Kluwer Arbitration Blog

Track 1B: One Step Further In The Chevron Saga

Daniela Páez-Salgado (Senior Assistant Editor) (Herbert Smith Freehills) · Friday, June 12th, 2015

The controversial dispute between the Ecuadorian government and the multinational corporation Chevron arose from the operations undertaken by Texpet –a subsidiary of Texaco at that time- on the country's Amazon region during the eighties. Texpet was the operator undertaking the exploration and exploitation of hydrocarbons in association with Petroecuador, formerly CEPE, the state-owned oil company of Ecuador.

In the early nineties, Texaco ended its operations in Ecuador and invested approximately 40 million dollars in a remediation project for the zones in the rainforest that had been polluted during the joint operation carried out with Petroecuador. In 1998, Texaco subscribed Release Agreements with the Ecuadorian State that released the company from any further environmental obligation related with environmental remediation.

In 1993, various Ecuadorian plaintiffs filed a class action lawsuit against Texaco before a New York court for public nuisance –among other claims- caused by the environmental damage perpetrated during its operation in Ecuador. Texaco defended itself arguing that American courts were not the most appropriate forum to settle the dispute under *forum non conveniens* doctrine. In fact, the plaintiffs and the evidence were all located in Ecuador. Thus, Texaco used this argument to persuade the court that it had no jurisdiction to adjudicate the dispute. The court agreed and dismissed the claim.

Accordingly, the plaintiffs embraced a new strategy to sue Texaco before the Ecuadorian courts. Since in 2001 Chevron acquired Texaco and all of its assets, the plaintiffs decided to sue Chevron as the legal successor of Texaco. In 2003, around 40 plaintiffs filed a claim against Chevron before the Lago Agrio courts. Lago Agrio is the first town where Texaco discovered oil. Ecuadorian lawyer Pablo Fajardo and Harvard educated lawyer Steven Dozinger acted as counsels for the plaintiffs in what is today known as the 'Lago Agrio litigation'. The claim was financially backed by investment funds.

The judge in Lago Agrio took eight years to give judgment. The judge condemned Chevron to pay 18 billion dollars to the plaintiffs for remediation and compensation of the environmental damage caused by its operations during the nineties. Chevron appealed the judgment and also requested a review of the appellate decision before the National Court of Justice acting as a court of *cassation*. On its decision, the National Court of Justice confirmed the judgment but lowered the amount of compensation to 9,5 billion dollars. At the moment, a decision of the Constitutional Court, the highest judicial court in Ecuador, is pending.

The plaintiffs have initiated enforcement proceedings against Chevron based on the National Court's decision. Since Chevron never operated in Ecuador, it has no assets in the country; thus, the plaintiffs have been trying to enforce the Lago Agrio judgment filing claims to freeze the multinational's assets in other jurisdictions such as Argentina, Canada and Brazil.

On its defense, Chevron has mainly alleged that (*i*) the claims were precluded due to the Release Agreements reached with the Ecuadorian authorities in the nineties and that (*ii*) the procedure and judgment rendered in Lago Agrio were vitiated by fraud committed between the plaintiffs' lawyers and the judge. According to Chevron, the fraud included forgery of plaintiffs' signatures, ghostwriting of procedural orders and judgment and the falsification of an expert witness report on the determination of damages.

In February 2011, Chevron filed a civil lawsuit against the plaintiffs' counsels before a New York court under the Racketeer Influenced and Corrupt Organizations Act (RICO Act) seeking to hold them accountable for fraud, extortion and other misconduct associated with the Lago Agrio litigation.

Last year, United States District Judge, Lewis Kaplan ruled that RICO Act was applicable to civil plaintiff's counsels, such as Mr. Donziger and his co-counsels, who attempted and/or committed illegal acts such as bribery, blackmail, extortion, witness tampering and fraud. *See,* Chevron Corporation v. Steven Dozinger et. al., S.D.N.Y., 4 March 2014. In addition, the decision prevented Dozinger to benefit from any money that derives from the enforcement of the Lago Agrio judgment. *See, ibid.*

In his nearly 500-page ruling, Kaplan agreed with Chevron's position that Mr. Donziger and his litigation team engaged in conspiracy and criminal conduct. Certainly, this decision will give any judge that has been requested to enforce the Lago Agrio judgment second thoughts on the legality of such request. The defendant Mr. Dozinger has appealed the judgment. A decision from the Second Circuit is now pending.

Chevron is also pursuing relief against the Ecuadorian State through international arbitration for denial of justice during the Lago Agrio litigation. In 2009, Chevron brought its claim under the U.S.-Ecuador BIT. The arbitration is administered by the PCA. The Arbitral Tribunal decided to divide the dispute into two tracks. Track 1 would deal with the question of whether the Release Agreements entered into by Texaco and the State precluded the claims in the Lago Agrio litigation. Track 2 will focus exclusively on the denial of justice claims.

On September 2013, the Tribunal issued a partial award (Track 1A) in favor of Chevron and its subsidiary TexPet. The Tribunal found that the Release Agreements released TexPet and its affiliates of any liability for all public interest or collective environmental claims and did not preclude individual claims for personal harm. *See,* Chevron v. The Republic of Ecuador, PCA No. 2009-23, First Partial Award on Track I, 17 September 2013.

On its next decision (Track 1B), the tribunal had to determine whether the Lago Agrio complaint involved or not collective claims (also known as 'diffuse rights claims'), which were precluded under the Release Agreements. *See, Chevron*, Decision on Track 1B, 12 March 2015, ¶ 3. On its recently issued decision, the majority of the Tribunal concluded that the Lago Agrio litigation involved both, diffuse rights claims and individual claims. ¶ 183. The tribunal pointed that the plaintiffs did not seek compensation particular to each plaintiff for a particular harm but asserted

reparation of the collective rights granted to the community. ¶ 163-164. Since the settlement agreements only barred individual claims, the Tribunal rejected *in limine* Chevron's preclusion contention. ¶ 183.

The award implies that the plaintiffs had a legitimate cause of action against Chevron, notwithstanding the execution of the Release Agreements and the remediation undertaken by Texaco in the past. Now that the Tribunal has decided that the plaintiffs had a right to bring a claim and legitimately did it, it will look at the development of the local proceedings to resolve the denial of justice claims that assert that the litigation was tainted by fraud. On their side, the Ecuadorian courts in their decisions on appeals and *cassation* rejected all of the fraud related claims raised by Chevron.

President Correa has embraced the tribunal's latest decision acknowledging it is a "great victory" for the Ecuadorian State. However, the majority expressly recognized in the award that their determination was just preliminary and that their decision could change when resolving Track 2.

This entry was posted on Friday, June 12th, 2015 at 12:30 pm and is filed under Arbitral Award, Ecuador, Investor, Oil & Gas, Permanent Court of Arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.