A comparative analysis of the attempts to enforce the Ecuadorian decision in the Chevron case

Multinationals and impunity

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Abstract: This article analyses comparatively the enforcement procedures of the Ecuadorian judgment in the famous Chevron case, related to environmental damages caused by oil drilling in Ecuador. Enforcement of the judgment was analysed in several American countries, such as the United States, Canada, Argentina and Brazil. The central problem of the article is how private international law can assure the enforcement of a foreign decision related to human rights against a multinational business conglomerate. Central arguments used on the enforcement decisions were legal separateness of subsidiaries and public order exception. Some procedures are still pending final decision. The methodology used includes a bibliographical and documental review, mainly upon legislations and court decisions. The article concludes that the Chevron case may indicate that the current doctrine in private international law does not offer adequate instruments to make multinational conglomerates accountable for human rights violations.

Keywords: Chevron case. Comparative analysis. Enforcement procedures. Environmental law. Extraterritorial validity of foreign decisions.

Uma análise comparada das tentativas de execução da sentença equatoriana no caso Chevron: multinacionais e impunidade

Resumo: Este artigo analisa comparativamente os procedimentos de execução do julgamento equatoriano do famoso caso Chevron, relacionado a danos ambientais causados por exploração de petróleo no Equador. A execução do julgamento foi analisada em diversos países americanos: Estados Unidos, Canadá, Argentina e Brasil. O problema central do artigo é como o direito internacional privado pode assegurar a execução

Recebido em 10/7/19
Aprovado em 12/8/19

de uma decisão estrangeira relacionada a direitos humanos contra um conglomerado multinacional. Os argumentos centrais usados nas decisões de execução foram a desconsideração da personalidade jurídica das subsidiárias e a exceção de ordem pública. Alguns procedimentos ainda estão pendentes de decisão final. A metodologia utilizada foi revisão bibliográfica e documental, principalmente referente a fontes primárias (legislações e decisões judiciais). O artigo conclui que o caso Chevron parece indicar que as teorias vigentes em direito internacional privado não oferecem instrumentos adequados para tornar conglomerados internacionais responsáveis por violações de direitos humanos.

Palavras-chave: Caso Chevron. Análise comparativa. Procedimento de execução. Direito ambiental. Validade extraterritorial de sentenças estrangeiras.

Introduction

The purpose of the present paper is to carry out a comparative analysis of the judicial procedures that aim to enforce the Ecuadorian judgment from the Chevron case in various countries. The Chevron case is probably the biggest example of challenges that private international law must face in order to make itself adequate enough to work within the new order of globalization, contributing to the implementation of human rights.

Due to deforestation and the dumping of crude oil in the environment, which was perpetuated in the Ecuadorian Amazon forest throughout several years, Chevron was sued in Ecuador by indigenous peoples and citizens who demanded compensation for health and environmental damages. The lawsuit culminated up to nine billion dollars in compensation, but since Chevron no longer had assets in Ecuador, the plaintiffs sought to enforce judgment in various countries throughout the Americas: USA, Canada, Argentina and Brazil.

The case presents a huge complexity, as it deals with several procedures that have been developed in multiples forums for over thirty years: at least five national courts, an international arbitration tribunal, the International Criminal Court and the Inter-American Commission on Human Rights. The numbers involved in the case are also significant: Chevron has US$ 260.1 billion in total assets, exploiting 2.6 million barrels of oil on a daily basis, in contrast to an Ecuadorian Gross Domestic product of US$ 97.8 billion. While the company itself has two thousand highly qualified

lawyers from over sixty law firms from all around the world, the plaintiffs are represented by *pro bono* lawyers, along with the support of non-governmental organizations.

The case also involves a thrilling script that includes accusations of corruption, bribery, ghostwriters of judgment, death threats and criminal organizations. In 2009, a spokesperson from Chevron affirmed that they would "fight this case until hell freezes over and then fight it on the ice", demonstrating no intention to seek an amicable agreement.

In the field of private international law, the case asserts the challenge of how to effectively protect human rights in a transnational setting and how private international law can offer a fair solution for the violations of rights perpetrated by multinational companies. Until the present moment[1], all the attempts to enforce the Ecuadorian judgment by private international law have failed.

The methodological approach taken in this study is based mainly upon primary sources (such as legislations, judicial decisions and opinions) that were obtained at official government websites. For a complementary point of view, and in order to ensure the actuality of the research, secondary sources, such as scientific articles and news stories, were also used. The data was analysed qualitatively and descriptively.

As a theoretical framework, this paper follows the proposition offered by Horatia Muir Watt in the field of private international law. The author considers that the "schmis of private international law", which is built upon the principle of party autonomy and sovereignty, needs to be overcome in order to join the wider debate on the future of law beyond the state.

[1] This article was closed in May 2019.

The paper has been organized in three sections. First, it offers a brief overview of Watt's position in the field. Next, the paper offers a summary of the Chevron case, analysing the Ecuadorian judgment and its developments. Afterwards, the paper examines each enforcement judgment in the following countries: the United States, Canada, Brazil and Argentina.

In conclusion, the paper aims to assert that the comparative analyses of the procedures and of the rules that have been applied demonstrate the insufficiency of contemporary private international law to deal with the protection of human rights in the analysed case, above all considering the huge gap between the resources of the parties involved. The study suggests, in accordance with the framework established by Watt, that the central doctrines of this field of the law, such as *forum non conveniens*, public order and conflicts of laws, may be re-evaluated in order to deal with fundamental rights.

