AGUINDA V. CHEVRONTEXACO: TESTING THE LIMITS OF U.S. RECOGNITION OF FOREIGN JUDGMENTS

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ABSTRACT

This paper examines the issue of U.S. recognition of any judgment that may be entered in Ecuador in the case of *Aguinda v. ChevronTexaco Corporation.* The paper examines the history of Texaco's investment, its environmental impact, the resultant litigation and grounds for non-recognition of any judgment in the United States. The paper concludes that Chevron may be able to establish several defenses to recognition but its burden is substantial and presents significant risks for the company.

INTRODUCTION

In May 2003, forty-six residents of the Sucumbios, Kichwa and Orellana Provinces of Ecuador (Plaintiffs) filed a lawsuit against Chevron Corporation (Chevron) in the Superior Court of Justice of Nueva Loja in the Sucumbios Province. The Plaintiffs' claims arose from past and ongoing environmental contamination resulting from oil and natural gas operations conducted by a consortium in which Texaco, Inc. participated from 1964 through 1992. The amount of damages sought by the Plaintiffs grew from $6.1 billion in 2004 to $16.3 billion by April 2008 and $27.3 billion by November 2008.

The value of any resultant judgment depends upon its recognition in the United States. The issue of whether to recognize a foreign judgment is governed by state law. The majority of states have addressed this issue through two statutes. Twenty-one states have adopted the Uniform Foreign Money Judgments Recognition Act of 1962 [1]. Ten states have adopted its successor, the Uniform Foreign-Country Money Judgments Recognition Act of 2005 [2].

MANDATORY GROUNDS FOR NON-RECOGNITION OF FOREIGN JUDGMENTS IN THE UNITED STATES

Due Process of Law

The Acts deny recognition to foreign judgments rendered under a system that does not provide due process. This determination begins with an examination of the procedural protections granted by the foreign legal system. The judicial system must secure an impartial administration of justice between the citizens of its own country and those of other countries. The majority of cases that have examined the Ecuadorian legal system have found it to be adequate.

Another important source for determining the adequacy of foreign legal systems is reports prepared by the U.S. government. Recent U.S. State Department reports regarding Ecuador paint a bleak picture of its judicial system. In its 2008 Human Rights Report, the State Department described continued problems with judicial corruption and the denial of due process [3]. Similar conclusions were reached in the State Department's 2009 Investment Climate Statement in which it stated that "[b]usiness disputes with U.S. companies can become politicized, especially in sensitive areas such as the energy sector" and

described the Ecuadorian judicial system as "hampered by processing delays, unpredictable judgments in civil and commercial cases, [and] inconsistent rulings" [4].
Undoubtedly, the Ecuadorian system provides far fewer protections than the United States. However, differences, assuming no substantial injustice or outrageous departure from fundamental fairness has occurred, are not determinative. The few cases considering the Ecuadorian judicial system have concluded that it comports with fundamental notions of due process. It would be a significant departure from precedent to conclude that Ecuador's legal system did not satisfy due process. Furthermore, the system bears little resemblance to other legal systems deemed inadequate by U.S. courts such as those existing in Cuba, Iran and North Korea.

Personal Jurisdiction

The Acts deny recognition to foreign judgments entered in the absence of personal jurisdiction of the court issuing the judgment. The Plaintiffs have alleged that the Texaco entities participating in the Consortium were directly and indirectly controlled by their parent companies. Second, the Plaintiffs alleged that these subsidiaries were intentionally undercapitalized for the purpose of limiting the impact of any claims derived from their activities.
These bases for asserting personal jurisdiction over Texaco in Ecuador have not withstood judicial scrutiny in the United States. In 1987, the U.S. District Court for the District of Delaware refused to find Texaco liable for actions of its Ecuadorian subsidiaries resulting in claims of breach of contract, unjust enrichment and intentional infliction of economic distress [5]. The court found that the boards of directors of Texaco's Ecuadorian subsidiaries were separate from Texaco's board, and each entity kept separate books, records, bank accounts and principal places of business, paid their own taxes and were responsible for their own daily operations. It could not be concluded that Texaco exercised complete domination or control over its Ecuadorian subsidiaries, and thus Texaco could not be liable for their acts or omissions.
It remains to be seen whether the Plaintiffs will be able to prove a meaningful nexus between Texaco, its subsidiaries and Chevron such as to support a finding of jurisdiction. The Plaintiffs have two significant obstacles to overcome in this regard. First, if personal jurisdiction could not be obtained over Texaco through its subsidiaries, it cannot be obtained over Chevron, which is yet another layer removed from Texaco's Ecuadorian subsidiaries. The second obstacle is chronological. Chevron's acquisition of Texaco did not occur until 2001, nine years after the termination of Texaco's active operations in Ecuador and three years after the Ecuadorian government released Texaco from future liability for environmental contamination in return for undertaking a $40 million environmental remediation effort.

