IN THE NAME OF THE KING

ruling

THE HAGUE COURT OF APPEAL

Civil law division

Case number : 200.112.516/01
District court case/roll numbers : 386934/HA ZA 11-402 and 408948/HA ZA 11-2813

ruling of 18 June 2013

In the case of:

the legal person governed by foreign law
THE REPUBLIC OF ECUADOR
established in Quito, Ecuador,
appellant,
hereinafter referred to as: Ecuador,
lawyer: *mr*. G.W. van der Bend from Amsterdam,

against

1. the company established under foreign law
CHEVRON CORPORATION (USA),
hereinafter referred to as: Chevron Corporation,
2. the company established under foreign law
TEXACO PETROLEUM COMPANY,
hereinafter referred to as: TexPet,
both established in San Ramon, California, United States of America,
respondent,
hereinafter also jointly referred to as: Chevron,
lawyer: *mr*. J.M.K.P. Cornegoor from Amsterdam.

Course of the proceedings.

By writ dated 1 August 2012 Ecuador appealed against the judgement pronounced between the parties by the District Court in The Hague on 2 May 2012 in the joint cases referred to in the heading of this ruling. By statement of appeal Ecuador presented eight grounds of appeal against the judgement that were contested by Chevron in its statement of defence with exhibits.

The parties pleaded the case on 13 May 2013; Ecuador by *mr*. E.D. Van Geuns, lawyer from Amsterdam, and Chevron by its aforementioned lawyer, both on the basis of written pleas that have been added to the case file. Prior to the pleading Ecuador submitted additional documents that are specified in the official report that was drawn up in respect of the hearing and which form part of the case file.

The parties then requested a ruling.

CERT. MERRILL VER

Assessment of the appeal

Introduction

1. The facts established by the district court in grounds for the decision 2.1 up to and including 2.7 of the contested judgement have not been contested, therefore the court of appeal also assumes this. The appeal concerns the following.

1.1 Chevron Corporation is indirectly a shareholder of TexPet. At the beginning of the 1960s Ecuador granted TexPet a concession for the extraction of oil and for oil exploration in the Amazon region of Ecuador. In 1971 Ecuador set up a state oil company, CEPE, later Petroecuador (CEPE/PE). In 1973 the terms of the 1964 concession were renegotiated and the parties entered into a concession agreement for a period of 19 years which related to a smaller area in the Amazon basin (hereinafter referred to as the Concession Agreement).

1.2 The Concession Agreement ended on 6 June 1992 when the term ended. On 17 November 1995 Ecuador, CEPE/CE and TexPet concluded a Global Settlement Agreement and Release (hereinafter referred to as: the Global Settlement Agreement) in relation to the termination and settlement of the Concession Agreement. Amongst other things, this provided for repairing the environmental damage caused by the oil extraction.

1.3 In the period from December 1991 up to December 1993 TexPet initiated seven sets of proceedings with the Ecuadorian courts in relation to what TextPet called culpable breaches by Ecuador under the Concession Agreement.
According to Texpet, Ecuador had systematically violated the Concession Agreement by representing the domestic requirement as too high and demanding more oil from TexPet above that which it was entitled to and which it then exported itself. In those proceedings TexPet claimed more than USD 354 million in respect of the excessive oil deliveries to Ecuador for which, according to TexPet, Ecuador should have paid the international market price instead of the lower domestic price.

1.4 In 1993 the United States of America (Hereinafter referred to as: the US) and Ecuador concluded a Bilateral Investment Treaty (hereinafter referred to as: BIT or: the treaty) which entered into force on 11 May 1997. Article VI of the BIT contains an arbitration clause.

1.5 On 21 December 2006 Chevron instigated a BIT arbitration procedure against Ecuador. In that arbitration, according to the UNCITRAL Rules, Charles N. Brower, A.J. van den Berg and K-H Böckstiegel were appointed as arbitrators (hereinafter referred to as: the Arbitral Tribunal). In the arbitration Chevron adopted the position that Ecuador was liable for the damage that Chevron had suffered due to (amongst other things) breach of Article II(7) of the BIT. That breach was, according to Chevron, the result of an unacceptable delay in the conclusion of the seven proceedings by the Ecuadorian courts.