1 Theoretical framework: rethinking private international law

Private international law, as sustained in the division of law and politics and in the schism between public and private, has developed a narrow vision over the years, which ignores the respect for human rights and generates immunity within the private sphere (WATT, 2011, p. 347-428). These developments are aggravated when accompanied by the rise of new sources of authority and normativity beyond nation states, leading to the emergence of post-national regimes of regulation (WATT, 2011, p. 352). In this scenario, "the private international law field appears to be directing its attention to much narrower, and indeed highly technical, issues, with little awareness of or interest in their governance implications" (WATT, 2011, p. 354).

Private international law as it is known today arose in the nineteenth century in the shadow of public law laid out in the Westphalian model of the international legal order. In the periphery of the relationships between sovereign states, private law ensured that utilitarian regulation for the conflict of laws was to be considered neutral, apolitical and far from any social conflict (WATT, 2016).

In this model, the principle of party autonomy provides support for the fiction of an autonomous private legal order. The principle has led to a transformation of the national public regulation into a disposable good, reinforcing the autonomy of corporations with respect to human rights violations (WATT, 2017).

Watt (2011, p. 382) presents the implications of such tunnel vision in the field: (a) a lack of any adequate theory of conflict; (b) inadequate mapping of global political economy; (c) structural bias that creates obstacles for the enhancement of global good; (d) insufficient attention to private rule-making; and (e) the lack of a sense of systemic linkages.

In order to build a planetary function of private international law, Watt considers it essential to quarry the fundamental rights in cases of abuse by private actors. The methodological tools for resolving conflicts in human rights and private international law can be considered in all three channels which fundamental rights claim to regulate: vertically, horizontally and diagonally. As a possible solution, the author proposes redefining the field of private, identifying public elements in the private actor's activities. Another possibility presented is to recognize the responsibility of the state with regards to the violation perpetrated by private actors (WATT, 2011, p. 395-405).

The second step in that purpose is related to re-shaping pluralism. The emergence of authorities and regulations beyond the state, as featured by non-democratic means and a lack of transparency, sheds light on issues related to legitimacy. As a possible solution, the author proposes "tak[ing] the 'private' seriously", which means ensuring that expressions of sovereignty beyond the state "gives rise to adequate reparation when it is harmful, and is conversely held to respect the reliance of third parties" (WATT, 2011, p. 405-409).

The third and last step listed by Watt is to re-embed the Global, promoting a progressive integration of human rights into the private international law methodology, using "jurisdictional and conflict of laws to give voice to affected communities, and simultaneously forces non-state actors to 'jurisdictional touchdown' by extending their social and environmental responsibility to match their sphere of influence" (WATT, 2011, p. 422).

These steps are fundamental in ensuring that interests beyond the state in the global scene comply with fundamental rights, working towards the overall planetary good. The change may seem ambitious; however, it can start by simply acknowledging the insufficiency of the contemporary private international rules and doctrines, pointing out their incongruities and deficiencies.

The Chevron case, which is partially presented in this paper, offers a unique opportunity for a comparative analysis of private international law in various countries, demonstrating the lack of governance present in the field that has led to the impunity of private actors with regards to significant violations of fundamental rights.

2 Brief presentation of the case

The Chevron case in Ecuador concerns a series of claims related to petroleum concession in Ecuador. It represents a complex case, as it

involves several impacts on the environment with multiples victims, claims in several Americans countries, arbitration claims and international treaties. As Whytock (2012, p. 428) states, "the case illustrates, in highly concentrated and dramatic form, a more general trend toward increasing complexity in transnational dispute resolution – inter-state, inter-systemic, and doctrinal".

Texaco-Gulf operated in Ecuador between 1964 and 1992. During this period, Texaco deliberately spilt an estimated 19.3 billion gallons of crude oil into the environment, contaminating multiples rivers and streams that served as water sources and fisheries (KIMERLING, 2006, p. 450).

The pollution, containing high levels of benzene, PAH and heavy metals, caused serious impacts to human health (miscarriages, malnutrition, cancer, among others) and to the environment (water pollution and animal deaths). In addition, the actions of Texaco in the area led to severe conflicts with multiple indigenous peoples (such as the Kichwa, the Huaorani and the Taegeri) (KIMERLING, 2006, p. 460-466).

The international norm directly concerning this case is a Bilateral Investment Treaty (BIT), which was celebrated in 1993 between the USA and Ecuador in relation to the protection of Texaco's investments in Ecuador (PIGRAU, 2014, p. 6-7).

Between 1991 and 1993, Texaco filed seven claims in Ecuador concerning non-compliance with the concession's contract. In 2006, the Texaco Company went to arbitration against Ecuador for alleged denial-of-justice violations, since those seven claims had not been taken up. The arbitration tribunal declared in 2010 that a denial of justice had occurred and awarded Texaco-Chevron approximately 96 million dollars (PIGRAU, 2014, p. 8).

Meanwhile, a class action lawsuit was presented before the New York Federal Court in 1993 representing 30 thousand Ecuadorian citizens, which claimed for reparations derived from human rights violations. In 2002, after several rulings and several procedural occurrences, the doctrine of *forum non conveniens* was applied, and Texaco was forced to accept Ecuador's jurisdiction and also that any judicial decision from Ecuadorian courts could be executed against Texaco in the U.S. (UNITED STATES, 2002).

