Case Comments

Clarifying the Meaning of ‘Investment’ and the Temporal Scope of Treaties

*Republiek Ecuador v Chevron Corporation (USA) en Texaco Petroleum Company, Hoge Raad (Dutch Supreme Court), Judgment, 26 September 2014*

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definition of investment – temporal interpretation of treaties – effectiveness – domestic court enforcement – challenge of arbitral awards

In its 2014 judgment, the Supreme Court of the Netherlands rejected the application of the Republic of Ecuador to overturn the Awards rendered by the Tribunal constituted under the auspices of the Permanent Court of Arbitration (PCA) in *Chevron v Ecuador.*1 The PCA Tribunal had awarded USD 96 million to Chevron on the grounds that there had been a violation of the ‘effective means’ clause in the US-Ecuador Bilateral Investment Treaty (the BIT). The Supreme Court found that the District Court of The Hague and the Court of Appeal of The Hague – before which Ecuador had previously sought to challenge the PCA Awards – had correctly found that the PCA Tribunal had jurisdiction, given that there had been an ‘investment’ under the BIT. This ‘investment’ consisted of seven domestic court proceedings in the aftermath of an

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1 *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador (Chevron I)*, PCA Case No 34877, UNCITRAL, Interim Award (1 December 2008), Partial Award on the Merits (30 March 2010), Final Award (31 August 2011).
investment project, brought by Chevron between 1991 and 1993 which were still pending upon the entry into force of the BIT in 1997.

The Supreme Court – which found that it was not competent to overturn points of law established in the previous judgments given that the BIT was to be understood as the ‘law of foreign States’ – held that the previous Dutch courts had correctly interpreted the term ‘investment’ in line with the principle of effectiveness and the general rules of treaty interpretation established by the Vienna Convention on the Law of Treaties (VCLT). This judgment constitutes another notch in Chevron’s belt in the numerous proceedings which have arisen pursuant to their exploitation of oil fields in the Amazon region, including not only ongoing arbitral proceedings under the aegis of the PCA, but also domestic judgments rendered in Ecuador and the US concerning alleged environmental damages.

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**Factual Background**

In 1963, a concession agreement was granted by Ecuador to Texaco Petroleum Company (TexPet) for oil exploitation in the Amazon area. This agreement was renegotiated in 1973 with an expiry date of 6 June 1992, and required that a percentage of TexPet’s crude oil production would be provided to the Ecuadorian government to meet the domestic need for oil. This oil would be purchased at a domestic price, set by Ecuador; the rest of the oil produced by TexPet could be sold according to the (substantially higher) international oil price. Between 1991 and 1993, TexPet initiated seven procedures in Ecuadorian courts, on the grounds that Ecuador had violated the 1973 concession agreement by demanding more oil for domestic purposes than necessary, and subsequently selling that oil on the international market at the international price.

On 17 November 1995, TexPet signed a Global Settlement Agreement and Release (hereafter Settlement Agreement) with Ecuador and its national

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2 *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (Chevron II)*, PCA Case No 2009–23, UNCITRAL.