# Chevron Fails to Stall Enforcement

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In the latest U.S. chapter of the long and hard-fought battle over claims of pollution and adverse health effects from oil development in the Ecuadorean rain forest by Texaco (acquired by Chevron in 2001), a potentially important court victory has gone to the so-called Lago Agrio plaintiffs. On Jan. 26, the Second Circuit U.S. Court of Appeals issued an opinion in **Chevron v. Naranjo**, ordering vacation of a preliminary injunction that prohibited the Lago Agrio plaintiffs from enforcing or preparing to enforce a potential Ecuadorean judgment against Chevron anywhere in the world outside Ecuador.

## BACKGROUND

The Chevron-Ecuador controversy first arrived in U.S. courts in 1993, when a group of Ecuadorean residents filed suit in the Southern District of New York, alleging a variety of environmental, health and other tort claims related to Texaco's oil extraction activities in Ecuador. As described by the Second Circuit, "the conflict between Chevron and residents of the Lago Agrio region of the Ecuadorean Amazon must be among the most extensively told in the history of the American judiciary" (noting that an "underinclusive" Westlaw search yielded 56 results dealing directly with the litigation).

In the recent episode addressed here, Chevron sued the Lago Agrio plaintiffs under New York's Uniform Money-Judgments Recognition Act, seeking a global anti-enforcement injunction against the Lago Agrio plaintiffs and their counsel, New York attorney Steven Donziger. Chevron sought to prevent enforcement of a $17.2 billion judgment awarded to the Lago Agrio plaintiffs by the Ecuadorean trial court where the underlying case was litigated, after being dismissed from U.S. courts based on *forum non conveniens*. The Ecuadorean court awarded plaintiffs $8.6 billion in damages plus $8.6 billion in punitive damages to be awarded if Chevron did not apologize within 14 days of the issuance of the opinion, which Chevron did not.

Chevron included its claim for injunctive relief in a Feb. 1, 2011, complaint that also asserted claims based on RICO, extortion, mail fraud and money laundering. On April 15, 2011, the district court severed the injunctive relief claim under the recognition act from the other claims and thus its decision and the Second Circuit's decision address only that single claim.

Chevron offered three arguments in support of injunctive relief: (1) that the Ecuadorean judgment was fraudulently procured; (2) that Ecuador lacks impartial tribunals; and (3) that domestic and international due process were violated in procuring the judgment. At the time of Chevron's complaint and the district court's opinion, the Ecuadorean judgment was on appeal in Ecuador, and thus was not yet final. On Jan. 3, while the Second Circuit appeal was pending, the appeals court in Ecuador affirmed the trial court's decision and the $17.2 billion judgment. Chevron appealed that decision to Ecuador's Supreme Court, the National Court of Justice, but the Ecuadorean high court rejected Chevron's request for a waiver of the obligation to post a bond to stay enforcement of the judgment while the appeal is pending. Chevron did not post a bond, so the judgment is or should soon be enforceable in Ecuador.

## THE SECOND CIRCUIT'S OPINION

Back in the United States, the Second Circuit based its opinion on two lines of reasoning. First, the court held that the recognition act was not enacted as a tool to pre-emptively prevent or impede the enforcement of foreign judgments, but rather as a tool to facilitate recognition and enforcement of final foreign judgments. At the time the district court opinion issued its preliminary injunction, there was neither a final judgment nor an enforcement action initiated by the Lago Agrio plaintiffs, in New York or elsewhere. The court of appeals reasoned that the provisions of the recognition act on which Chevron relied in support of its injunction claim provide potential defenses in an action for recognition of a foreign judgment in New York, but they do not create affirmative causes of action to enjoin enforcement. The court distinguished the one out-of-circuit case where a pre-enforcement injunction was issued under another state's recognition act on the grounds that in the other case, the judgment holders had already attempted, but failed, to enforce the judgment in another U.S. court. In any event, the Second Circuit stated that even if the reasoning of the other case did allow for an injunction to issue, the court declined to follow it.