1.6 In the arbitral interim award of 1 December 2008 (hereinafter referred to as: 'the Interim Award) the Arbitral Tribunal declared itself to be competent to take cognizance of the Chevron claims. In the arbitral (partial) final award of 30 March 2010 ('the

Partial Award') the Arbitral Tribunal found that Ecuador was guilty of a denial of justice in relation to the undue delay because a judgement in the 7 proceedings had not been given in a timely manner by the Ecuadorian courts. For that reason Ecuador was ordered to pay compensation to Chevron. In its arbitral final award ('the Final Award') of 31 August 2011 the Arbitral Tribunal set the level of compensation at USD 96,355,369.17 (including interest).

2. In the proceedings with case number 11-402 Ecuador applied for the Interim Award of 1 December 2008 and the Partial Award of 30 March 2010 to be set aside. In the proceedings with case number 11-2813 Ecuador applied for the Final Award of 31 August 2011 to be set aside. Ecuador founded this on claiming that a valid agreement for arbitration was lacking and that the Arbitral Tribunal had therefore incorrectly declared itself to be competent in the Interim Award, so that the arbitral judgements were rendered liable for set aside on the grounds referred to in Article 1065 paragraph 1 sub a of the Netherlands Code of Civil Procedure. In addition, in the first instance Ecuador argued that on a number of points the Arbitral Tribunal had breached its remit by failing to consider essential defences from Ecuador. In part for this reason the arbitral judgements were, according to Ecuador, not reasoned. With regard to this, Ecuador referred to the grounds for set aside in Article 1065 paragraph 1, sub c and d of the Netherlands Code of Civil Procedure.

3. The court dismissed both grounds and rejected the claims.

Competency and applicable law

4. It is established between the parties that the Netherlands is applicable as the place of arbitration, so that on the basis of Article 1073 paragraph 1 of the Netherlands Code of Civil Procedure the provisions of Title 1 of Book 3 of the Netherlands Code of Civil Procedure (Articles 1020-1073 of the Netherlands Code of Civil Procedure) are applicable to these proceedings. Now that the arbitral judgments have been lodged with the District Court in The Hague, the District Court and the Court of Appeal in The Hague derive competency from Article 1064 paragraph 2 of the Netherlands Code of Civil Procedure.

Assessment of the appeal

5. As is evident from the grounds of appeal, only the first stated ground for set aside, namely: the lack of a valid arbitration agreement, and with that the competency of the Arbitral Tribunal, is to be considered. In this regard the court has considered that the competency of the Arbitral Tribunal is based on an agreement that is deemed to be embodied in the BIT, whereby Article VI paragraph 4 of the BIT applies as an open offer from one state that is party to the treaty to nationals and companies of the other state that is party to the treaty for '*any investment dispute'* to be settled through arbitration (ground for the decision 4.10). In ground for appeal 4 Ecuador complains about the element of the consideration that the arbitration agreement is embodied in the BIT. According to Ecuador that is incorrect because Article VI of the BIT only contains an offer from the state that is a party to the treaty to nationals of the other state that is party to the treaty. The ground for appeal fails. After all, the District Court has explained this in greater detail in the continuation of the relevant consideration.

6. With the question raised in the other grounds for appeal in mind about whether the BIT includes an offer as referred to above for the settlement of the dispute presented to the Arbitral Tribunal, the Court of Appeal shall now quote the relevant sections from the BIT.

The title reads:

"Treaty (…) concerning the Encouragement and reciprocal Protection of Investment"

The preamble states, amongst other things:

Desiring to promote greater economic cooperation between them (de Verenigde Staten en Ecuador), *with respect to investment by nationals and companies of one Party in the territory of the other Party;*

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maxim effective utilization of economic resources;

The relevant provisions read as follows:

Article I

1. For the purposes of this Treaty,

(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, lions and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to:
literary and artistic works, including sound recordings;
inventions in all fields of human endeavor;
industrial designs;
semiconductor mask works;
trade secrets, know-how, and confidential business information; and
trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any license and permits pursuant to law;

(...)

