

District Court in The Hague denies Ecuador's application to set aside track II award in favour of Chevron

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In *Republic of Ecuador v Chevron and others* (ECLI:NL:RBDHA:2020:8929), the District Court in The Hague rejected Ecuador's application to set aside an award issued against it in an arbitration brought by Chevron and TexPet.

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The District Court in The Hague has rejected Ecuador's claim to set aside an award rendered against it in an arbitration brought by Chevron and TexPet.

Chevron and TexPet initiated multiple investment treaty arbitrations against Ecuador after a fraudulent judgment was rendered by the Lago Agrio court in Ecuador at the request of the Amazon Defense Front and Ecuadorian citizens. In one of those arbitrations, the tribunal issued an award ordering Ecuador to prevent the enforcement of the Lago Agrio judgment. Ecuador then sought to set aside this award, while the quantum stage of the arbitration continues.

The court dismissed Ecuador's argument that Chevron had failed to challenge the corrupt judge or file a complaint with the Judicial Council. It ruled that Ecuador had not made clear that this was an essential defence in the arbitration. Further, the tribunal's award implied that the tribunal had rejected that defence in any event.

The court also:

- Dismissed Ecuador's argument that the tribunal had failed to provide any conclusive reasoning on Ecuador's defence that Chevron should have followed the procedure under the Collusion Protection Act, as the tribunal had clearly assessed and rejected this defence.
- Ruled that Ecuador had not clarified why the tribunal could not impose the orders it did on Ecuador, as the orders were aimed at preventing enforcement of the Lago Agrio judgment that would have damaged Chevron.
- Found that the tribunal did not violate its mandate by ordering Ecuador to make restitution for the internationally wrongful acts established by the tribunal, as the tribunal had ruled that it considered the orders a suitable form of reparation.

The fact that the tribunal had stated in this award that the forthcoming award on quantum could, to the extent relevant, address issues of non-compensatory restitution, also did not constitute a violation of the tribunal's mandate.

Lastly, the court rejected Ecuador's argument that the tribunal's award ordering Ecuador to prevent enforcement of the Lago Agrio judgment outside of Ecuador constituted a ground for setting aside the award, as Ecuador was merely ordered to withdraw the enforceability of the fraudulent Lago Agrio judgment. (*Republic of Ecuador v Chevron and others* (ECLI:NL:RBDHA:2020:8929) (16 September 2020).)

Background

When an arbitration has its seat in The Netherlands, article 1065(1) of the *Dutch Civil Procedural Code* ("*Wetboek van Burgerlijke Rechtsvordering*") (DCPC), as amended on 1 January 2015, stipulates that the grounds for setting aside an arbitral award include that the:

- Tribunal violated its mandate (*article 1065(1)(c)*).
- Award lacks reasoning (*article 1065(1)(d)*).
- Award is in violation of public policy (*article 1065(1)(e)*).

Pursuant to article 1064a(4) of the (current) DCPC, all grounds relied on in an application to set aside an award must be included in the summons for the setting aside proceedings, failing which the court must ignore such grounds.

Facts

The detailed facts of this long-standing case can be found in [Legal update, Dutch Supreme Court upholds interim and partial final arbitral awards in Chevron-Ecuador saga](#).

In brief, Ecuador, Petroecuador (state oil company) and TexPet (an indirect subsidiary of Chevron) entered into two settlement agreements in relation to the winding up of a concession agreement in 1995, followed by a final release signed by the parties in 1998.

In May 2003, the Amazon Defense Front and a number of Ecuadorian citizens, initiated proceedings against Chevron before the Lago Agrio court in Ecuador, claiming that oil production by TexPet had caused pollution.

Chevron and TexPet filed a bilateral investment treaty (BIT) claim against Ecuador in December 2006, claiming that Ecuador was liable for the unacceptable delay in seven proceedings initiated by TexPet against Ecuador before the Ecuadorian courts. The tribunal issued an award ordering Ecuador to pay damages, which Ecuador unsuccessfully tried to set aside before the Dutch courts.