The court also reasoned that the procedural requirements of the recognition act are motivated by an interest in facilitating the recognition and enforcement of foreign judgments, not preventing it. The exceptions to recognition exist to facilitate trust among nations by preventing one country from selling justice to the highest bidder and then tying the hands of foreign courts from not enforcing their judgments. To the extent Chevron believes the proceedings in Ecuador were tainted by corruption, it can raise such arguments if and when the Lago Agrio plaintiffs attempt to enforce their judgment in the U.S.

The Second Circuit found additional reasons to reverse the preliminary injunction based on considerations of international comity. The court noted that the New York Legislature enacted the recognition act to provide a ready means for foreign judgment creditors to secure enforcement in New York courts, in order for New York to act as a responsible participant in the international system of justice. The recognition act was not enacted to enable New York courts to pass judgment on the justice systems of the world. The court distinguished cases involving anti-foreign-suit injunctions, emphasizing that contrary to the characterization of both sides, an attempt to obtain an anti-enforcement injunction was not governed by the same standards and concerns.

An anti-suit injunction is a procedural tool to prevent a litigant from subjecting a party to defending the same suit in multiple jurisdictions. In contrast to that scenario, the underlying litigation in Ecuador and the claims brought by Chevron in New York encompassed "two distinct disputes," and they were sequential as well. The factors that apply to anti-suit injunctions simply do not apply.

As for comity, the court noted that it is "a particularly weighty matter for a court in one country to declare that another country's judicial system is so corrupt or unfair that its judgments are entitled no respect from the courts of other nations." That determination may be unavoidable when a party seeks to enforce an actual foreign judgment, but that is very different from a court in one country attempting to preclude the courts of every other nation in the world from ever recognizing a foreign judgment.

To take such sweeping action would potentially disrespect those other courts by implying that they are not to be trusted to make the determination for themselves. Accordingly, Chevron's request for injunctive relief raises "far graver" comity concerns than a request that courts in New York decline to recognize and enforce a particular judgment from the courts of Ecuador.

Having found that the New York Recognition Act did not authorize a pre-emptive anti-enforcement injunction, the Second Circuit did not need to reach the issue of international comity. The court seemed deeply troubled, though, by the global aspect of the injunction, over and above its stern rejection of the underlying procedure itself. Perhaps the court meant to signal to the parties that if and when the Ecuadorean judgment became final, comity concerns will remain an issue. In that respect, the court drew a clear distinction between the defenses that may be available in an action for recognition of a particular foreign judgment, on the one hand, and a pre-emptive request to prevent recognition and enforcement, in New York courts and elsewhere. As the Second Circuit noted, parties on the losing end of a foreign judgment are not without recourse; they may use the exceptions of the recognition act to defeat an action for recognition and enforcement once it is filed; but they may not jump the gun.

## THE NEXT STEPS

Moving forward, Chevron may seek further (*en banc*) review by the Second Circuit and/or petition the Supreme Court for *certiorari*. In the meantime, the court of appeals remanded the case to the district court to litigate the remaining severed claims. On Feb. 16, U.S. District Judge Lewis Kaplan lifted the stay he had imposed on the rest of the case, and litigation resumed.

With a final judgment from Ecuador in hand, the Lago Agrio plaintiffs may seek recognition of their judgment in U.S. courts, and/or in other jurisdictions where Chevron might have attachable assets. In the meantime, Chevron continues to pursue its arbitration claim under the U.S.-Ecuador Bilateral Investment Treaty. On Feb. 16, the Hague-based tribunal in the arbitration proceedings issues a Second Interim Award on Interim Measures, in which it directed the Republic of Ecuador "(whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador" of the Lago Agrio judgment. And on Feb. 17, the Ecuadorean Provincial Court of Justice in Sucumbios held that it lacked the power under Ecuadorean law to suspend enforcement. The only thing certain, is that Chevron, Ecuador and the Lago Agrio plaintiffs will continue to litigate their respective rights in the courts of Ecuador and the United States, as well as international arbitration in the Hague. Further enforcement litigation in New York will be guided by the decision of the Second Circuit.

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