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Chevron goes all-in against Ecuador; New claim reflects latest BIT usage

Luke Eric Peterson (Investment Arbitration Reporter) · Thursday, September 24th, 2009

For those wondering what the state of the art looks like in the realm of bilateral investment treaty arbitration, you could do worse than browse the Notice of Arbitration filed yesterday in the Chevron v. Ecuador case.

The underlying dispute is a much-publicized one, tracing its roots to a long-running multi-forum battle over liability for environmental damage arising out of Amazonian oil production. Yesterday, Chevron upped the ante by suing Ecuador for various breaches of the US-Ecuador BIT in relation to the government's posture towards (and alleged interference in) a massive civil claim which could put Ecuador on the hook for many Billions in environmental remediation costs.

For Ecuador, the latest move by Chevron may confirm the Government's suspicions that an earlier (still pending BIT claim) for alleged denial of justice in relation to a series of separate contract disputes was just an under-card battle. (Ecuador has long speculated that any favourable arbitration ruling for Chevron in the denial of justice claim – while seemingly unrelated to the broader environmental dispute – would be brandished subsequently in the context of Chevron's efforts to resist enforcement of any environmental rulings emanating from Ecuador; in other words, Chevron might trumpet an award for "denial of justice" as concrete evidence of the unreliability and lack of independence of the same Ecuadorian courts currently presiding in the higher-stakes environmental dispute.)

Whatever strategic considerations are at play, the new claim by Chevron is a huge one. If damages in the Ecuadorian civil suit – run into the tens of Billions, as has been surmised – then the new BIT claim would contest the liability of Chevron to pay those sums.

A glance at the Notice of Arbitration (NOA) filed yesterday by Chevron also reveals other noteworthy features.

In a sense, the claim is very much in the vanguard of investment treaty usage: seeking to use an investment treaty to indemnify a foreign investor from any future adverse rulings in the local courts of the host state. Indeed, only a few days ago, my newsletter discussed a similarly-framed claim that is waiting in the wings: the Mexican cement multinational CEMEX has threatened to sue the US Government under NAFTA for indemnification over any losses arising out of a 588 Million USD lawsuit brought by officials in the State of Texas.

Although investors have sometimes sued governments in BIT arbitration in relation to the actions of local courts, it is still somewhat novel for investors to file pre-emptive arbitrations in anticipation of future unfavourable results in the local courts.

Other aspects of the Chevron NOA also reflect new and emerging trends in BIT arbitration.

First, and perhaps most obvious is the claim for so-called moral damages – a commonly-sought remedy in international human rights claims – but now becoming *de rigeur* in investment treaty claims thanks to the 2008 award in the DLP v. Yemen arbitration at ICSID. BIT Claimants are increasingly trying their luck by arguing that they should be compensated not just for financial losses, but also for less quantifiable forms of harms resulting from loss of reputation, subjection to harassment, etc.

A second noteworthy feature of Chevron's new claim is that the relief sought by Chevron is heavily skewed towards declarative relief and orders of performance, which presumably seek to expand upon recent arbitral rulings which have confirmed the capacity of arbitrators to make orders and declarations, rather than limit themselves to awarding damages for harms.

In its newly-filed claim, Chevron will ask arbitrators to *declare* that the California-based company has no liability for health, environmental or cultural degradation in Ecuador thanks to earlier settlement agreements reached in the late 1990s.

Moreover, in a request, that is sure to raise political hackles, Chevron is also asking arbitrators to *order* Ecuador to inform its local courts that Chevron bears no liability, and that the Ecuadorian Government and Petroecuador are responsible for any further environmental remediation work.

For further certainty, Chevron is also seeking the earlier-mentioned *indemnification*, which would oblige Ecuador to compensate Chevron for any damages that may be award in a pending civil suit against the company.

Third, as is increasingly the case in BIT arbitration, the spectre of bribery or misconduct is put front and center in the case. Chevron has made international headlines recently by bringing forward what it characterizes as evidence that an official of Ecuador's ruling party solicited a bribe from parties angling for a share of any environmental remediation work that might arise in case of a Ecuadorian court verdict against Chevron. In its NOA filed yesterday, Chevron also points to a covertly-recorded conversation wherein the Judge presiding in a civil claim against Chevron is heard to state that he will find against Chevron in late 2009. (The Judge has since recused himself.)

As many readers of this blog will know, arbitrators are increasingly called upon to examine allegations of corruption or other misconduct on the part of investors or states – and such inquiries can have major repercussions for the viability of an investor's claim or a government's defence. Indeed, either party can come out looking less than lily-white when arbitrators agree to scrutinize their conduct over the lifetime of an investment.

If the arbitration plays out in public, it may provide gripping theatre.

Thus far, Chevron appears to be prosecuting the claim with a high-degree of publicity. The company has publicized its filing as well as evidence of alleged wrongdoing on the part of Ecuadorian officials, and has made its Notice of Arbitration a public document.

It remains to be seen whether the company will persist on this path. Sometimes claimants launch treaty-based arbitrations in a flurry of publicity, but quickly go to ground when the process begins to unfold (see ICSID cases such as Libananco v. Turkey).

Were Chevron and Ecuador both amenable, the case could continue to play out in public. Although UNCITRAL-based claims are typically conducted in-camera, the supervising agency, The Permanent Court of Arbitration, could certainly accommodate the curious eyes of the public and the media, if the parties were to oblige).

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