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Ecuador Moves to Stay Arbitration Brought by Chevron

Andrea Bjorklund (UC Davis School of Law) · Thursday, February 18th, 2010 · Institute for Transnational Arbitration (ITA), Academic Council

I am in Australia in advance of the investment law conference at Sydney Law School at the end of the week, and I took advantage of many plane hours to read the docket in the case pending between Ecuador and Chevron/Texaco Petroleum Company (TexPet) in the Southern District of New York. They repay study. In short, Ecuador has asked the U.S. federal court to stay an arbitral claim that Chevron and TexPet have submitted under the Ecuador-United States BIT and the UNCITRAL arbitration rules, and Chevron and TexPet have asked the court to dismiss the motion. These are only the latest in a series of events that date back to at least 1993, when a group of indigenous peoples filed claims in New York against Texaco, the indirect parent of TexPet, seeking damages and restitution for pollution in Ecuador allegedly resulting from TexPet's oil and gas exploration and development activities (the Aguinda litigation). TexPet operated in Ecuador, as part of a consortium, under a concession agreement from 1965 to 1992. The initial New York case was eventually dismissed on forum non conveniens grounds, and has been re-filed in Ecuador by another group of plaintiffs, some of whom overlap with those in the first action (the Lago Agrio litigation). The refiled case is currently pending and the acts of the court hearing that litigation in Ecuador, along with measures allegedly taken by the executive branch of the Ecuadoran government, form the basis for the investment treaty claim.

In 1995 TexPet and the Government of Ecuador entered into a settlement agreement under which they agreed to a remediation plan for environmental damages caused on public lands and agreed on TexPet's responsibilities for clean up. In 1998 TexPet and Ecuador certified that TexPet had satisfied the terms of the settlement agreement. Perhaps the most significant issue in all of these related cases is the scope of that settlement agreement and whether it encompassed the claims that the private plaintiffs are now seeking to advance in the Lago Agrio litigation. Certainly Chevron (which acquired Texaco some years after the 1995 settlement agreement) and TexPet argue that it did. According to Chevron and TexPet, the Government of Ecuador initially took that position but has now changed its view and is working with the private plaintiffs against Chevron and TexPet.

This constellation of cases raises a host of interesting issues; the following are those that sprang out immediately. No doubt many others will emerge as the case moves forward.

The motion to stay in U.S. court raises an unanswered procedural question under Article II of the New York Convention – can a court stay an arbitral proceeding if it determines that an arbitral agreement is "null and void, inoperable or incapable of being performed," or can it only decline to order the parties to proceed to arbitration?

Chevron and Texaco have argued that the U.S. court lacks subject matter jurisdiction because an action to enjoin arbitration does not "arise under or relate to" the New York Convention, a prerequisite for establishing federal question jurisdiction. The language of Article II of the New York Convention provides: "The court of a Contracting State . . . shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The subject-matter jurisdiction argument is that the Convention only contemplates measures in favor of arbitration; it does not permit courts to enjoin arbitrations. (There is a similar argument under the Federal Arbitration Act).

I would suggest that the court has the authority to hear the case as it arises in an international arbitration that falls under the auspices of the New York Convention. It thus has subject matter jurisdiction in U.S. Constitutional law terms. A slightly different question is whether the New York Convention and the implementing legislation confer on the court the ability to order the relief requested. (For U.S. civil procedure buffs, can the plaintiffs survive a 12(b)(6) motion to dismiss?) The language of the New York Convention does not on its face permit a court to order a stay of arbitration; rather, it speaks in terms of compelling arbitration if the parties have an arbitration agreement. The New York courts have themselves recognized this apparent lack of authority in the Convention, though they have issued stays in a few cases, including one at the request of Petroecuador in yet another related case. That case, a AAA arbitration in which Chevron and TexPet sought contribution from Petroecuador under the 1965 Concession Agreement for any damages that would be awarded in the Lago Agrio litigation, was stayed because the court found that Petroecuador had never signed the joint operating agreement and therefore had never consented to arbitration.

One might phrase the question as whether the authority to enjoin arbitration is necessarily encompassed in the authority to decline to compel in the demonstrable absence of an arbitration agreement. It is noteworthy that Professor Michael Reisman, who filed an affidavit as an expert in the stay proceedings, appears to assume that the authority to enjoin is encompassed in Article II: "The only grounds for a federal court to intervene and to prevent an arbitration are if the agreement to arbitrate is 'null and void, inoperative or incapable of being performed.'" On the other hand, if a court in any New York Convention country with jurisdiction over the parties can enjoin an arbitration even before a tribunal is constituted (as is the case in the BIT arbitration), the potential for court interference with arbitration is heightened. I do not propose to resolve this question here, but flag it for further exploration.

In this particular case, even if the U.S. District Court finds it has the authority to order a stay in the absence of a valid arbitration agreement, there appears to be no reason for it to exercise its authority. The investment treaty in question creates a valid arbitration agreement. To the extent that Ecuador challenges the jurisdiction of the UNCITRAL tribunal, it must do so before the tribunal under the doctrine of compétence-compétence, as so comprehensively explained by Professor Michael Reisman in his expert witness statement.

I would also like to preview briefly some of the interesting issues the investment arbitration is likely to raise, assuming it moves forward. First, there will likely be jurisdictional objections. Based on the public documents filed in the U.S. court, there are interrelated questions of jurisdiction ratione materiae and ratione personae– does either Chevron or Texaco Petroleum qualify as an investor under the BIT? The BIT entered into force in 1997. It is reasonably clear that TexPet qualified as an investor in the 1980s until its concession ended in 1992, but it is perhaps not as clear that TexPet was an investor after 1992, or after 1997 when the BIT entered into force. The

final agreement purporting to settle the environmental clean up was signed in 1998, and the alleged acts of the Government of Ecuador in violation of that agreement occurred well after the entry into force of the BIT. Thus, one will likely see questions about the definition of investment – could the settlement agreement itself constitute an investment, for example? — and whether an investment of which the investor divested itself prior to the BIT's entry into force could nonetheless serve as the basis for a claim when there is something akin to a continuing violation.

The merits of the case also will present fascinating issues. According to the Notice of Arbitration, the Ecuadoran judge presiding over the Lago Agrio litigation has already indicated publicly his determination to decide against Chevron and TexPet and to award damages in the tens of billions of dollars notwithstanding the fact that discovery has not yet closed. Moreover, the Ecuadoran Prosecutor General has allegedly circumvented proper criminal procedure to indict two Chevron attorneys who executed the 1998 Final Release even after initial investigations revealed no fraudulent conduct. This seems like a return to early claims commission cases, prior to the separation of human rights and investment law, and will raise the question of the appropriate remedy should the tribunal find the actions against the attorneys to have been politically motivated. With respect to the litigation itself, the Ecuadoran court has not yet acted, which could raise issues of ripeness, not to mention allegations of lack of finality à la Loewen v. United States.

In short, this is a fascinating case well worth attention due to the many questions it raises, including those regarding the intricate relationships among proceedings occurring simultaneously in different fora.

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