At the same time that these claims were established, Texaco celebrated an agreement with the Ecuadorian government, agreeing to perform environmental recovery work in exchange for their release from Ecuador's claims. In September 1998, according to Texaco, the work had been completed, releasing the corporation and its successors from any further responsibility or claims, in a document named "Final Release"[2]. However,

[2] The mentioned "Final Release" affirms that "in accordance with that agreed in the [1995 Settlement Agreement] the Government and PetroEcuador proceed to release, absolve and discharge forever from any liability and claims by the Government of the Republic of Ecuador, PetroEcuador and its Affiliates, for items related to the obligations

the plaintiffs alleged that the remediation was inadequate, representing only "cosmetic changes" (PATEL, 2012, p. 81).

Afterwards, in 2003, some of the victims[3] filed a class action against Texaco in Ecuador in the Lago Agrio Court of Justice, in Ecuador. At this point, Texaco had been acquired by Chevron. For more than eight years, the proceedings have been plagued by procedural incidents and denials of illegal activities, which even included corruption accusations.[4] A central element in the corruption argument was related to a scientific report prepared by Richard Cabrera, which was presented to the court during the trial. Chevron alleged that Cabrera was not impartial, presenting evidence of a relation between the expert and the plaintiffs (PATEL, 2012, p. 90-92).

In 2011, the decision was announced in favour of the claimants, ordering Chevron to pay almost twenty billion dollars both for reparative damages and as punishment. The company was also ordered to provide a public apology to the plaintiffs (ECUADOR, 2011). The decision was entirely confirmed by the "Corte Provincial de Justicia de Sucumbíos" in 2012 (ECUADOR, 2012), but partially modified by the "Corte Nacional de Justicia" in 2013, which withdrew the punishment compensation, decreasing the judgment to almost ten billion dollars (ECUADOR, 2013). The final decision was issued in June 2018, denying an extraordinary demand of protection (*acción extraordinaria de protección*) proposed by Chevron Corporation. The final decision approaches several critical issues for environmental law in a very forward looking manner, contributing for the evolution of the field. Some points mentioned are: recognition of a collective right to environment, retroactive application of the environmental law, application of the principle *in dubio pro natura*, among others (ECUADOR, 2018).

In 2009, Chevron filed a demand in the Permanent Court of Arbitration in The Hague (GIORGETTI, 2013; HART, 2016), aiming to stop the procedures and the enforcement of the Ecuadorian decision. The final decision was issued in 2016 and ordered Ecuador to suspend any execution proposed against Chevron. The decision was based on the Investment

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assumed by TexPet in the aforementioned Contract, which has been fully performed by TexPet, within the framework of that agreed with the Government and PetroEcuador" (THE HAGUE, 2016, p. 4).

[3] The action was filed by forty-six of the Aguinda plaintiffs and two additional plaintiffs. Many indigenous communities were not a party in the action and complained about the appropriation of their name without consent and about the exclusion from decision-making in matters that could affect their legal rights (KIMERLING, 2006, p. 629).

[4] In 2008, between the proposition of the action and its judgment, it was ratified in Ecuador a new Constitution that enshrined the rights of nature – the first of its kind in the world. The innovation clearly reflects a commitment to environmental protection, even by judicial means. This breakthrough probably played an important role in the final judgment (CELY, 2014, p. 353-358).

Treaty celebrated in 1993 and the agreement related to environmental damages celebrated in 1998. The Arbitration Court declared that Ecuador violated the Agreements when the enforcement procedures in Brazil, Argentina and Canada were commenced. Even though the Final Release was celebrated between Ecuador State and Texaco, the arbitration decision recognized its effects for third parties, the Lago Agrio plaintiffs, which were not even heard in the arbitration procedure. The decision was also criticized by Linares Rodríguez (2012), meanly considering that the arbitration and the Ecuadorian procedures have distinct parties, claims and *causa petendi*, which lack any hierarchical position between them. According to the author, "the arbitral decision presents an unfeasible juridical justification" (LINARES RODRÍGUEZ, 2012, p. 592). The arbitral decision was contested before the Supreme Court of Netherlands, which in April 2019 ruled in favour of Chevron, denying the request to annul the arbitration.

The plaintiffs of the Case Lago Agrio commenced actions related to the Ecuadorian judgment in two international Courts. In the International Criminal Court, the complaint was proposed against Chevron's CEO and other high-ranking officials for committing a crime against humanity (CRASSON, 2017; LAMBERT, 2017). Even though the Court has demonstrated a tendency to accept environmental damage as a crime, the complaint was not accepted as the facts happened prior to the temporal limitation of the Court in July 2002.

The lawyers of the plaintiffs also filed a petition in the Inter-American Commission on Human Rights, with which they demanded protection for themselves, considering threats that they received and a burglary that took place in one of their law offices.

As Chevron Corporation no longer had any assets in Ecuador, the Lago Agrio plaintiffs were forced to seek out the implementation of the judgment in other countries where the transnational company had assets. Chevron Corporation only has assets in United States, but its subsidiaries have assets in multiples countries. Until the present moment, enforcement actions were commenced in United States, Canada, Argentina and Brazil.

3 Judgment enforcement in the United States of America

Chevron U.S.A. Inc., a subsidiary of Chevron Corporation, is the second largest energy company in the United States, headquartered in California and producing mainly crude oil and natural gas. The total production in this country is equivalent of twenty seven per cent of the corporation's worldwide production, what demonstrate the extensive importance of operations in such country (CHEVRON, c2019, p. 3).

