

*International Environment***Long Road Ahead for Ecuadoreans To Enforce \$9.5B Judgment Against Chevron**

Ecuadorean villagers who sued Chevron Corp. for allegedly polluting the Amazon rain forest while drilling for oil will have a hard time collecting the \$9.5 billion judgment ordered by a court in their country, law professors and attorneys told Bloomberg BNA in recent interviews.

Whether the plaintiffs ultimately succeed in collecting some or all of the award may turn on whether they can convince a court outside the U.S. to enforce the judgment—one observer says the plaintiffs' best shot may be in another Latin American country.

Meanwhile, attorneys for the plaintiffs have appealed a ruling barring enforcement in the U.S., where the bulk of Chevron's assets are.

Although the ruling doesn't bind courts in other countries, observers say it is likely to taint the Ecuadorian ruling and make foreign courts reluctant to enforce it.

"We can expect the storied Chevron litigation to continue into the future," Jeremy D. Frey, a partner at Pepper Hamilton LLP in Philadelphia specializing in complex civil litigation, told Bloomberg BNA in a March 12 e-mail.

"It will not just be in the Second Circuit, where Mr. Donziger's chances of prevailing are low by any statistical measure, but elsewhere as well," Frey said. Steven R. Donziger is one of the attorneys for the Ecuadorian plaintiffs.

Donziger's dealings in Ecuador should serve as a reminder to attorneys that even when they are acting in foreign countries, they are still bound by the ethical and professional rules of the jurisdiction where they are barred, another observer warns.

How Did We Get to \$9.5B? The dispute, which pits Chevron against 30,000 indigenous plaintiffs in Ecuador's northern Amazon jungle, stems from Texaco Inc.'s oil exploration activities in Ecuador from 1964 to 1992. Chevron acquired Texaco in 2001.

The indigenous plaintiffs originally filed a class action against Texaco in 1993 in the Southern District of New York. The U.S. Court of Appeals for the Second Circuit dismissed the suit in 2002 on forum non conveniens grounds, finding that the U.S. wasn't the proper

venue (*Aguinda v. Texaco Inc.*, 303 F.3d 470 (2d Cir. 2002)).

The plaintiffs then sued Chevron in 2003 in Ecuador's Lago Agrio region where Texaco operated.

After an eight-year trial, Ecuadorian Judge Nicolas Zambrano ruled against Chevron Feb. 14, 2011, assessing a fine of \$8.6 billion (*Aguinda v. ChevronTexaco Corp.*, Superior Court of Justice of Nueva Loja (Lago Agrio), No. 002-2003, 2/14/11) (26 TXLR 186, 2/17/11).

The award increased to more than \$18 billion when Chevron failed to make a public apology to the Lago Agrio plaintiffs.

The Ecuadorian Supreme Court upheld the liability finding Nov. 12, 2013, but halved the bill to \$9.5 billion, finding that the trial judge had improperly doubled the compensation as a form of punitive damages (28 TXLR 1266, 11/21/13).

Fraud, RICO Litigation in U.S. On Feb. 1, 2011, Chevron sued the Ecuadorian plaintiffs and Donziger, in the Southern District of New York under the Racketeer Influenced and Corrupt Organizations Act, calling the Ecuadorian action a "sham" (26 TXLR 492, 4/28/11).

The district court enjoined enforcement of the Ecuadorian court's \$18 billion award March 7, 2011, finding that Ecuador failed to provide impartial tribunals or due process (26 TXLR 259, 3/10/11).

The Second Circuit vacated the district court's worldwide injunction Jan. 26, 2012 (*Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012)) (26 TXLR 1107, 9/22/11), and the U.S. Supreme Court denied certiorari (27 TXLR 1121, 10/11/12).

Judge Lewis Kaplan issued his decision in *Donziger* March 4, 2014, ruling that attorneys for the Ecuadorian plaintiffs committed fraud by bribing Zambrano and ghostwriting his decision, and engaged in a pattern of racketeering activity (*Chevron Corp. v. Donziger*, 2014 BL 58523, S.D.N.Y., No. 11-691, 3/4/14) (29 TXLR 206, 3/6/14).

Kaplan's ruling enjoined the attorneys from enforcing the action in the U.S., and created a constructive trust for the benefit of Chevron on all property traceable to the Ecuadorian judgment.

But the court said the ruling doesn't bar efforts to enforce the judgment in other countries.

Donziger appealed to the Second Circuit March 18. Donziger also asked the court to delay enforcing its ruling, saying it "seeks to preemptively undermine the judicial decree of a foreign sovereign nation and, in so do-

ing, to let Chevron Corporation off the hook for decades of deliberate pollution in the Amazon rainforest.”