In September 2009, Chevron and TexPet filed another treaty claim against Ecuador under the US-Ecuador BIT claiming among other things that Ecuador should be ordered to take all measures necessary to prevent any judgment in the Lago Agrio proceedings from being enforced. Further, they argued that Ecuador should be ordered to pay to Chevron and TexPet any amount they would be ordered to pay in the Lago Agrio proceedings.

This arbitration was trifurcated into the following phases:

- Jurisdiction regarding TexPet and preliminary issues (track I).
- Jurisdiction regarding Chevron and the merits (track II).
- Quantum of damages claimed by Chevron (track III).

In February 2011, the Lago Agrio court ordered Chevron to pay USD8.6 billion in damages and another USD8.6 billion in punitive damages if Chevron failed to apologise within 15 days, to be increased by 10% of USD8.6 billion in procedural costs. This judgment was upheld on appeal by the Ecuadorian Supreme Court, which only annulled the order to pay punitive damages.

Following a number of interim awards, ordering Ecuador to, among other things, take all measures at its disposal to suspend or cause the suspension of the enforcement or recognition of any judgment against Chevron in the Lago Agrio case, the tribunal rendered an award in track I of the arbitration on 17 September 2013. Ecuador unsuccessfully tried to set aside the interim awards and the track I award before the Dutch courts (see [Legal updates, Chevron v Ecuador interim awards on enforcement of judgment and jurisdiction](#) and [Dutch Supreme Court upholds interim and partial final arbitral awards in Chevron-Ecuador saga](#)).

On 30 August 2018, the tribunal rendered an award in track II, ruling that Ecuador breached its obligations under the BIT with the USA (see [Legal update, Ecuador found liable for denial of justice \(PCA tribunal\)](#)).

In the track II award, the tribunal ordered Ecuador to:

- Remove the status of enforceability of the Lago Agrio judgment.
- Preclude any of the Lago Agrio claimants from enforcing any part of the judgment.
- Advise any states in which the judgment may be enforced of the tribunal's orders.
- Abstain from collecting any proceeds from enforcement of the judgment.

- Return to Chevron any proceeds that may have been received.
- Take corrective measures to wipe out the consequences of Ecuador's internationally wrongful acts in regard to the judgment.
- Comply with its obligations towards Chevron and TexPet under one of the 1995 settlement agreements.
- Compensate Chevron and TexPet for any damage caused to them by the Lago Agrio judgment.

In December 2018, Ecuador filed an application with the District Court in The Hague to set aside the track II award.

Decision

The District Court in The Hague dismissed Ecuador's claim to set aside the track II award.

First, the court set out the applicable legal framework under article 1065 of the DCPC, referring to the The Hague's Appeal Court decision reviving the Yukos awards (see [Legal update, Court of Appeal in The Hague overturns District Court decision and revives Yukos awards](#)).

The court noted that Ecuador did not challenge the tribunal's finding that a judge in the Lago Agrio proceedings allowed parts of the judgment to be written by ghost-writers, including representatives of the Lago Agrio claimants in return for a promise of payment. Also, Ecuador did not challenge the finding that the judgment relied on an opinion by an expert appointed by that judge. To that extent, the court assessed that the fraudulent nature of the Lago Agrio proceedings and judgment was a given.

Denial of justice: essential defences

The court dismissed Ecuador's argument that Chevron had failed to challenge the corrupt judge or file a complaint with the Judicial Council. Ecuador had failed to explain why it would have been clear to the tribunal that Ecuador regarded such defences as essential defences. In the arbitration, Ecuador had, in its defence, emphasised Chevron's failure to invoke other avenues of protection and the tribunal had considered and dismissed those. Moreover, the tribunal's ruling implied that it had rejected Ecuador's claim that Chevron failed to challenge the corrupt judge or file a complaint with the Judicial Council. Thus, the court ruled that the award could not be set aside on this basis.

