

PCA CASE No. 2009-23

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS, SIGNED 27 AUGUST 1993 (THE "TREATY") AND THE UNCITRAL ARBITRATION RULES 1976

BETWEEN -

1. CHEVRON CORPORATION (U.S.A.)
2. TEXACO PETROLEUM COMPANY (U.S.A.)

The Claimants

- and -

THE REPUBLIC OF ECUADOR

The Respondent

Order for Interim Measures

dated 9 February 2011

The Arbitration Tribunal:

Dr. Horacio A. Grigera Naón;
Professor Vaughan Lowe, QC;
V.V. Veeder QC (President)

WHEREAS, the Tribunal issued its order for interim measures on 26 January 2011, providing (inter alia) for an oral hearing on 6 February 2011 at the Peace Palace, The Hague, the Netherlands on the Claimants' Second Application for Revised Interim Measures made by letter dated 14 January 2011;

WHEREAS, by letter dated 1 February 2011, the Respondent declared its intention not to make written submissions on the Claimants' Second Application in accordance with Paragraph A of the Tribunal's order of 26 January 2011;

WHEREAS, by e-mail message dated 1 February 2011, the Respondent submitted to the Tribunal a copy of the civil complaint filed earlier that same day by the First Claimant (Chevron Corporation) in the US District Court for the Southern District of New York against several named defendants comprising (inter alios) the Lago Agrio plaintiffs and their legal representatives (but not including the Respondent) for damages and injunctive relief under 18 U.S.C. § 1962, entitled "Chevron Corporation v Steven R. Donziger, et al." (for convenience, here called the "RICO action");

WHEREAS, by order dated 2 February 2011, after considering written submissions made by the Parties dated 1 February and 2 February 2011, the Tribunal decided to maintain and confirm the oral hearing on 6 February 2011;

WHEREAS, the Tribunal subsequently received the letter dated 2 February 2011 from the President of the Chamber of the Provincial Court of Justice of Sucumbíos (copied to the Parties) in response to the Tribunal's letter dated 10 December 2010 regarding the likely date of the first-instance judgment in the Lago Agrio Case, which date currently remains uncertain but potentially imminent;

WHEREAS, on 3 February 2011, the First Claimant submitted an application to the US District Court for the Southern District of New York in the RICO action for an order to show cause why a temporary restraining order and preliminary injunction should not be entered against the defendants at a hearing fixed for 1400 hours on 8 February 2011, whereby the defendants would be enjoined "...and any persons acting in concert with them from funding, commencing, prosecuting, advancing in any way, or receiving benefit from, directly or indirectly, any action or proceeding for recognition or enforcement of any judgment entered against Chevron in [the Lago Agrio Case], or for prejudgment seizure or attachment of assets based on any such judgment...";

WHEREAS, on 6 February 2011, there was an oral hearing in the Small Court Room at the Peace Palace commencing at 0945 hours and concluding at 1645 hours at which the Parties made oral submissions to the Tribunal on the Claimants' Second Application, recorded by transcript and attended (for the Claimants) by Doak Bishop, Edward Kehoe, Caline Mouawad, Isabel Fernández de la Cuesta, Kristi Jacques, Elizabeth Silbert (all of King & Spalding), James Crawford (of Matrix Chambers, by telephone from Australia); Hewitt Pate, David Moyer and David Cohen (all of the First Claimant); and (for the Respondent) by Álvaro Galindo Cardona (of the Procuraduría General del Estado), Zachary Douglas (of Matrix Chambers), Eric Bloom and Ricardo Ugarte (both of Winston & Strawn);

WHEREAS, on 6 February 2011, at the conclusion of the hearing, the Tribunal continued, until further order, Paragraph C of its order for interim measures of 26 January 2011; and

WHEREAS, on 8 February 2011, the Claimants informed the Tribunal that the US District Court for the Southern District of New York had granted that day the First Claimant's application in the RICO action for a temporary restraining order directing the defendants "to

temporarily refrain from taking any action to seek recognition or enforcement of a Lago Agrio judgment”;

THE TRIBUNAL NOW DECIDES:

