

Arbitration - Ecuador

The cost of failing to comply with an interim award

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Introduction

In the protected dispute between Chevron Corporation and Ecuador on one side, and the US multinational and a group of Ecuadorean citizens on the other, an international arbitral tribunal established under the Permanent Court of Arbitration has found Ecuador liable for breaching two interim awards on provisional measures. As a result, the tribunal has opened the door for ordering Ecuador to pay considerable damages to Chevron.

Background

Chevron, Texaco Petroleum Company, Ecuador and a group of Ecuadorean citizens have been engaged in a complex dispute since the mid-1990s. One of several chapters in this seemingly endless saga involved a civil lawsuit filed against Chevron in 2003 by a number of indigenous groups settled in and around Lago Agrio, a town in the northern province of Sucumbios. Texaco and state-owned oil company Petroecuador carried out operations in the area for several years in the form of a consortium. The plaintiffs alleged that Chevron and Texaco caused environmental damage, which severely affected the health of families living in the area. The defendants denied this.

On September 29 2009, while the Sucumbios court was hearing the action filed by the plaintiffs, Chevron and Texaco filed a United Nations Commission on International Trade Law (UNCITRAL) international arbitration with the Hague Permanent Court of Arbitration under the US-Ecuador bilateral investment treaty.⁽¹⁾ Both companies alleged that Ecuador had breached the rights and guarantees provided in the treaty because the respondent had refused to honour the 1995, 1996 and 1998 settlement and release agreements under which Texaco was discharged of any liability for its past oil operations. The companies also claimed that the trial in the Sucumbios court was marred with corruption, political interference and lack of independence, denying them due process.

As the investment arbitration process was underway the Ecuadorean court ruled for the plaintiffs. In February 2011 Chevron and Texaco were ordered to pay approximately \$19 billion in damages, one of the world's largest awards (the *Lago Agrio* judgment). The decision was confirmed by the Superior Court of Sucumbios on January 4 2012. A few weeks later, the Permanent Court of Arbitration tribunal ruled that it had jurisdiction to hear the claims filed by Chevron and Texaco under the treaty.

On January 25 2012 the tribunal, at the request of Chevron and Texaco, issued its first interim award on provisional measures. The tribunal ordered Ecuador "to take all measures at its disposal to suspend or cause to suspend the enforcement or recognition within or without Ecuador of any judgement" against the claimants. The tribunal noted that the award was made without prejudice to the merits of the parties' substantive rights.

Despite this order the Sucumbios court went ahead with the local process. As Chevron relied on Ecuador's compliance with the first interim award, the company did not place the required bond to suspend the enforcement of the Sucumbios ruling, while its cassation appeal was decided by the National Court. Thus, the *Lago Agrio* judgment became enforceable.

Because the plaintiffs had announced their intention to enforce the *Lago Agrio* judgment in third countries, on February 16 2012 the court tribunal, at the request of

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Chevron and Texaco, issued a second interim. It expanded its first interim award by ordering Ecuador to abstain from issuing any certification that may help the plaintiffs to enforce the Sucumbios sentence against Chevron in third countries.

Ecuador did not comply with the second interim award. The Ecuadorean Ministry of Foreign Affairs issued the certification needed to enforce the Sucumbios ruling in third countries. The Ecuadorean plaintiffs then filed petitions to enforce the *Lago Agrio* judgment with the courts of Canada, Brazil and Argentina - countries where Chevron had important assets. In Argentina, the plaintiffs were able to make some inroads. A Buenos Aires court issued a temporary order freezing the assets of a Chevron subsidiary doing business in Argentina.

New interim award

On February 3 2013 the international arbitration tribunal issued a new interim award. The tribunal found that Ecuador was in breach of the first and second interim award under the UNCITRAL rules and international law:

"in regard to the finalisation and enforcement subject to execution of the Lago Agrio Judgment within and outside Ecuador, including (but not limited to) Canada, Brazil and Argentina."

Moreover, the tribunal decided that Ecuador should show cause in accordance with a procedural timetable, to be fixed later, as to why it should not compensate Chevron for any harm caused by its violation of the first and second interim awards.

The tribunal rejected Ecuador's position that it was unable to comply with the awards because the Ecuadorean judiciary was an independent branch of government. The tribunal said that its interim awards were directed not only to Ecuador's executive branch, but to all its branches. It added that neither:

"disagreement with the Tribunal's orders and awards on interim measures nor constraints under Ecuadorean law can excuse the failure of the Respondent, through any of its branches or organs, to fulfill its obligations under international law imposed by the Treaty, the UNCITRAL Rules and the Tribunal's orders and awards thereunder, particularly the First and Second Interim Awards on Interim Measures."

Comment

While the tribunal may take several months to issue its ruling on the merits of the controversy, the failure of Ecuador to comply with the interim awards on provisional measures may cost it as much as what is stake in the arbitration itself. According to Chevron, the actions taken by the plaintiffs to enforce the *Lago Agrio* judgment in Argentina and elsewhere have already caused substantial damages and the loss of important business opportunities. In the coming weeks Chevron will spell out the amount of money it is seeking from Ecuador as compensation. It will not come as a surprise if it is measured in billions of dollars.

For further information on this topic please contact [Hernán Pérez Loose](#) at Coronel & Pérez by telephone (+593 4 2519 900), fax (+593 4 2320 657) or email (hperez@coronelyperez.com).

Endnotes

(1) Case 2009-23.

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