Denial of justice: Collusion Protection Act procedure

As to Ecuador's assertion that the tribunal had failed to provide conclusive reasoning on Ecuador's defence that Chevron should have followed the procedure under the Collusion Protection Act, the court ruled that the tribunal had assessed this defence, but ruled that this procedure was not an effective local remedy for Chevron.

Tribunal's orders: setting aside the Lago Agrio judgment impossible

The court then turned to the orders given in the track II award for Ecuador to ensure that the Lago Agrio judgment could not be enforced in or outside of Ecuador. The court noted that Ecuador accepted the jurisdiction of the tribunal and thereby committed to complying with the tribunal's orders pursuant to the BIT with the USA. The court ruled that Ecuador had not explained why the tribunal could not impose the orders it as they were aimed at preventing enforcement of the Lago Agrio judgment that would have damaged Chevron. Moreover, the court did not consider

this to be an essential defence for Ecuador as it is an internationally accepted principle that a state cannot use its national laws to breach its international obligations.

Tribunal's orders: the track II award

Ecuador further argued that the tribunal should not have ordered Ecuador to make restitution for the internationally wrongful acts established by the tribunal, as Ecuador could not comply with that order. According to the court, it could not rule on whether or not the tribunal rightfully applied international law but it did hold that the tribunal had not violated its mandate as it had ruled that it considered the orders a suitable form of reparation. The fact that the tribunal ordered Ecuador to take certain measures "to the satisfaction of the tribunal" did not violate the principle of 'functus officio', as this wording did not imply that the tribunal would revisit the debate on this order after the track II award.

Tribunal's orders: track II award led to unwanted consequences

The fact that the track III award could, to the extent relevant, address issues of non-compensatory restitution, did not cause the tribunal to violate its mandate. Although the tribunal ruled in Procedural Order 21, that all remaining issues requiring a final decision by the tribunal would be addressed by the parties at the hearing in track II (except quantum issues), this was a direction to the parties rather than the tribunal. Moreover, in other procedural orders, the tribunal had explicitly held that it could defer issues from track II to track III.

Tribunal's orders: liability for acts of other states

Lastly, Ecuador claimed that the order for it to prevent enforcement of the Lago Agrio judgment in other states constituted a violation of the tribunal's mandate. The court dismissed this argument, ruling that the order did not mean that Ecuador should use extraterritorial powers over other states. Rather, Ecuador was ordered to withdraw the enforceability of the fraudulent Lago Agrio judgment and prevent the enforcement thereof. Should other states nonetheless allow enforcement of the Lago Agrio judgment, Ecuador would not be liable.

Costs and procedure

The court did not rule on two of Ecuador's arguments as they were not included in the summons to set aside in violation of the statutory procedure.

In dismissing Ecuador's application, the court, like the tribunal, observed that it could not understand why the parties had spent so much money on legal proceedings, when that money could have been used to repair the environmental damage. The court ordered Ecuador to pay the procedural costs, which, given the underlying interests at stake, it fixed at the highest possible rates (amounting to some EUR12.000).

Comment

Given that the court emphasised that the Lago Agrio judgment was fraudulent, a fact which Ecuador acknowledged, it is not surprising that the court rejected Ecuador's application to set aside the award, which was intended to prevent enforcement of that judgment, among other things.

Given the reference to The Hague's Court of Appeal decision, reviving the Yukos awards of February 2020, which is being appealed to the Dutch Supreme Court, Ecuador may feel supported in any appeal should the Supreme Court annul the Court of Appeal's decision in the Yukos matter. It appears likely that Ecuador will appeal, given that two

previous setting aside proceedings commenced by Ecuador relating to claims by Chevron ended up at the Dutch Supreme Court.

Remarkably, and uncommon to the Dutch courts, the court criticised the parties for spending so much money on litigation rather than resolving the underlying environmental issues and claims for damages.

Although the cost order issued will still be regarded as immaterial from an international perspective, the court did raise the fixed rates of the cost order from cases with an undetermined value (such as a setting aside claim) to cases with an underlying interest of over EUR1 million.

Case

Republic of Ecuador v Chevron and others (ECLI:NL:RBDHA:2020:8928) (16 September 2020).

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