Subject Matter Jurisdiction

The Acts deny recognition to foreign judgments entered in the absence of subject matter jurisdiction. Neither Act defines those circumstances in which subject matter jurisdiction will be deemed to exist for purposes of recognition. As a result, this determination is based on the local law of the foreign jurisdiction.
The Plaintiffs based their Complaint on the Environmental Management Law of 1999, which grants affected individuals or groups of individuals the right to initiate litigation to compel remediation and recover damages for environmental harm. However, Ecuador's Constitution and Civil Code clearly place responsibility for environmental protection on the government. Furthermore, the Environmental Management Law cannot be utilized against Texaco let alone Chevron as it was adopted seven years after Texaco ceased its participation in the Consortium and one year after it was released from liability for future environmental remediation.

In creating new rights and an accompanying claim for relief, the Environmental Management Law is not merely a procedural mechanism but also represents a substantive change in the law. It cannot be given retroactive effect and serve as a jurisdictional basis for the Complaint. Such a result is prohibited by the Ecuadorian Constitution which provides that "[n]o one may be judged for an act or omission which at the time it was committed was not legally classified as a . . . violation, nor . . . . shall a person be judged except in accordance with preexisting laws" [6]. This prohibition is reiterated in the Ecuadorian Civil Code, which states that "[t]he law provides only for the future; it has no retroactive effect" [7]. Finally, Ecuadorian case law has concluded that the Environmental Management Law cannot be given retroactive effect [8].

DISCRETIONARY GROUNDS FOR NON-RECOGNITION

Due Process of Law

The 2005 Act provides that U.S. courts may refuse to recognize judgments where the foreign proceedings were not compatible with due process of law. There are three potential due process issues that must be considered in any U.S. recognition proceeding against Chevron.

The first issue relates to the Plaintiffs' standing to assert claims for damages. Standing has been recognized as a constitutional prerequisite for the assertion of claims in the United States [9]. Constitutional requirements for standing in U.S. courts consist of: (1) an injury in fact that is concrete, distinct, palpable, and actual or imminent; (2) a causal connection between the injury and the conduct which is the subject matter of the complaint; and (3) a substantial likelihood that the requested relief will remedy the alleged injury [10].

In order to have standing, the Plaintiffs must possess a legally protected interest. The interest asserted by the Plaintiffs did not belong to them at the time of the filing of the litigation but was within the exclusive domain of the Ecuadorian government. Even assuming the existence of a legally protected interest, the Plaintiffs have failed to establish distinct and particularized harm. The Plaintiffs' alleged collective harm is insufficient to establish standing in the United States and Ecuador. The Environmental Management Law requires parties to demonstrate individualized harm, but the Plaintiffs seek compensation for broad communal environmental harms.

Second, there is no causal connection between the Plaintiffs' injuries, if any, and the conduct which is the subject matter of the litigation. The Plaintiffs must demonstrate that their injuries were the direct result of Chevron's conduct. The U.S. Supreme Court has denied standing to plaintiffs whose injuries are the result of the actions of a third party not before the court [10, p.225]. The Plaintiffs' injuries, to the extent they can be particularized, are not the result of Chevron's actions but instead are the result of actions of the Consortium of which Texaco was a member. However, Texaco and other Consortium members are not parties to the Ecuadorian litigation.

Finally, the Plaintiffs' requested remedies do not possess redressability, which is defined as the substantial likelihood that the relief will remedy the alleged injury [11]. As there has been no attempt to plead or otherwise prove individualized harm, the most likely outcome of the litigation is a generalized damages award to be divided amongst the Plaintiffs. The Plaintiffs' strategy appears to be to secure a lump sum award first and then determine the existence of actual individual injury and appropriate compensation. This plan usurps judicial authority and is a dereliction of duty to the extent it is permitted by the Superior Court. Such a result should not receive the official imprimatur of the U.S. legal system bestowed by recognition.