(e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

(…)

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

Article II

(...)
7. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorisations.
(...)

(...)

Article VI

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) (...); or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
(...)
3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (IICSID convention"), provided that the Party is a party to such Convention; or
(ii) to the Additional Facility of the Centre, if the Centre is not available; or
(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or
(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national of company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute (...); and
(b) an "agreement in writing" (...).

(...)

Article XII

1. This Treaty (...) shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter. (...)"

7. Ecuador bases its appeal on a lack of competency on the part of the Arbitral Tribunal on the argument that because the TexPet investment in Ecuador ended on 6 June 1992, while the BIT first came into force on 11 May 1997, that with due regard for Article XII there is no evidence of an investment that is covered by the scope of the BIT and that consequently there is no investment dispute as referred to in Article VI (the arbitration clause) of the BIT.
Chevron has conducted a twofold defence against this:
a) a distinction has to be made between the competency of the Arbitral Tribunal, which should be tested exclusively against that which is stipulated in Article VI of the BIT, and the question as to whether Ecuador has breached its obligations under the treaty; only in the context of the last question is it important whether the interests for which Chevron requires protection are covered by the scope of the treaty;
b) if this was to be judged differently, it applies that indeed there is evidence of an existing investment in the sense of the treaty at the time that the BIT came into force.

8. In the arbitration the parties have accordingly taken their positions.
Without apparently dealing with the distinction argued by Chevron (as above under a), the Arbitral Tribunal has ruled, in brief, that it is competent because at the time that the BIT came into force there was evidence of an existing investment in the sense of Article I (and XII) of that treaty.

9. With regard to the competency of the Arbitral Tribunal the District Court considered, in brief:

i) that when testing against Article 1065 paragraph 1 sub a of the Netherlands Code of Civil Procedure the Court should not act with restraint and should fully test the competency of the arbitrators (ground for the decision 4.5);
ii) that Ecuador has not contested that the dispute between the parties arises from, or relates to the Concession Agreement which, in the sense of Article VI paragraph 1 sub a, can be deemed to be an investment agreement, and has not contested that the dispute between the parties forms a dispute in the sense of Article VI paragraph 1 sub c, so that there is compliance with the conditions prescribed in Article VI for settlement of the dispute by the Arbitral Tribunal (ground for the decision 4.10);
iii) that the full test of the competency of the Arbitral Tribunal pursuant to Article 1065 paragraph 1 sub a of the Netherlands Code of Civil Procedure does not mean that the District Court also has to give a judgment about the follow-on question about whether the arbitration clause in Article VI has to be read in conjunction with Article XII of the BIT, and in that sense restricts the (temporal) scope of the arbitration clause; that a distinction has to be made between, on the one hand, the question about the competency of the Arbitral Tribunal for settling the dispute presented by Chevron (the question about a valid arbitration agreement) and, on the other hand, the question about the competency of the Arbitral Tribunal to make a judgment about investments that had

ended at the time that the BIT entered into force (the interpretation of the scope of Article XII), such question not being presented to the District Court for full testing (ground for the decision 4.11); and that also from the text of Article VI it follows that this contains an entirely independent provision, because it is not apparent from this that when assessing the question as to whether there is evidence of an '*investment dispute*' one has to return to the definition of Article I or the temporal scope of Article XII (ground for the decision 4.12).

The District Court has thus upheld the Chevron defence referred to above under a).

10. In ground for the appeal 1, Ecuador argues that, insofar as the District Court finds that the judge should also show the restraint as referred to in ground for the decision 4.4 for an application to set aside based on Article 1065 paragraph 1 sub a of the Netherlands Code of Civil Procedure (non-competency), then this is incorrect. The ground for appeal fails. After all, it is apparent from ground for the decision 4.5 that the District Court (correctly) endorses a full test with regard to that ground for set aside.

11. Grounds for appeal 2, 3 and 5 relate to the opinion of the District Court that the content of Articles I and XII should not be involved in the assessment of the competency of the Arbitral Tribunal (for this see ground for the decision 9, under iii)). Grounds for appeal 6 and 7 argue that at the time that the BIT entered into force there was no existing investment and that the offer from Ecuador to settle disputes through arbitration contained in Article VI of the BIT was, for that reason, not applicable to the dispute brought before the Arbitral Tribunal by Chevron. To support its grounds for appeal Ecuador refers to the text of Articles I, VI and XII of the treaty, as well as the purpose of it.

