

Chevron v. Ecuador **The Saga Continues**

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The *Chevron v. Ecuador* saga has held the arbitration community's attention for over a decade. It began in 2003 when Ecuadorian citizens instituted proceedings against Chevron before the Court of Lago Agrio in Ecuador for environmental damage allegedly caused by Texaco (now Chevron's subsidiary) during its operations in the Amazon region. In 2011, Chevron was condemned by the local court to pay about USD \$9 billion in damages to the plaintiffs. In 2014, a New York District Court found this judgment to have been procured by fraudulent means, a decision currently on appeal. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

In a parallel UNCITRAL arbitration commenced in 2009, Chevron sought declaratory relief that it is released from all environmental liability for Texaco's operations and that Ecuador is responsible for any remaining remediation work. *Chevron Corp. and Texaco Petroleum Corp. v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23. In 2014, Ecuador sought to set aside interim and partial awards rendered by the arbitral tribunal, which confirmed the tribunal's jurisdiction under the US-Ecuador Bilateral Investment Treaty (the "Treaty") and ordered Ecuador to take all measures at its disposal to suspend enforcement of the Lago Agrio judgment.

In a decision dated 20 January 2016, the District Court of The Hague (the "District Court") upheld the arbitral tribunal's awards, rejecting all of Ecuador's grounds for setting them aside. *The Republic of Ecuador v. Chevron Corp. and Texaco Petroleum Corp.*, District Court of the Hague, C/09/477457 / HA ZA 14-1291 (2016).

First, Ecuador argued there was no valid arbitration agreement because, inter alia, the arbitral tribunal could not derive jurisdiction from the Treaty since neither Chevron nor Texaco had a protected investment within the meaning of the Treaty. Ecuador claimed the dispute presented to the tribunal did not ensue from Texaco's Concession Agreement, but rather from a subsequent Settlement Agreement and the Lago Agrio proceedings, none of which involve an investment under the Treaty. The District Court agreed with the arbitral tribunal that Chevron had a protected investment, relying on the Treaty's broad definition of "investment" and the fact that "an investment does not end because the form of the investment changes." It also relied on the "inextricable conjunction" between the Concession Agreement and the Settlement Agreement. In its analysis, the District Court acknowledged that courts should "observe restraint" in investigating setting-side grounds, except when the question concerns the existence of a valid arbitration agreement. *See Ecuador v. Chevron* at 6-13.

Second, Ecuador argued that the interim and partial awards were contrary to public policy because the arbitration tribunal wrongly intervened in the Ecuadorian judicial process, decided on the rights of the Lago Agrio plaintiffs, who were not parties to the arbitration, and deprived Ecuadorian citizens of the right to live in a non-polluted environment. The District Court rejected this argument by giving "decisive weight" to the fact that Chevron's claims in the arbitration were not directed against the Lago Agrio plaintiffs, but at preventing the enforcement of the Lago Agrio judgment which was apparently procured by fraud. *See Ecuador v. Chevron* at 13-17. In doing so, the District Court relied on the New York judgment, which found: "[i]f ever there were a case warranting equitable relief with respect to

a judgment procured by fraud, this is it.” *Chevron v. Donziger* at 2.

Third, Ecuador argued that the arbitral tribunal exceeded its mandate by rendering an interim award that found Ecuador to be in violation of the tribunal’s previous interim awards. Ecuador reasoned that a decision enforcing the tribunal’s orders was “not, by its nature, an interim measure,” and could not be granted in that form. The District Court dismissed this argument, pointing to the tribunal’s broad authority to issue interim measures under the UNCITRAL Rules and noting that it could not “see why” the tribunal would lack authority to decide that Ecuador had violated its earlier decisions. *See Ecuador v. Chevron* at 17-18.

At a time when Ecuador faces several other arbitral proceedings and the Oxy settlement payout, its announcement to appeal the District Court’s decision comes as no surprise. The saga continues, and the arbitration community will surely await future developments with interest.