Other International Courts. The day before the \$8.6 billion Ecuadorean ruling, arbitrators for the Permanent Court of Arbitration in The Hague ordered that any judgment against Chevron be suspended (*Chevron Corp. v. Ecuador*, Permanent Ct. Arb., No. 2009-23, 2/10/11).

Chevron filed a claim with the panel under the U.S.-Ecuador bilateral investment treaty, arguing that agreements between Texaco and the Ecuadorean government in the 1990s released it from liability for any pollution.

An Ecuadorean appellate court rejected the panel’s ruling blocking enforcement of the verdict in March 2012 (27 TXLR 294, 3/8/12).

Meanwhile, the Ecuadoreans filed enforcement proceedings in other foreign courts, seeking to attach Chevron’s assets in satisfaction of the Ecuadorean judgment.

On May 31, 2012, the plaintiffs sued Chevron’s wholly owned subsidiaries in Canada in the Ontario Superior Court of Justice (27 TXLR 702, 6/21/12). The Court of Appeal for Ontario ruled Dec. 17, 2013, that the Ecuadoreans have the right to pursue Chevron’s Canadian assets (*Yaiguaje v. Chevron Corp.*, Court of Appeal for Ontario (Toronto), No. C57019, 12/17/13) (29 TXLR 9, 1/2/14).

The plaintiffs convinced a trial court in Argentina to embargo Chevron’s Argentine subsidiary’s assets, dividends and future bank deposits. The decision was ultimately reversed by the Argentine Supreme Court, which held that Chevron Argentina was separate from Chevron Corp., and that the Ecuadorean plaintiffs had failed to pierce the corporate veil (*Aguinda Salazar v. Chevron Corp.*, Corte Suprema de Justicia (Arg.), No. 253 XLIX, 6/4/13).

An enforcement suit filed by the plaintiffs in June 2012 in Brazil is still pending (27 TXLR 756, 7/5/12).

“Judge Kaplan’s order adds great weight to Chevron’s argument that the original judgment in Ecuador was invalid and was obtained via procedures that were fundamentally unfair.”

MORRIS RATNER
PROFESSOR, UC HASTINGS COLLEGE OF THE LAW

The bulk of Chevron’s assets are in the U.S., but the Ecuadorean plaintiffs didn’t try to enforce the \$9.5 billion judgment in U.S. courts.

One of the problems with seeking to enforce the judgment in the U.S. is that the proceeding would have been subject to the broad discovery obligations that ultimately

resulted in Kaplan’s ruling against Donziger, Keith Gibson, who defends mass torts, class actions and other complex litigation at Weil, Gotshal & Manges LLP in New York, told Bloomberg BNA in a March 14 e-mail.

If Kaplan’s March 4 order is upheld on appeal, the plaintiffs will be completely foreclosed from enforcing the judgment in the U.S.

Frey called Kaplan’s ruling “searing,” and said it “left open, as it had to, enforcement of the Ecuadorean judgment against Chevron in the balance of the world.”

The plaintiffs will continue their attempts to enforce the judgment in countries around the globe, where Chevron does business and has assets, Frey said. “That would not be everywhere, but close to it. Ironically, Ecuador is apparently not one of them.”

“While some courts (e.g., in Argentina) indicated a willingness to enforce the judgment, Judge Kaplan’s recent ruling taints the Ecuador court’s judgment, making it less likely that a foreign court will enforce it in the first instance,” Morris Ratner told Bloomberg BNA in a March 11 e-mail. Ratner is a professor specializing in the intersection of civil procedure, ethics and the business of law at the University of California Hastings College of the Law, San Francisco.

The plaintiffs will look for countries where Chevron has assets and whose courts will “give full faith and credit to the judgment of Ecuador,” Linda Malone told Bloomberg BNA in a March 11 interview. Malone is a professor of international and environmental law at William & Mary Law School, Williamsburg, Va.

The plaintiffs’ attorneys likely picked the countries where they have tried to enforce the judgment based on where Chevron has significant assets, and where they thought the courts would be receptive to enforcing the foreign judgment, she said.

Enforcing Foreign Judgments. “While Judge Kaplan’s decision is not binding on foreign jurisdictions, given the detail with which the opinion is written, it would be tough for an impartial tribunal to ignore the findings and reach a different result,” Gibson said.

“One would presume that if Donziger and his team had evidence to counter the findings of fraud, coercion, etc., they would have presented such evidence to Judge Kaplan,” he said.

But enforcement of foreign judgments is complicated, Steven R. Perles told Bloomberg BNA in a March 14 e-mail. Perles, founder of the Perles Law Firm P.C. in Washington, practices international civil litigation and has sued foreign states for their complicity in acts of international terrorism.