12. The first point of dispute between the parties is whether the content of Articles I and XII has to be involved when assessing the competency of the Arbitral Tribunal. On this point the Court of Appeal arrives at a different opinion than the District Court. It is correct that the question of competency is a different question from the question about whether the claims are allowable. It is also correct that an arbitral clause should be regarded as a separate agreement (Article 1053 of the Netherlands Code of Civil Procedure) when assessing the competency of the arbitrators. However, that does not detract from the fact that the question of competency cannot be answered without involving the question about whether, when interpreting the arbitral clause (Article VI of the BIT), the content of Articles I and XII has to be involved. Whether that is the case is a question of the actual interpretation of Article VI.

13. The parties do not dispute that the BIT should be interpreted in accordance with the rules set out in the Vienna Convention on Treaties (1969), hereinafter referred to as: VCT. The relevant provisions of this read as follows (in the English text):

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Thus, a treaty should in the first instance be interpreted in accordance with the meaning of the phrasing contained therein when used in normal speech, viewed in the context in which they have been placed and with due regard for the purpose of the treaty (Article 31 paragraph 1). A term has a special meaning if it is established that the parties had intended this (Article 31 paragraph 4). The context of the provision to be interpreted consists of, apart from the preamble and the text of the treaty, any agreement or other instrument accepted by the parties relating to the conclusion of the treaty (Article 31 paragraph 2). In addition to the context, when interpreting, any other agreements, amongst other things, between the parties to the treaty relating to the interpretation and application of the treaty, should be taken into account, as should the manner in which the treaty is applied in practice ('subsequent state practice') (Article 31 paragraph 3).
This primary standard of interpretation is denoted as the objective or textual method. The history surrounding the formation of the treaty (including the '*travaux préparatoires*') belongs, according to Article 32 of the VCT, to the secondary sources of interpretation.

14. The parties have stated that, in addition to the content of the actual BIT, there are no relevant sources of interpretation in the aforementioned sense (according to the written pleading from Ecuador in the first instance, under 2.4 and 2.5). During the pleading opportunity at the appeal hearing the lawyer for Ecuador notified, when asked, that nothing was known about the formation of the treaty other than that there are many of these types of treaties with similar content. The only sources that the parties have referred to are: the '*submittal note*' with which the BIT was presented to the Congress of the United States by President Clinton (Chevron) and the position of the United States in the *Mondev* arbitration (Ecuador) that is to be discussed later. The *submittal note* does not qualify as an interpretation instrument as referred to in Article 31 paragraph 2 of the VCT. With regard to the question about whether the position of the United States can be regarded as a relevant part of *state practice* this shall be addressed later by the Court of Appeal.

15. The starting point for assessing the competency question is the arbitral clause, i.e. Article VI of the BIT. Unlike the District Court, the Court of Appeal is of the opinion that the mere fact (if correct) that from the phrasing of Article VI it is not apparent that one has to refer back to the definition provision of Article I and/or the provisions relating to the temporal scope of the treaty (Article XII) is not decisive for answering the question whether the content of those provisions has to be involved when interpreting Article VI. After all, when interpreting a treaty provision the phrasing must be interpreted in light of its context (including the further content of the treaty) and the purpose of the treaty. The fact that Article VI has to be regarded as a separate agreement for assessing the competency of the Arbitral Tribunal does not detract from this (for this see ground for the decision 12).