In the United States, most states adopt the Uniform Foreign Money-Judgment Recognition Act (UFMJRA) of 1962 and its revised version of 2005, regulating the recognition and enforcement of foreign decisions in the U.S.A. (UNITED STATES, 2011a). The acts maintain most of requirements settled in the seminal U.S. Supreme Court case Hilton vs. Guyot (KHATAM, 2017, p. 249). Although such regulations foresee the validation of foreign decisions just like it would a decision from another state, it stipulates some exceptions: offense to public policy, disobeying due process of law, partial tribunal or judgments, etc. (PATEL, 2012, p. 85).

In the present case, the decisions related to enforcement in the U.S. are a result of a civil lawsuit proposed by Chevron Corporation, in contrast to the attempts of enforcement in other countries, which were commenced by the plaintiffs in the Lago Agrio judgment.

Upon the decision in the Ecuadorian courts, Chevron commenced a suit in the U.S. District Court of New York under the RICO (Racketeer Influence and Corruption Organizations) Law against the lawyer of the plaintiffs, Steven R. Donziger. The thesis was that the Ecuadorian lawyers acted as part of a criminal organization, extorting the company by means of bribery, corruption and fraud. On February 2011, the judge decided to apply a temporary restraining order, blocking the Ecuadorian claimants and their attorneys from requesting execution of the Ecuadorian judgment (UNITED STATES, 2011b). The decision was reformed in September 2011 by the Second Circuit Court of Appeals by alleging that the U.S. could not deny applicability of the Ecuadorian judgment, as the company itself had at first alleged a lack of authority on behalf of the U.S. Courts for the judgment (UNITED STATES, 2011b).

After several procedural decisions, the trial took place between October and November 2013. The decision was put forth in March 2014 in favour of Chevron's demand, prohibiting the defendants from seeking to enforce the Ecuadorian judgment in the United States. The Second District Court of Appeals confirmed the decision in August 2016 (UNITED STATES, 2014).

The decision points out multiples criminal elements in the Ecuadorian judgment, such as the bribery of judges and judicial officials, coercion, ghostwriting of the judgment (which was supposedly written by the plaintiffs), extortion, money laundering, obstruction of justice, witness tampering and racketeering. The decision applies the RICO Law regardless of whether or not the defendant is associated with organized crime, accompanying the precedence of the Supreme Court.

In conclusion, the decision affirms: "the saga of the Lago Agrio case is sad. It is distressing that the course of justice was perverted. The LAPs received the zealous representation they wanted, but it is sad that it was not always characterized by honour and honesty as well" (UNITED

STATES, 2014, p. 484). For the judge, it is not a matter of whether the pollution occurred or not, or who is responsible, but instead whether the decision was a fruit of crime.

On June 2017, in a very swift decision, the Supreme Court denied the Certiorari demanded by the plaintiffs.

The decisions are completely innovative, applying a law that was intended to prevent criminal organizations from avoiding the enforcement of foreign decisions. As stated,

> the Second Circuit refashioned a statute designed to combat organized crime into a tool for preemptively challenging corrupt foreign judgments in federal court. Although the court's application of RICO may prove narrow in practice, its resourceful approach presents a potential model for paving federal inroads into state judgment recognition law (CHEVRON…, 2016, p. 746).

In similar stance, according to Khatam (2017, p. 273), both the Chevron strategy and the final decision were considered extraordinary, as it was an innovative mechanism to block enforcement of a foreign decision in the U.S. in cases of intrinsic fraud. In addition, it represents an inventive precedent to account U.S. lawyers for attorney misconduct and ethics violation for acts committed abroad.

4 Judgment enforcement in Argentina

Chevron's operation in Argentina has been underway since the eighties through its subsidiary, Chevron Argentina S.R.L. and is related to the extraction of crude oil and natural gas (ARGENTINA, c2001-2019).

The most important regulations in the field of foreign judgments in Argentina is the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards and the Inter-American Convention on Execution of Preventive Measures (CIDIP II, Montevideo, 1979), both ratified by the country in 1983 (ORGANIZATION OF AMERICAN STATES, c2014a, c2014b).

In the domestic Argentinian law, the procedure is established in the Code of Civil and Commercial Procedures (CPCCN) in articles 515 to 517 (ARGENTINA, [2019]). The domestic law fixes its application only when there are no international agreements recognized. In addition, according to the Argentinian Constitution, international conventions have a superior hierarchical position in the legal framework (ARGENTINA, [1995]) even though the requirements in the domestic law are very similar to those in the Inter-American Convention.

It is essential to distinguish two similar procedures related to international judgments in Argentina: precautionary measures and *exequatur*, both of which were moved by the Lago Agrio plaintiffs in Argentina. Whereas the first has a decision of the Superior with force of *res judicata*, the second is in First Instance pending final judgment.

The precautionary measure intends to protect the property until the final execution and its acceptance or dismissal does not affect the analysis of the *exequatur*. The national judge that receives the precautionary measure (J2) has jurisdiction to apply the measure or adapt it to major effectivity, while the foreign judge who proclaims the measure (J1) is the only one with jurisdiction to analyse the suitability of the case. In other words, the applying judge (J1) is the only one jurisdiction to declare the accomplishment of the measure (art. 3-4) (ORGANIZATION OF AMERICAN STATES, c2014a). It is possible to apply the exception of public order when the judgment offends central principles of the country where the homologation is required (art. 12) (ORGANIZATION OF AMERICAN STATES, c2014b).