“At the international level, final judgments are enforceable, or not, as a matter of comity not treaty obligation,” he said. “Nation states have never been able to reach a treaty consensus as to what constitutes an enforceable judgment.”

“In general, U.S. courts recognize final, valid judgments rendered pursuant to fundamentally sound pro-

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Ecuadorean Litigation Against Chevron and Fallout

Ecuadorean Litigation

1993
Ecuadoreans file class action for personal damages against Texaco in SDNY



2002
2d Cir. affirms dismissal on forum non conveniens grounds



2003
Plaintiffs sue in Ecuador to force Chevron to clean up site



Donziger Litigation

Feb. 4, 2011
Chevron sues Donziger in SDNY for fraud



March 7, 2011
SDNY grants global injunction against any attempt by plaintiffs to enforce any judgment



Jan. 26, 2012
2d Cir. overturns SDNY's injunction blocking enforcement of award



Oct. 9, 2012
U.S. Supreme Court denies cert.



March 4, 2014
SDNY bars enforcement of verdict in U.S.



Feb. 14, 2011
Super. Ct. Nueva Loja orders Chevron to pay \$8B, increased to \$18B when it won't apologize



Nov. 12, 2013
Ecuador's high court says Chevron only responsible for \$9.5B



Other International Litigation

Feb. 10, 2011
Arbitrators for the Permanent Court of Arbitration in The Hague order that any judgment against Chevron be suspended



March 1, 2012
Ecuadorean appellate court rejects PCA's order blocking enforcement of the verdict

May 31, 2012
Plaintiffs sue to enforce verdict in Canada



Dec. 17, 2013
Canadian court says plaintiffs may pursue Chevron's assets in Canada

June 27, 2012
Plaintiffs sue to enforce verdict in Brazil (pending)



Nov. 7, 2012
Argentine trial court freezes Chevron's assets there



June 4, 2013
Argentine high court reverses

As of March 21, 2014

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cedures by foreign courts if such courts would recognize our own courts' judgments," Ratner said.

Here the issue was whether the procedures that led to the Ecuadorean judgment were fair, or whether the judgment was the product of fraud.

"Judge Kaplan's order adds great weight to Chevron's argument that the original judgment in Ecuador was invalid and was obtained via procedures that were fundamentally unfair," Ratner said.

Legal, Cultural, Political Differences. The Ecuadoreans might have an easier time recovering in other Latin American countries with political, cultural and legal similarities to Ecuador.

"Even if the Second Circuit overturns Judge Kaplan, American courts will rigorously apply their own standards with respect to punitive damages and aren't, for example, likely to be sympathetic to punitive damages imposed because Chevron wouldn't make a public apology," Perles said. "But that sort of thing might not bother another country in Latin America, especially if it's a country with similar US/oil politics as Ecuador," Perles said.

Perles said legal and cultural differences determine whether a court will enforce a foreign judgment. He used Libya's terrorist bombing of a Berlin discotheque in 1986 as an example.

"A look at the disparate results at the end of the odyssey of German and American claims resulting from the same incident perfectly illustrates the conundrum," he said.

The American victims settled with the Libyan government for \$3 million per victim. Had the claims resulted in a judgment in a U.S. court, there is no guarantee the judgment could be enforced against Libyan assets in Germany or Italy ("an excellent venue to hunt Libyan state assets," according to Perles).

Enforcement in those countries depends on how their legal system views a final judgment issuing from an American court, Perles said.

Libya couldn't be haled before German courts as it could before American courts. "The German system has a very different take on sovereign immunity (not believing a state should be held liable for state-sponsorship of terrorism) and victim compensation, very low compensatory damages, and punitive damages are verboten!" he said.

Politics also plays a role.

"Foreign courts will likely view Mr. Donziger's Ecuadorean judgment through the lenses of their own political circumstances," Frey said. "Chevron can expect some mixed results from its attempts to defend in part based on the findings of a U.S. court ruling that favors a U.S.-based multinational corporation."

He said Chevron likely will use Kaplan's opinion as ammunition to explore whether governmental authorities will help its effort to try to re-open the Ecuadorean judgment.

"By being the aggressor and moving forward in the U.S. and using the corresponding discovery tools available to it, Chevron was able to control the litigation process and has put itself in a very strong position in any potential future attempts by Donziger or others to enforce the Ecuadorean judgment."

KEITH GIBSON
WEIL, GOTSHAL & MANGES LLP

Funding Issues. Any amounts the plaintiffs recover in foreign courts will help fund the ongoing litigation.