16. To substantiate the competency of the Arbitral Tribunal, Chevron has relied on two grounds referred to in Article VI: paragraph 1, opening words and under a) and paragraph 1, opening words and under c). The Court of Appeal sees reason to discuss this latter ground first. Article VI paragraph 1, opening words and under c) reads:

> *"For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (...) (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."*

From the underlined section of the sentence (underlined by the Court of Appeal) it appears that in the actual arbitral clause (at least with regard to the ground being discussed here) a link is established between the dispute and the scope (also referred to by the parties as: "the scope of protection") of the treaty. After all, in ground c) arbitration is offered as a means of settling disputes for disputes relating to rights that are created or conferred by the treaty. In this context, Chevron is invoking the right, assigned to it in Article II, paragraph 7 of the BIT. With that it is important whether Chevron is able to rely upon that right and it is inevitable that the applicability of the BIT is assessed *ratione materiae* and *ratione temporis*. That thus the opinion about 'the scope of protection' of the treaty – insofar as, in other words: in order to be able to assess the competency of the Abritral Tribunal – is submitted to the national regular court for full testing, is a consequence of the way in which the parties to the treaty have expressed the arbitral clause. Unlike the argument put forward by Chevron, this does not stand in the way of the aforementioned assessment.

17. With regard to the applicability of the BIT *ratione temporis* Article XII, paragraph 1, stipulates:

> *"This Treaty (...) shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter. (...)"*

Apart from the question about whether that also applies when the word '*investment*' is used as an adjective – for example as part of the term '*investment dispute*' or '*investment agreement*' – it is, in the opinion of the Court of Appeal, in any event not subject to doubt that for establishing the meaning of the word '*investment*' (noun) in the provisions of the BIT, the definition of this term in Article 1 of the treaty is the determining factor. This follows from Article I, paragraph 1, opening words under a):

"For the purpose of this Treaty,

(a) "investment" means (…)"

It has to be accepted that except when there are indications to the contrary, each time when the word '*investment*' appears in the treaty, this has to be interpreted in the sense defined in Article I. After all, that is the purpose of a definition clause. The Court of Appeal has not seen any indication that the term '*investment*' in Article XII, paragraph 1 ("*It shall apply to investments..*") has to be interpreted differently than in the sense described in Article I.

18. The question about how '*investment*' is defined in Article I now has to be answered. In this context it is important that it is established between the parties that the 1992 Concession Agreement has ended and with that the oil extraction activities that were the subject of the Agreement. It is also an established fact between the parties that these activities (in any event) qualify as '*investment*' in the sense of the BIT. The Court of Appeal shall hereinafter designate these activities as "the operational phase".
Chevron is of the opinion that at the time the BIT entered into force (11 May 1997) there was still an investment in the sense of the treaty. It argues that the term 'investment' in the BIT and also in the 'BIT practice' is defined broadly and that it covers the entire lifecycle of an investment, including the winding up phase. Chevron points out that the list of the forms of investment in Article I (a) of the BIT is not limitative. Both the claims that Chevron has brought before the Ecuadorian courts (for this see ground for the decision 1.3) and the activities that it undertook in order to (according to Ecuador) repair the environmental damage caused in the operational phase, qualify, according to Chevron, as investment in the winding up phase. More specifically, according to Chevron the stated rights of action fall under the '*claims*' or '*rights*' referred to in Article I, paragraph 1 sub (a) (iii) and (v).

19. Ecuador does not contest that the description of 'investment' in Article I(a) of the BIT is broad and that the list is not limitative. Nor does it contest that the winding up of an investment is covered by 'the scope of protection' of the BIT. However, according to Ecuador, due to that which is stipulated in Article XII, what it calls "additional protection" only comes into effect when it concerns an investment that was still in the operational phase at the time that the BIT entered into force (see amongst other things the written pleading from Ecuador in the first instance, under 4.4.), or at any rate, as further explained by Ecuador in the pleading during the appeal, in a phase that contributes to the economy of the country in which the investment was made. According to Ecuador that follows from the purpose of the BIT, which it further describes as the encouragement of investments. Protection of investments for which the operational phase has already ended can, according to Ecuador, not contribute to the purpose. More specifically, according to Ecuador, neither Chevron's rights of action or the activities relating to the clearing up of environmental damage, contributed to its economy.
As regards the text from Article I (a), Ecuador argues that the circumstance that phenomena listed under (i) up to and including (v) are covered by the definition by virtue of the opening words of (a), does not mean that the relevant elements themselves are elevated to become investments. For example, according to Ecuador, Chevron's rights of action can be designated as a '*claim to money*' as referred to under (c) but cannot in themselves be regarded as '*investment*'. In addition, (with regard to element (c)) it argues that it is required that those claims are '*associated with an investment*', whereby '*investment*' has to be

defined as an investment in an operational sense or at least an investment in a phase that contributes to the economy of the relevant country, at the moment that the treaty enters into force.