Closely related to the standing issue is the attempted retroactive application of the Environmental Management Law. The ex post facto application of penal legislation is constitutionally prohibited in the United States [9, article I, section 9, clause 3]. The Ecuadorian Constitution, Civil Code and applicable

case law also prohibit retroactive application of laws in general and the Environmental Management Law in particular. Application of the Environmental Management Law to this case is clearly retroactive as it would grant standing to private individuals where none previously existed [12].

In addition to violating U.S. and Ecuadorian law, retroactive application of the Environmental Management Law demonstrates the fundamental reasons underlying the prohibition upon ex post facto laws. Such application was clearly not intended at the time the Environmental Management Law was adopted. The Law contained no provision indicating that it was to be given such effect. This absence of a clear intention to bestow retroactive effect may serve as an additional ground for non-recognition [12, p. 270].

The absence of clear legislative intent fails to accord Texaco and Chevron fair notice of the requirements of the law and the opportunity to conform their conduct accordingly [12, p. 265]. Texaco and Chevron's expectations regarding the state of environmental law in Ecuador at the time of the filing of the litigation would be disrupted by a retroactive application of the Environmental Management Law. These expectations are particularly strong in this case given the previously-referenced Ecuadorian law relating to retroactivity and the passage of time from the termination of Texaco's involvement in the Consortium to the adoption of the Law.

Retroactive application of the Environmental Management Law also deprives Texaco and Chevron of their legitimate expectations arising from the remediation of environmental contamination performed by Texaco upon the termination of the Consortium. Texaco spent $40 million in the performance of remediation in return for a full and final release of liability from the Ecuadorian government, the entity it believed to be the sole party in interest. Chevron undoubtedly relied upon this release in its decision to acquire Texaco. Nevertheless, four years after its adoption, the Environmental Management Law was cited as a jurisdictional basis for the litigation.

A further reason for the prohibition upon retroactivity is the prevention of arbitrary and vindictive application of legislation [13]. Retroactive application of the Environmental Management Law to Chevron is indicative of motivations other than the even-handed enforcement of the law. Rather, such application is evidence of a change in governmental attitudes toward business and a perceived opportunity to obtain a significant contribution to the cost of environmental remediation from a large multinational enterprise and excuse injuries caused by Petroecuador's ongoing operations. This conclusion is strengthened by the fact that retroactive application would create a penalty in favor of private parties where none previously existed [14].

The final due process issue relates to the size of the potential judgment. The Due Process Clause of the U.S. Constitution imposes substantive limits on the ability of the states to impose and, by extension, recognize punitive damages [15]. Awards imposing "grossly excessive" punishments are presumptively unconstitutional [15, p. 433]. Although the U.S. Supreme Court has not annunciated a bright line test for determining when such awards are constitutionally impermissible, it has indicated that few awards exceeding a single digit ratio between compensatory and punitive damages will satisfy due process [16]. The permissible ratio must be smaller as the size of the compensatory award increases [16, p. 426].

Utilizing Chevron's calculation that ninety percent of the claimed damages do not serve a compensatory purpose, the maximum amount of the compensatory award would total $2.7 billion, and the punitive portion of the award would be $24.5 billion. This ratio exceeds nine times and would thus draw close to the constitutional prohibition upon double digit awards. Furthermore, the ratio should be far less given the size of the compensatory award.

A punitive award in excess of a single digit ratio may also fall within Justice O'Connor's warning regarding attempts to redistribute wealth through significant awards against large nonresident corporations [17]. As "mere abstractions" often representing "a large accumulation of productive resources," corporations "are unlikely to be viewed with much sympathy" [17, p. 491]. As a result, courts may be tempted to "think little of taking an otherwise large sum of money out of what appears to

be an enormously larger pool of wealth . . . [and] may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from 'wealthy' corporations to comparatively needier plaintiffs" [17, p. 491].

Justice O'Connor's warning is of particular relevance in this case. Utilizing Chevron's calculations, a punitive award in the amount sought by the Plaintiffs would be equal to almost half of Ecuador's gross domestic product. The amount is fifty times Texaco's net profits derived from its operations in Ecuador and does not bear a reasonable relation to its ownership interest in the Consortium. If awarded in their entirety, the damages would exceed Chevron's annual total net earnings by $600 million and its annual net international earnings by $10 billion.

