

Arbitration - Ecuador

State fails to comply with international arbitral award alleging human rights concerns

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The Republic of Ecuador has refused to enforce an interim arbitral award issued by an international arbitral tribunal. The tribunal had directed Ecuador to halt an ongoing judicial proceeding between a group of Ecuadorian citizens and a multinational corporation until it rules on the merits of the dispute. The court ruled that it would not abide by the arbitral award because the interim award conflicted with human rights treaties of which Ecuador is a signatory.

Facts

In 2003 a group of Ecuadorian citizens from the Amazonian region of the country filed a lawsuit against Texaco Petroleum Company, a US oil multinational which merged with Chevron Corp in 2001. The plaintiffs alleged in their complaint that Texaco had caused environmental damage during the years when the US company and Petroecuador, the Ecuadorian state oil company, operated fields in the province of Sucumbíos. The plaintiffs sought to recover approximately US\$29 billion in damages.

The plaintiffs filed their complaint with the Sucumbíos Provincial Court after they had tried unsuccessfully for almost a decade to have their case heard by the New York courts.⁽¹⁾

One of the defences raised by Chevron before the Ecuadorian court was that Petroecuador was bound to appear as co-defendant in the proceeding by virtue of two agreements that it had signed in 1995 and 1998. In those agreements, Petroecuador had released the US company of any environmental liability once the foreign investor had conducted extensive remediation operations in the fields.

The proceedings in Ecuador have been marred with controversy. The defendant argued that Petroecuador had colluded with the plaintiffs in order to evade its legal responsibilities and to obtain a financial windfall from Chevron. According to Chevron, the Ecuadorian courts did not guarantee it due process. Furthermore, the defendant claimed that the plaintiffs, experts and judges had committed acts of corruption. The plaintiffs and the Ecuadorian authorities denied any wrongdoing.

In September 2009 Chevron submitted a request for an international investment arbitration under the terms of the US-Ecuador Bilateral Investment Treaty.⁽²⁾ Chevron argued that Ecuador breached its obligations under the treaty, including the fair and equitable clause.

While the treaty litigation was in its preliminary phase, the trial in Ecuador entered its final stages. In February 2011 the trial judge handed down his sentence, obliging Chevron to pay US\$19.2 billion.⁽³⁾ The proceeds were expected to finance, among other things, remedial operations in the areas that the plaintiffs claimed had been affected by Chevron. One year later, on January 3 2012, the Sucumbíos Appellate Court confirmed the judgment. Although Chevron filed recourse of cassation to the national court on January 20 2012, the company did not post a bond to suspend the effects of that ruling and, therefore, the judgment became enforceable.

On February 16 2012, in response to a request filed by the plaintiffs, the international arbitral tribunal issued an interim award on interim measures.⁽⁴⁾ The tribunal ordered Ecuador (whether by its judicial, legislative or executive branches) "to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgment by the Sucumbíos Provincial Court (Sole Division) of January 3 2012". It also ordered Ecuador to abstain from granting any certification that "would cause the said judgment to be enforceable" against Chevron.

On January 26 2012 the Ecuador attorney general sent a letter to the Sucumbíos Provincial Court notifying the judges of the bilateral treaty arbitral tribunal decision.⁽⁵⁾

Decision

On February 17 2012 the Sucumbíos Provincial Court issued a ruling where it restated the rule of Ecuadorian cassation law: that the only method by which a party can suspend the effect of an adverse sentence subject to cassation is by placing a bond with the court of appeal – something that Chevron failed to do. More importantly, the court decided that it would not enforce the interim award issued by the treaty tribunal.⁽⁶⁾

The court's core argument for not enforcing the interim award was that having been confronted by two conflicting obligations, the obligation to enforce the award under the principles and rules of international law and the obligation of the state to protect human rights of individuals under other international conventions, it had opted for the latter.

The court stated that:

"Chevron has provided us with a correct explanation regarding the international obligations that are binding on Ecuador from the point of view of public international law, especially the Vienna Convention. Nonetheless, the case at hand does not simply involve obligations of the Ecuadorian state under international treaty law; instead, there is also a potential conflict among international rules: on the one hand, the binding nature for the Ecuadorian state of arbitration awards (in investment matters), and on the other, the effective [enforcement] of human rights."

The court argued that the rules of the Vienna Convention on the Law of Treaties, which require Ecuador to comply with the interim award, is as binding on Ecuador as is the Inter-American Convention on Human Rights, of which Ecuador is a member. The court recalled that under Article 29 of the Inter-American Convention on Human Rights, states are prohibited from interpreting the convention "as permitting any party (eg, Chevron or the arbitration tribunal), from suppressing the enjoyment or exercise of the rights and freedoms

recognised in the convention".