20. The Court of Appeal is of the opinion that the interpretation thus given by Ecuador for the term 'investment' in Articles I and XII is not tenable. The following is considered in regard to this.

21. As is apparent from the title and the preamble of the BIT, the purpose of the treaty is to encourage and protect investments, made by nationals of a state that is party to the treaty, in the other state that is party to the treaty. Protection is provided by a fair and reasonable treatment of investments. In that sense, protection of the investments serves to encourage (new) investments; also see the second part of the preamble, in which is it is recognised that "*agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties*". In addition, it can be regarded as an empirical fact that a fair winding up of an investment is conducive to attracting new investments. The fact put forward by the parties that throughout the world thousands of such bilateral investment treaties have been concluded provides confirmation of this.

22. From the statements made by the parties it follows (in both of their perceptions) that in normal use of language '*investment*' means: the operational phase. It is already apparent from Article I (a) that the term '*investment*' in the BIT has a broader meaning. Ecuador also recognises this (for this see ground for the decision 19). Insofar, it is apparent from the actual treaty that there is compliance with that which is stipulated in Article 31, paragraph 4 of the VCT.
From the words in Article I (a), opening words, "*and includes*" it follows that the phenomena stated in the subsequent list (i) up to and including (v), are made part of the term '*investment*'. Thus, amongst other things, '*claims to money, associated with an investment*' (under iii) belong to an '*investment*' under the BIT.
The Court of Appeal is of the opinion, together with Chevron and the Arbitral Tribunal, that the word '*investment*' in the designation '*associated with an investment*', like the second word in the phrase '"*investment" means every kind of investment'* in the opening words of Article I (a), is manifestly intended to have the meaning that the word has in normal language usage. After all, a circular definition would otherwise exist which, from the point of view of logic and practicality, would not be obvious.
An investment in the sense of Article I (and therefore: in the sense of the treaty) covers ('*includes*') therefore (amongst other things) a right of action that is associated with an investment in the operational sense. The provision in paragraph 3 of Article I, which states that a change to the form in which resources are invested does not remove the character of an investment, is in line with this.

23. The Court of Appeal rejects the arguments by Ecuador that a right of action can only be associated with an investment in the sense of Article I (a) (iii) if that investment (in an operational sense) still existed when the treaty entered into force. That does not follow from the phrasing of Article I. Furthermore, this interpretation would result in the word '*investments*' in Article XII having the meaning that is designated to it in normal language usage rather than the meaning as defined. As the Court of Appeal for this in ground for the decision 17, has considered, there is no indication whatsoever that the word '*investments*' in Article XII has to be interpreted differently than how it is (more broadly) defined in Article I.
Such an indication, unlike Ecuador's argument, does not exist in the purpose of the BIT. As considered for this in ground for the decision 21, a fair and reasonable winding up of

an investment (in the meaning according to normal language usage) is conducive to attracting new investments and is thus conducive to the investment climate. That applies equally to the winding up of investments for which the operational phase has already ended.
Insofar as Ecuador is relying on its own intention that deviates from this, meaning that it did not wish its offer of arbitration for investment disputes to extend to investments for which the operational phase had already ended when the treaty entered into force, or alternatively which no longer contributed to its economy, this is not taken into account by the Court of Appeal. Pursuant to the interpretation rules set out in the VCT the (unilateral, not expressed in the treaty) intention of a party is, after all, not normative.

