 4.20). Furthermore, according to the law of Ecuador, it is also undisputed that a party may enter into an agreement later and that rights may be derived therefrom. Hence, Chevron may derive its own rights from Clause 5.1 (¶ 4.21).

The District Court dismisses further Ecuadorian claims on the lack of a precise basis and emphasizes that there is no need to assess whether Chevron qualifies as a third party under Clause 9.4; it is not a question of jurisdiction (¶¶ 4.22- 4.23). Thus, Ecuador's claim seeking setting aside based on the lack of an arbitration agreement must be denied (¶ 4.24).

d) Art. 1065(1), opening words and under (e) DCCP [Public Policy Defence]

District Court shall observe restraints in the context of its assessment to setting aside awards due to public policy violations. It shall be awarded only in the event of a violation of a

mandatory law provision that is of such fundamental nature that compliance with that provision may not be limited by means of procedural restrictions, the violation of equal treatment as set out in Art. 1039(1) DCCP, and fundamental principles of procedural law. No room exists for restraint in the application of Art. 1065(1) DCCP in the event of a violation of the right to be heard (¶ 4.25).

The Tribunal's First and Second Interim Awards order Ecuador to suspend the enforcement of the court decision rendered in the framework of the Lago Agrio proceedings. The Fourth Interim Award entails that Ecuador has breached that order (¶ 4.26). Ecuador stated that by granting these awards, the Tribunal violated Ecuador's sovereignty and independence in an unacceptable manner. However, the District Court rejected this argument as Ecuador voluntarily, unambiguously, and unconditionally bound itself and its judiciary in the BIT (¶ 4.27).

It is undisputed that the interim measures, temporarily suspending the Ecuadorian court judgment, (may) have a direct consequence on the Lago Agrio claimants. The District Court assigns decisive weight on the temporary nature of them. Moreover, the interim measures were not directed against the Lago Agrio claimants. In essence, Chevron and TexPet claims against Ecuador entail that Ecuador is exclusively liable for the damages awarded in favour of the Lago Agrio claimants (¶¶ 4.28-4.29). In the opinion of the District Court, serious indications exist that the judgements handed down at the first instance in the Lago Agrio proceedings came into being fraudulent and were rendered under political pressure. Hence, these circumstances provide justification for (temporary) consequences for the Lago Agrio claimants, even in the event the measures restricted Lago Agrio claimants' mandatory rights of fundamental nature (¶¶ 4.30-4.33).

Ecuador deems it contrary to public policy that the Tribunal did not base its decision to take interim measure on any substantiation and also established no facts in that regard. The District Court rejected this claim but agreed that in the first two interim measures the substantiation was concise; however, this does not give sufficient cause that this decision breached public policy (¶¶ 4.34-4.35). The 1995 Settlement Agreement does not prevent the Ecuadorian citizens from lodging their claims against their State (¶¶ 4.36-4.37).

e) Art. 1065(1), opening words and (c) DCCP

Ecuador alleged that the Tribunal's decision concerning Ecuador's violation of the breach of the First and Second Interim Award, included in the Fourth Interim Award, is not, by its nature, an interim measure, and, therefore, cannot be granted based Art. 26 Arbitration Rules (¶¶ 4.38-4.39). The District Court rejected this argument due to the broad authority granted to arbitral tribunals by this article (¶ 4.40).

4. The District Court's Decision

The District Court dismissed all claims, ordered Ecuador to pay the costs of the proceedings at the highest liquidation rate (EUR 3,211 per point), and the costs of the proceedings on the part of Chevron and TexPet (EUR 7,030) to be increased by statutory interest as from the fourteenth day after the date of this judgement (¶¶ 4.41 – 5.3) The judgment has immediate effect with regard to the costs (¶ 5.4).