Awards purporting to punish a wrongdoer on behalf of non-parties are also subject to careful scrutiny [18]. Any judgment that may enter in this case is suspect to the extent it awards billions of dollars in damages to thousands of unnamed non-party victims. Such an award amounts to an unconstitutional taking of property. This conclusion is supported by the fact that defendants who are threatened with punishment for injuring non-party victims have no opportunity defend such a charge through presentation of evidence or confrontation of such individuals. Additionally, to permit punishment under such circumstances would "add a near standardless dimension to the punitive damages equation" [18, p. 354]. Any punitive award would be defensible as long as it could be reasonably attributable to some harm suffered by an unidentified non-party. This result would deprive courts of the opportunity to conduct a meaningful review and is inconsistent with the presumption that excessive awards are unconstitutional.

Any punitive portion of the judgment would implicate one additional due process concern. Any punitive award or legal system in which it was entered may not deprive the defendant of "fair notice . . . of the severity of the penalty that a State may impose" [19]. Although Chevron clearly is on notice that any damages award in Ecuador could be large, it is also entitled to rely upon Ecuadorian law. Chevron is also entitled to rely on the Plaintiffs' estimate of damages as an outer limit to its liability. However, this amount continued to grow from $6.1 billion in 2004 to $16.3 billion by April 2008 and $27.3 billion by November 2008. As a result, Chevron has faced considerable uncertainty throughout the course of the litigation in determining the extent of its liability. This uncertainty may constitute a lack of fair notice regarding the severity of the potential penalty.

These contentions do not necessarily lead to the conclusion that a U.S. court will disregard all punitive portions of the Superior Court's judgment. Assuming that Texaco's activities result in liability and such liability can be attributed to Chevron, some punitive award may be appropriate. This conclusion is based upon the degree of reprehensibility associated with the environmental contamination resulting from the Consortium's operations. A punitive award may be appropriate given the physical harm that occurred as a result of oil exploration and production. This harm was not an isolated incident but involved repeated conduct over a twenty-six year period. Conversely, the Plaintiffs face substantial obstacles presented by the requirements that significant awards be supported by conduct evincing indifference or reckless disregard of the health and safety of others and that the harm result from malice, trickery or deceit rather than mere accident. Nevertheless, a more modest award may survive a due process challenge in a U.S. recognition proceeding.

CONCLUSION

The stakes for Chevron in the Ecuadorian litigation are extremely high. It is unlikely that it will escape the litigation unscathed. Although the ultimate judgment will most likely be less than the $27.3 billion claimed by the Plaintiffs, it would not be surprising if the judgment was measured in billions rather than millions of dollars. Such an outcome will not bankrupt the company but will nevertheless deal Chevron a significant blow. In addition to the financial consequences is the incalculable loss of business

reputation and goodwill. Although the case has not yet received the media exposure of other environmental disasters, Chevron should tread lightly in order to avoid the indelible stain of permanent linkage of its name with environmental catastrophe as exemplified by Union Carbide, Exxon and, most recently, BP.

However, the stakes are equally high for the Plaintiffs. The Plaintiffs have invested most of this past decade pursuing their claims. In the meantime, hydrocarbon exploration and production activities continue to take a toll on area residents. Although likely to obtain a favorable judgment from the Superior Court, the amount may be less than the Plaintiffs wish. Obtaining this judgment is only half the battle. Given the likelihood of a time-consuming appeal, the possibility that the Plaintiffs will receive compensation in the near future is remote.

Given this uncertainty, it is perhaps wisest for all sides to return to an opinion issued seventeen years ago by the judge assigned to the initial case filed in the United States in 1993. In denying the Plaintiffs' motion to adopt compulsory settlement procedures, Judge Vincent L. Broderick stated that "[c]ourts cannot . . . coerce settlements in litigation and must instead utilize their powers of adjudication where appropriate if agreement is lacking" [20]. Settlement may be reached only by "voluntary acquiescence of both sides based upon intelligent self-interest" [20, pp. 5-6].The time for the exercise of intelligent self-interest by both parties is long overdue.

REFERENCES

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