- (A) As to jurisdiction, the Tribunal records that it has not yet determined the Respondent’s challenge to its jurisdiction (as recorded in the fourth preamble to its Order of 28 January 2011). Nonetheless, for the limited purpose of the present decision, the Tribunal provisionally assumes that it has jurisdiction to decide upon the Claimants’ Second Application for Interim Measures on the ground that the Claimants have established, to the satisfaction of the Tribunal, a sufficient case for the existence of such jurisdiction at this preliminary stage of these arbitration proceedings under the written arbitration agreement invoked by the Claimants against the Respondent under the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (the “BIT”), incorporating by reference the 1976 UNCITRAL Arbitration Rules (the “UNCITRAL Rules”);
- (B) The Tribunal notes that: (i) Article 26 of the UNCITRAL Rules permits a tribunal, at the request of a party, to take interim measures (established in the form of an order or award) in respect of the subject-matter of the parties’ dispute; (ii) Article 32(1) of the UNCITRAL Rules permits a tribunal to make (inter alia) an award in the form of a final, partial or interim award; (iii) Article 32(2) of the UNCITRAL Rules provides that any award is final and binding on the parties, with the parties undertaking to carry out such award without delay; and (iv) Articles VI.3(6) of the BIT provides (inter alia) that an award rendered pursuant to Article VI.3(a)(iii) of the BIT under the UNCITRAL Rules shall be binding on the parties to the dispute, with the Contracting Parties undertaking to carry out without delay the provisions of any such award and to provide in its territory for its enforcement;
- (C) As to form, the Tribunal records that, whilst this decision under Article 26 of the UNCITRAL Rules is made in the form of an order and not an interim award, given the urgency required for such decision, the Tribunal may decide (upon its own initiative or any Party’s request) to confirm such order at a later date in the form of an interim award under Articles 26 and 32 of the UNCITRAL Rules, without the Tribunal hereby intending conclusively to determine the status of this decision, one way or the other, as an award under the 1958 New York Convention.
- (D) As to the grounds for the Claimants’ Second Application, the Tribunal concludes that the Claimants have made out a sufficient case, to the Tribunal’s satisfaction, under Article 26 of the UNCITRAL Rules, for the order made below in the discretionary exercise of the Tribunal’s jurisdiction to take interim measures in respect of the subject-matter of the Parties’ dispute;
- (E) Bearing in mind the Respondent’s several obligations under the BIT and international law, including the Respondent’s obligation to carry out and provide for the enforcement of an award on the merits of the Parties’ dispute in these arbitration proceedings (assuming this Tribunal’s jurisdiction to make such an award), the Tribunal orders:
- (i) the Respondent to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case; and

(ii) the Respondent's Government to inform this Tribunal, by the Respondent's legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of this order for interim measures;

pending further order or award in these arbitration proceedings, including the Tribunal's award on jurisdiction or (assuming jurisdiction) on the merits;

- (F) The Tribunal records that it is common ground between the Claimants and the Respondent in these arbitration proceedings, as also re-confirmed by the Respondent at the oral hearing on 6 February 2011 (page 107 of the English transcript and page 101 of the Spanish transcript) that, under Ecuadorian law, a judgment entered in a domestic proceeding at first instance (such as a first-instance judgment in the Lago Agrio Case) is not final, conclusive or enforceable during the pendency of a first-level appeal until at least such time as that appeal has been decided by the first-level appellate court;
- (G) The Tribunal continues Paragraph C (1) to (3) of its order of 28 January 2011 (which order is incorporated by reference herein);
- (H) The Tribunal decides further that the Claimants shall be legally responsible, jointly and severally, to the Respondent for any costs or losses which the Respondent may suffer in performing its obligations under this order, as may be decided by the Tribunal within these arbitration proceedings (to the exclusion of any other jurisdiction);
- (I) This order shall be immediately final and binding upon all Parties, subject only to any subsequent variation made by the Tribunal (upon either its own initiative or any Party's request); and
- (J) This order, as with the earlier order of 26 January 2011, is made by the Tribunal strictly without prejudice to any Party's case as regards the Tribunal's jurisdiction, the Claimants' First Application made by letter dated 12 December 2010, the Respondent's opposition to such First Application, and to any claim or defence by any Party as to the merits of the Parties' dispute.

PLACE OF ARBITRATION: THE HAGUE, THE NETHERLANDS

DATE: 9 FEBRUARY 2011

THE TRIBUNAL:

Dr. Horacio A. Grigera Naón

Professor Vaughan Lowe QC

V.V. Veeder QC (President)