The precautionary procedure had the first decision in November 2012, when the First Instance judge ordered the embargo of 40% of the company's assets, both current and future. The judge applied the CIDIP II – preventive measures and, by analogy, the Argentinian Procedure Code. Analysing the arguments related to the extent of the pronounced judgment, the judge denied its jurisdiction to reconsider, affirming the exclusive jurisdiction of the Ecuadorian judge (ARGENTINA, 2012).

The judge also stated that the Argentinian subsidiary is not a different juridical person from Chevron Corporation, as there was evidence that 100% of the subsidiary's stock packet belonged to Chevron Corporation (ARGENTINA, 2012).

This decision is partially reaffirmed by the Cámara Civil de Feria in December 2012, which reaffirms the unity between the Argentinian subsidiary and Chevron Corporation. The decision was only modified in terms of embargo on the incoming payments from third party (ARGENTINA, 2013a).

Chevron offered an appeal to the Supreme Court and the General Prosecutor (PGN) presented a nonbinding opinion in which she defends the urge for the judgment's reformation, as the concession of the precautionary measure could affect the energy policy and the country's economic development, causing irreparable damages within the Argentinian society and economy. In addition, it is argued that, as the Argentinian subsidiaries were not a party in the Ecuadorian process, having not been summoned and having not been offered a defence, the concession of the precautionary measure would violate the public order. Another argument mentioned is that most of the international conventions in the field of enforcement of international judgments establishes the right to a defence, mentioning various examples. The incongruence here is that the convention applied during this occasion is not one of them, which means that the requirement was not established.

The decision of the Supreme Court in June 2013 follows the argumentation of the PGN (ARGENTINA, 2013b). The Argentinian companies are considered third parties, which should have been summoned by the Ecuadorian judge. Because it did not happen, it is considered a violation of the public order and shall not be accepted. In the Ecuadorian decision, the judge applies the disregard doctrine to apply the effects of the decision against the Chevron Corporation to the Argentinian subsidiaries. The Supreme Court judgment reviews this decision according to the Argentinian law, in a clear offense to the CIDIP II – precautionary measures (art. 3 and 4)

(ORGANIZATION OF AMERICAN STATES, c2014a; ARGENTINA, 2013b).

The decision was not unanimous, as Judge Fayt presented a separated opinion. Fayt affirmed that the concession of a precautionary measure *inaudita altera pars* is not an offense to the Argentinian public order, as the Procedure Code has a similar provision. In addition, he reaffirms the jurisdiction of the Ecuadorian judge to the analysis of the adequacy of the measure (ARGENTINA, 2013b).

The decision of the Supreme Court was criticized as a lack of cooperation in the Inter-American System and as having been politically influenced by the economic agreements between Argentina and Chevron, both occurring throughout the vague concept of "public order".

Although in the Argentinian Law there is not a definition of the term, the clarification is essential as a way to prevent the use of its vagueness for political purposes. Martín Paiva (2014, p. 1) defines public order by affirming that no alien element violates the internal public order when there is a similar rule in the domestic legislation. The Argentinian law previews the admissibility of concession of the precautionary measure *inaudita altera pars*, leading to the conclusion that in the case under review there was not a violation of public order (LINARES RODRÍGUEZ, 2012, p. 600-601).

The influence of political and economic factors may have been important for the final decision. Linares Rodríguez (2012, p. 600-601) affirms that there was influence from multiples political elements, as Chevron was in the moment the only private oil company interested in exploiting oil in Argentina. In addition, Chevron directors have made public declarations that the investments in Argentina would only be sustained if the precautionary measures were suspended. Naturally, this tension generated pressure from the government to suspend the precautionary measures. Similar analysis is presented by Corti Varela (2012, p. 204).

In December 2013, the plaintiffs filed an *exequatur* (enforcement procedure) in the National Court. The regulation that was applied to the procedure was the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (art. 2-3) (ORGANIZATION OF AMERICAN STATES, c2014b), since the procedure code and the constitution stipulate the application of the conventions, as mentioned above. The requirements established in the convention can be separated into two blocks: procedural elements, subdivided into requirements before the judgment is rendered and requirements to be fulfilled in the country where the judgment is to take effect, and merit elements.

In the first block, the following requirements, all according to the law where the judgment was rendered, are established: a) fulfilment of all the formal requirements in the judicial process; b) opportunity to present a defence; and c) the judgment must be final or, where appropriate, apply *res judicata*.

The second block is composed of the following requirements, all according to the law where the judgment is to take effect: a) translation and notarization of all documents into the official language of the state in which they are to take effect; b) jurisdiction of the judge or tribunal rendering the judgment; and c) summoning of the parties.

The merit requirement is composed of a single requirement: the judgment cannot be manifestly contrary to the principles and laws of the public policy (order public) of the state in which recognition or execution is sought.

Both parties presented replicas and the public prosecutor presented a non-binding opinion on April 2016 recommending the rejection of the suit.