Frey said Kaplan's ruling and reported claims against Donziger by an investor will make it hard for the plaintiffs to find the funds to continue the battle around the world.

"Chevron has already shown it's going to put up a fight wherever the issue may be joined," he said. "But for Mr. Donziger to lodge his judgment in Nigeria, for example, is not really all that costly."

"Presumably if they were able to obtain enforcement in some jurisdictions abroad," Gibson said, "it would have the double benefit of garnering momentum in favor of enforcing the Ecuadorean judgment, as well as providing Donziger and his team with funds to continue to pursue enforcement in other jurisdictions."

Kaplan's constructive trust also complicates the matter, Frey said. The order assigns to Chevron all funds Donziger and the other attorneys have received or may receive "traceable to the Judgment or the enforcement of the Judgment anywhere in the world."

"In chess that would mean at least check. It likely does not mean checkmate," Frey said.

Malone said the case is "of great concern" from the perspective of environmental law because so many environmental wrongs occur outside of U.S. borders.

"When plaintiffs invest years and years of effort and time at great personal expense—and often at great physical expense in terms of danger to themselves, for there to be the possibility that a company can turn around in U.S. courts and attack the judgment as being an invalid international court judgment is unusual, and does establish a very disturbing precedent," she said.

Collateral Attacks. Rather than wait around for the Ecuadorean plaintiffs to seek enforcement of the judgment in the U.S., Chevron collaterally attacked the judgment against it in the *Donziger* proceeding.

So far, this unusual strategy has been very successful for Chevron, Ratner said.

"I have not seen this strategy regularly adopted in the past," he said. "It does bode poorly for plaintiffs where a foreign judgment may not have been obtained by fraud, but who now face the prospect of multiplied litigation proceedings."

Although the plaintiffs won the case in Ecuador, they now have to defend their handling of the original case in foreign courts.

“Litigation is already costly,” Ratner said. “This new battlefield potentially adds significantly to the cost of litigation, a cost that large, well-funded corporations can shoulder more easily than can typically less-well-funded plaintiffs.”

Broad U.S. Discovery Provisions. Chevron’s move was likely strategic, designed to take advantage of the broad discovery provisions available in U.S. courts, Gibson said.

Chevron used 28 U.S.C. § 1782 to seek materials from Donziger and others related to the Ecuador litigation to prove its fraud and RICO allegations. “This type of discovery is not available in most foreign jurisdictions, and certainly was not available in Ecuador,” he said.

Specifically, Chevron obtained Donziger’s communications and personal notes, as well as footage from “Crude,” a documentary which Donziger had recruited a filmmaker to create about the litigation.

“It was clear from a review of the materials, including discussions that were captured on video, that Donziger and his team did not expect that any of these written materials would be brought to light given the lack of disclosure obligations in most countries outside of the U.S.,” Gibson said in a post on Weil’s Product Liability Monitor blog.

Gibson said Chevron’s aggressive approach was the right one in this case. The company knew there were allegations of fraud and collusion between Donziger and Zambrano, but “without the ability to obtain discovery, it is unlikely that it would have been able to prove such fraud,” he said.

“Had Chevron not taken a proactive approach and gone on the offensive, the posture of the case may have been very different by the time the plaintiffs sought to enforce the judgment in the U.S.,” he said.

Being the aggressor in the U.S. with access to American discovery tools allowed Chevron to control the litigation process. Chevron “has put itself in a very strong position in any potential future attempts by Donziger or others to enforce the Ecuadorean judgment,” Gibson said.

Where Did Donziger Go Wrong? Donziger’s eagerness to help the Ecuadorean plaintiffs recover may have gotten away from him.

“Donziger certainly would have been better off playing by the rules,” Gibson said.

Kaplan noted in his decision that Donziger’s excuse, “This is how things are done in Ecuador,” wouldn’t fly in a case brought in New York.

Because Donziger is a member of the New York bar, he is subject to New York’s rules of professional conduct.

“U.S. lawyers must always keep in mind that even though they may be acting in foreign jurisdictions, they are still subject to the ethical and professional rules of the state in which they are licensed, and violation of those rules even outside of the jurisdiction, may still have consequences,” Gibson said.

If the plaintiffs had sought more realistic damages and not created such a media sensation, “Chevron may have been less incentivized to fight and may have been willing to discuss settlement,” Gibson said. “Given the outrageous judgment and the intense media and PR campaign by the plaintiffs and the Ecuadorean Government, Chevron’s decision to aggressively fight was likely a rather easy decision.”

Ultimately, Donziger’s zealotry may cost his clients the judgment they have waited so long to recover.

By PERRY COOPER

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