24. Ecuador's reliance on the stance adopted by the United States in the *Mondev* arbitration does not lead to a different interpretation. That arbitration was based on the North American Free Trade Agreement (NAFTA) concluded between the United States, Canada and Mexico in 1994. In that arbitration the United States was taken to court for its handling of a claim by a Canadian investor by the judicial authorities in the state of Massachusetts. In this matter the operational phase of the investment had also ended when the treaty entered into force. The United States argued that the arbitrators did not have competency on the basis of grounds similar to those put forward by Ecuador in these proceedings. However, this adopted course of action cannot be qualified as '*state practice*' on the part of the United States which, pursuant to Article 31 paragraph 3 sub b of the VCT is relevant for the interpretation of the BIT in question. After all, this does not concern '*state practice*' when applying the BIT in question. The condition that this *'practice' 'establishes the agreement of the parties regarding its interpretation'* referred to in Article 31 paragraph 3 sub b of the VCT is also not complied with.

25. It is established that at the moment the BIT entered into force Chevron had rights of action as referred to in Article I(a) (iii) of the treaty and therefore had an 'investment' in the sense of Article I (a) and (therefore) Article XII, paragraph 1. This means there was an '*alleged breach of any right conferred or created by this Treaty with respect to an investment*' in the sense of Article VI paragraph 1, sub c. The fact that the dispute settled by the Arbitral Tribunal about the question as to whether the handling of those rights of action complied with the obligations set forth in Article II, paragraph 7 of the BIT (in brief: the offering of an effective course of proceedings), qualifies as a '*dispute arising out or relating to*' such an '*alleged breach*' is not in dispute. The dispute brought before the Arbitral Tribunal by Chevron is therefore covered by the scope of the offer to nationals of the other party to the treaty to have the dispute settled by means of arbitration as included in Article VI of the BIT, therefore in this matter the Arbitral Tribunal was indeed competent.

26. With this state of affairs no decision needs to be made on whether:
i) Chevron's rights of action also qualify as '*rights*' in the sense of Article I (a) (v);
ii) the activities (on the instructions) of Chevron relating to repairing environmental damage can be regarded as '*investment*' in the sense of the BIT;
iii) the Arbitral Tribunal was also able to derive competency from Article VI, paragraph 1, sub a.

27. The Court of Appeal further considers that, although that argument was not (in so many

words) part of Ecuador's grounds for appeal, the opinion of the Court of Appeal does not mean that – in deviation from that which is stipulated in Article 28 of the VCT – retroactive force can be derived from the BIT. Pursuant to Article XII of the treaty this is applicable to existing and future investments in the sense of Article I (a). There is thus mention of immediate effect. Furthermore, it is not contested that the dispute about the breach of Article II paragraph 7 of the treaty arose after the treaty entered into force and that the arbitrators have only assessed the actions of Ecuador after that.

28. Considering the above, the grounds for appeal 2, 3 and 5 succeed, however, considering the failure of grounds for appeal 6 and 7, this cannot lead to set aside of the contested judgement. Ground for appeal 8, regarding the burden of proof with regard to the existence of a valid arbitration agreement, does not require any discussion.

29. As the party failing to succeed in its action, Ecuador is ordered to pay the costs of the appeal.

Decision

The Court of Appeal

upholds the appealed judgement;

orders Ecuador to pay the costs of the appeal proceedings, so far estimated at € 666 for expenses and € 2,682 in salaries;

declares this ruling provisionally enforceable as regards the order to pay costs.

This ruling was rendered by *mr.* T.H. Tanja-van den Broek, *mr.* M.Y. Bonneur and *mr.* B. Smulders and was pronounced in open court on 18 June 2013 in the presence of the Clerk of the Court.

[*3 x signatures*]

Issued as a true bailiff's copy to *mr. J.M.K.P. Cornegoor*, lawyer for the ~~appellant~~/respondent.
The Clerk of the Appeal Court in The Hague

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) te weten:

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This is to certify that the attached translation is, to the best of our knowledge and belief, a true and accurate translation from Dutch into English of the attached document.

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Dated: July 9, 2014
Datum: 9 juli 2014

Nathan Haselby
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[handtekening]
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ROBERT J. MAZZA
Notary Public, State of New York
No. 01MA5057911
Qualified in Kings County
Commission Expires April 1, 2018

Sworn to and signed before
Beëdigd en ondertekend in
aanwezigheid van
Me, this 9th day of
de notaris op dag 9 van
July 2014
de maand juli 2014

Notary Public
Publieke Notaris

[ondertekend door]
[zegel]