The first instance decision was issued in October 2017 denying the homologation in ground of lack of jurisdiction. According to the judge, María Viano, article 5º of the Argentinian Procedural Code stablishes that the jurisdiction is set by the domicile of the defendant, mentioning precedents in *exequatur* procedures. Subsequently, the Judge mentioned the Argentinian Supreme Court decision regarding procedural measures in the same case, which stablished that the Argentinian subsidiaries are distinct personalities from Chevron Corporation, with distinct assets. Therefore, the Judge concluded that "there is no direct connection of the case with the local court and thus it does not justify the formal opening of this jurisdiction, since the jurisdiction for the exequatur should be to the judges of the country in whose territory there are enforceable assets" (ARGENTINA, 2017, p. 16, our translation).

The judge also declared that when the procedure was issued, the Ecuadorian decision did not had force of *res judicata*, failing to comply with CIDIP – II, article 2º, G and CDPCC, article 517, 1º. The *exequatur* was proposed with the decision of first instance from Ecuador, which was modified later by the *Corte Nacional de Justicia* in Ecuador (ARGENTINA, 2017).

The plaintiffs' lawyers lodged an appeal against the judgement alleging that Chevron Corporation had assets in Argentina by means of its subsidiaries, justifying, therefore, the jurisdiction of the Argentinian Court. The appeal was judged by the *Camara Civil de Apelaciones* in July 2018, accompanying a nonbinding opinion presented by the prosecutor's office in June 2018 (ARGENTINA, 2018). The three-judge panel unanimously dismissed the appeal. They affirmed that it is within the jurisdiction of the domestic judge to analyse its own jurisdiction for validation of a decision from an international judge and, in order to do so, they should analyse if the subject and the object of the demand are under its circumscription, according to the domestic law. Consequently, it was considered that the decision issued by first instance judge had no error and should be maintained, as there was no connection point between the case and the domestic jurisdiction. The judges concluded, "[t]here are no attachable assets in this country that serve as a point of connection that would allow the local forum to exercise jurisdiction" (ARGENTINA, 2018, p. 7).

There is no mention in the judgment to the decisions from Brazil, Canada and United States. In addition, the decision did not approach the intricate arguments related to public order, fraud and corruption. Instead, the central argument is a formal requirement based upon the previous decision from the Supreme Court of Argentina, which reinforce the authority of the decision within the country (ARGENTINA, 2018).

The decision in the *exequatur* procedure demonstrates a trend in the use of formal or procedural arguments to deny recognition of foreign sentences, as well as the avoidance of polemic topics. The absence of mention to other foreign courts related to the case may demonstrate a lack of cooperation within courts. The decision presents very similar arguments from the ones used in the Canadian and Brazilian decisions and could, therefore, reinforce itself by dialoguing with other judges.

The plaintiffs appealed to the Supreme Court (*Corte Suprema de Justicia de la Nácion*) and it is still pending a final decision.

5 Judgment enforcement in Canada

Chevron has operated in Canada for over eighty years through its subsidiaries Chevron Canada Limited and Chevron Canada Resources.

According to the Canadian Constitution (CANADA, [2019a]), the jurisdiction to enforce foreign judgments belongs to the provincial jurisdiction, specifically the province in which the debtor has assets, as well as to the superior court. Canada is under the common law system in which each province has its own procedure, although they are very similar (KOEHNEN; KLEIN, 2010, p. 1). According to the jurisprudence of the Supreme Court (cases Van Breda, Monguard, Beals and Pro-Swing), there are some requirements that can be demanded: 1) the foreign court had a real and substantial connection with the litigants or with the matter of dispute; 2) the judgment was obtained by due process; 3) the judgment is conclusive; 4) the judgment is for an ascertainable sum of money, or, otherwise, fulfils multiples factors of exception (Pro-Swing case).

In matters of arguments of defence, the Supreme Court accepted the following arguments: foreign public law exceptions, fraud, offence to public policy and natural justice. Specifically in matters of fraud related to the merits (as is alleged in the Chevron case), the Canadian court only analyses when the fraud allegations are new and were not analysed by the prior court. The offence to public policy must be narrowly applied only when the decision is an affront to morality (KOEHNEN; KLEIN, 2010, p. 2).

In May 2012, an action against Chevron was filed by the Lago Agrio plaintiffs in the Ontario Superior Court of Justice. Neither of the defendants filed a defence, but instead brought motions alleging the absence of jurisdiction of the court for the case, as Chevron had no assets in Ontario, and since Chevron Canada was not a party in the Ecuadorian process. One year later, the court recognized its jurisdiction to rule the action. However, it stayed the action, after considering the absence of evidence showing that Chevron Corporation had assets in Ontario and the separation and independence between Chevron Canada and Chevron Corporation. Even though the Ecuadorian Court pierced the corporate veil to apply the responsibility to all Chevron subsidiaries, for the Canadian Court, this decision does not render *res judicata*, as Chevron Canada was not a part (CANADA, 2013b).

The decision was reviewed in December 2013 by the Court of Appeals of Ontario (CANADA, 2013a). This decision reaffirmed the jurisdiction of the Ontario court for the case, reinforcing the "real and substantial connection". However, the Court of Appeals considers that the motion judge erred by granting the stay, as this issue was not argued before the trial, thus not allowing the plaintiffs to offer legal arguments.

The Supreme Court confirmed the decision in 2015, reaffirming the jurisdiction by means of recognizing the real and substantial connection (CANADA, 2015).