According to the court, the mandatory nature of that provision, and the fact that "the arbitration award is based on international rules created with the aim of protecting investments", led the court to conclude that the arbitration award could not be imposed "above prevailing human rights obligations". The court added:

"In this decision, this Division hereby affirms Ecuador's commitment to its international obligations, both in investment matters and in human rights matters, but in accordance with our analysis it is very clear that, under the Vienna Convention and other international obligations, in case of doubt regarding which rules apply, the latter, that is, human rights, take preference."

While acknowledging that international law supersedes domestic law, the court also highlighted the obligations that the Constitution imposes on judges with respect to the protection of human rights.

On March 1 2012, in response to a request filed by Chevron for clarification and revocation of the February 17 2012 decision, the court issued a second ruling confirming its original judgment.⁽⁷⁾ However, in this second opinion, the court justified at length its decision on the constitutional right of equal treatment under the law. According to the court, enforcement of the arbitral award would amount to a breach of such principle because it would create an exception to the general rule of the cassation law – that the only mechanism to suspend the enforcement of sentence is by posting a bond. Chevron would receive privileged treatment if it were allowed to suspend the enforcement of the sentence via the international interim award rather than by posting a bond.⁽⁸⁾

Comment

The ruling of the Sucumbíos court promises to attract international attention. The plaintiffs have announced that they will try to enforce the sentence in jurisdictions other than Ecuador, since Chevron has practically no assets in the country.

Some of the arguments of the court are hard to reconcile. The court placed considerable weight on the fact that, by complying with the interim arbitral award, the enforcement of its ruling would be suspended and therefore the plaintiffs' human rights would be infringed. In the first place, the court did not explain why it believed that the plaintiffs' human rights would have been breached by enforcing an award that is not definitive. It reached that conclusion without justifying the connection.

Second, the court did not deal with the fact that the same result – suspension of the sentence – would have taken place had Chevron placed a bond under the rules of Ecuador domestic law. Moreover, the constitutional argument that the court developed in its second ruling to justify its preference for the domestic mechanism to suspend its ruling over the international one is questionable under the doctrine of general constitutional law, including that of Ecuador.

Furthermore, the argument that the court faced two conflicting international treaties – the Vienna Convention and the Inter-American Convention on Human Rights – is somewhat problematic because:

- there were not two decisions of two international tribunals in conflict at stake;
- the Vienna Convention was not in contradiction either with the Inter-American Convention on Human Rights or the bilateral treaty; and
- the purpose of the Inter-American Convention on Human Rights is to protect citizens from human rights abuses by the state – not to shield states from complying with international obligations.

In justifying its decision, the court gave considerable authority not only to the Inter-American Convention on Human Rights but also to the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights as the international institutions in charge of enforcing the convention. This is noticeable in its second ruling.

However, such deference of the provincial court to these international bodies contrasts with that assumed by the national court in the case of newspaper *El Universo* – a suit that attracted worldwide attention because of its human rights implications. In that case, the national court ignored a precautionary measure issued by the Inter-American Commission to Ecuador on February 21 2012 seeking to suspend the effects of the court's decision because the defendants' right to freedom of expression was in serious jeopardy. In fact, the national court went ahead and confirmed a ruling of a lower court that had sentenced the newspaper, its three editors and a journalist to pay US\$40 million to the president for offending his honour. The ruling also sentenced the editors and the journalist to serve three years in prison. The national court eventually suspended the penalties. However, this was not as a result of the Inter-American Convention on Human Rights ruling, but rather because the president had pardoned the accused.

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Endnotes

- (1) In 2002 the New York Court of Appeal affirmed the decision of a district court and dismissed the case on the grounds of *forum non conveniens* (inconvenient forum).
- (2) See PCA case No 2009-23, *Chevron Corporation (USA) & Texaco Petroleum Company (USA) v The Republic of Ecuador*, available at www.chevron.com/documents/pdf/ecuador/NoticeOfArbitration.pdf.
- (3) Spanish version of the first instance process and the trial judge's sentence available at www.funcionjudicial-sucumbios.gob.ec/sucumbios/index.php/consulta-de-causas.html. Select 2003 under 'Año Juicio' and type 'Aguinda Maria' under 'Actor/Ofendido'.
- (4) See www.chevron.com/documents/pdf/ecuador/SecondTribunalInterimAward.pdf.
- (5) Letter No 06514, February 16 2012.
- (6) Spanish version of the provincial court process available at www.funcionjudicial-sucumbios.gob.ec/sucumbios/index.php/consulta-de-causas.html. Select 2011 under 'Año Juicio' and type 'Aguinda Maria' under 'Actor/Ofendido' and 'Chevron' under 'Demandado/Imputado'.
- (7) *Ibid.*

(8) *Ibid.*

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