The procedure was sent back to the Ontario Superior Court of Justice for trial, which, in January 2017, pronounced summary judgment, concluding that the subsidiaries are separate legal entities, in effect dismissing the enforcement against them. The judgment also displaced the possibility of piercing the corporate veil, as the requirement "complete control" was not fulfilled (CANADA, 2017). The decision states:

> Chevron Canada is not an asset of Chevron. It is a separate legal person. It is not an asset of any other person including its own parent, CCCC […] [It] is not the judgment-debtor under the Ecuadorian judgment and, therefore, the *Execution Act* does not apply to it with respect to that judgment (CANADA, 2017).

The Court of Appeal for Ontario upheld the impossibility to pierce the corporative veil in May 2018. The majority of the Court reaffirmed the principle of corporate separateness and clarified that a company's assets do not belong to related corporations, such as subsidiaries, meanly in a complex corporation chain such as Chevron. The Court also stated concern with policy implications of piercing the corporate veil regarding stakeholders.

However, judge Nordheimer presented a concurring opinion that may open a very small breach for future litigations. He stated that there might be some rare and exceptional circumstances where an exception to the corporate separateness would be suitable as a measure of equity. In his words, "the law should not allow even legitimate corporate structures to work an 'injustice'" (CANADA, 2018). The plaintiffs appealed to the Supreme Court, but the appeal was dismissed in April 2019 (CANADA, 2019b).

Nevertheless, the action remains against Chevron Corporation. The first instance judgment affirmed that if all the allegations of fraud, corruption and bribery are considered true, they could raise all the permissible defences accepted by the Canadian Supreme Court and impede the recognition of the judgment (CANADA, 2017). In this way, it is widely accepted that the accusations of fraud will be the core argument from now on.

6 Judgment enforcement in Brazil

Chevron has operated in Brazil since 1997 through its subsidiaries Chevron Brasil Upstream Frade Ltda. and Chevron Brasil Lubrificantes Ltda. The main interest of the company in the country is related to oil drilling (mainly in deep water), as well as natural gas, lubricant and grease plants (BRAZIL, c2001-2019). The company's operation resulted in a massive oil spill in 2011 in Bacia de Campos. The company was negligent in applying its emergency plan. Two civil claims were postulated demanding a total of US$ 17.5 billion for compensation. However, an agreement was settled in the amount of R$ 300 million in compensation. All civil claims were dropped (BRANCO, 2016).

In Brazil, according to the Federal Constitution, the Superior Court of Justice (*Superior Tribunal de Justiça*) must first homologate the foreign judgments and only then can it produce valid effects in national territory (BRASIL, [2019a]). The regulation of the procedures are predicted in the Civil Procedure Code (BRASIL, [2019b]) and in the Regiment of the Superior Court of Justice (BRASIL, 2019c)[5].

[5] Brazil ratified the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards in 1995. Nevertheless, in Brazil, constitutional dispositions are superior to International Conventions, which have the same hierarchy as infra-constitutional laws.

Brazilian Law considers indispensable requirements for the homologation of the judgment: the judgment must be declared by the capable authority; the judgment must be preceded by regular summons; the judgment must be effective in the country where it was declared; the judgment must respect the Brazilian *res judicata*; the judgment must be translated into Portuguese; and, finally, the judgment must not offend the public order, human dignity and national sovereignty (*Regimento interno do Superior Tribunal de Justiça*, art. 216-D and 216-F). The requirements are mainly formal ones, and the homologation analysis should not be supported by any merit argument (ROLAND, [2018], p. 4-8).

After the homologation was required, the interested party receives a summons to offer a contestation against the requirement, which can only be based on the requirements of the judgment listed above. Subsequently, terms for replica are offered. The public prosecutor can offer a nonbinding impugnation to the requirement. A reporting judge is designated to the procedure, submitting their final decision to the president of the court.

Following the homologation, the judgment can be enforced in the Federal Court, following the general procedures for enforcement of any civil decisions in Brazil. During this stage, it is essential that the demanded company have assets in the national territory.

The Chevron case came into the Brazilian court in June 2012, becoming the biggest enforcement case in the country's entire history. The public prosecutor issued a nonbinding opinion in May 2015, recommending that the court reject the recognition of the judgment due to alleged fraud and corruption in the Ecuadorian judicial process. In the prosecutor's opinion, he refers directly to the US-American decision and to the recognition of fraud in order to affirm that the Ecuadorian decision offends the Brazilian public order and, therefore, should not be homologated. The only evidence analysed by the prosecutor are the ones affirmed in the US-American court, which were not validated in the Brazilian. The opinion also mentions the Inter-American Convention against Corruption.

In September 2017, the plaintiffs' attorneys presented a petition to relinquish the demand. At a press conference carried out on Ecuador, the Union of People Affected by Chevron-Texaco (UDAPDT) justified the withdrawal by "various evidence related to the loss of a guarantee of a fair trial in this jurisdiction". They also asserted: "we are not going to fall for Chevron's game and await a preconceived judgment, a product of transnational imperialism, which we know has used its economic influence to push justice aside" (THE PEOPLE..., 2017). Chevron attorneys contested the petition, demanding final judgment.

The final decision of the Court was issued in November 2017, denning the homologation, by use of an innovative argumentation. First, the Court recognized the presence on the demand of all procedural requirements: regular summons on the original case, *res judicata* of the sentence, regularity of the power of attorney and translation. It was not identified any irregularity in the petition that could avoid the judgment. However, the Court applied the "effectiveness principle", which would demand the existence of a connection point between the foreign case and the Brazilian jurisdiction. As the Brazilian subsidiary was not a part in the original case and Chevron Corporation had no assets in Brazil, the Court considered that there was no jurisdiction of the Brazilian Court (BRASIL, 2017).

The requirements provided in Brazilian law are similar to the ones provided in the Convention.

According to the Ministers, the homologation procedure is only an instrument for the enforcement procedure, what impels the analysis about the possibility of actuation of the Brazilian jurisdiction. As Chevron Corporation has neither assets nor domicile in Brazil, there would be a lack of jurisdiction for the future enforcement, after the sentence homologation.

The actions on the United States and Canada are mentioned to reinforce the decision, but the decision from Argentina is neglected, even though both the Brazilian legislation and the argumentation of the case are far more similar to the Argentinian decision than to the North American ones (BRASIL, 2017). Additionally, the arguments related to the existence of a connection point and lack of jurisdiction were central for both the Argentinian and the Brazilian decision.

Even though the final decision was unanimous, in the separated opinions of the case, it was observed a controversy regarding the petition to relinquish the procedure. For the majority of the Court, it was not possible to relinquish the homologation procedure or it would only be possible if the other party (Chevron Corporation) had consented. In contrary sense, leading the minority, Minister Andrighi expounded that the renounce would be possible if there were explicit powers of the attorneys for this purpose. She proposed to stay the procedure (BRASIL, 2017).

One very important argument was brought by separate opinion of Minister Noronha, regarding the General Prosecutor's opinion. He stated that "we [the Court] don't have any relation with the American Justice or the Justice of any other country" (BRASIL, 2017, p. 58, our translation). By mention of a precedent from the Superior Court, the Minister asserted that the lack of jurisdiction is enough to set aside the sentence homologation and did not consider any other argument.

The plaintiffs' attorneys lodged an appeal (*Embargos de Declaração*) that aims to clarify a decision in case of doubt, omission or contradiction. In May 2018 it was accepted only to amend a material error on the publication of the decision. Since June 2018, the decision has force of *res judicata* (BRASIL, 2018).

The innovation of the Brazilian Court is very interesting. The violation of public order would be a challenging task, considering the vagueness of the concept and the need to analyse several evidences produced in foreign courts. Avoiding such difficulties, the public order is barely mentioned. The Court attested that all rules regarding procedural requirement were fulfilled, but denied the homologation considering violation of a principle that is not written in any Brazilian law, creating a new precedent for the Court. In previous cases (for example, cases: Brasil, Superior Tribunal de Justiça, SEC nº 3.035/FR, judg. Aug. 31, 2009; SEC nº 1.185/EX, judg. Jun. 10, 2011; and SEC nº 5.270/EX, judg. Jun. 14, 2011) (BRASIL, 2009, 2011a, 2011b), the Court analysed only procedural and formal requirements and the analysis of legitimacy and interest of the parties were analysed only in the subsequent enforcement procedure.

Just as in the Argentinian case, the subsidiary is considered a different legal entity from Chevron Corporation, what would prevent the homologation of the Ecuadorian decision. However, the decision distinguish itself from the Canadian judgment as it does not approach the disregard doctrine and the possibility of piercing the veil of the companies.

Conclusion

After the analysis of the procedures, it was noticed that, on the American continent, there is no uniformity in the requirements for the

enforcement of foreign judgments, even though the Organization of American States has multiples treaties for that purpose. Neither is there a conventional rule to regulate simultaneous enforcement commenced in a plurality of countries, as Linares Rodríguez (2012, p. 598) states.

Nevertheless, in the four countries analysed, there are two central arguments observed regarding the judgment enforcement: separateness between the subsidiary and the central corporation and the possibility of piercing the corporate veil; and obedience in the foreign judgment of the rule of law and, in the hypothesis of its infringement, offense to public order.

The first argument was decisive for the preliminary decisions in Canada, for both of the Argentinian procedures and for the Brazilian Court. The second argument is probably going to play a central role in the final decisions of Canada, as it can be observed in table 1.

Table 1

Judicial decisions regarding the Chevron case within domestic Courts

	COUNTRY	DATE OF PROPOSAL	DATE OF LAST DECISION	CENTRAL ARGUMENT ON FINAL DECISION	CURRENT SITUATION
MERIT PROCEDURES	United States	November 1993	August 2002	Dismissed – Forum non conveniens	*Res judicata*
	Ecuador	May 2003	June 2018	Chevron is condemned for environmental damage	*Res judicata*
ENFORCEMENT PROCEDURES	United States	February 2011	June 2017	Fraud and corruption in the Ecuadorian judgment	*Res judicata*
	Canada	May 2012	April 2019	Dismissed against Chevron Canada – Disregard doctrine	Pending final decision in relation to Chevron Corp.
	Argentina – Precautionary order	November 2012	June 2013	Dismissed – Disregard doctrine and public order	*Res judicata*
	Argentina – *exequatur*	November 2012	July 2018	Dismissed – Lack of jurisdiction and lack of *res judicata*	Pending appeal
	Brazil	March 2013	May 2018	Dismissed – Principle of effectiveness and lack of jurisdiction	*Res judicata*

Source: elaborated by the author with data contained in the judgments.

Specifically in relation to the doctrine of corporate separateness, the cases demonstrate the requirement for private international law to offer an improved perspective in relation to domestic law, considering the emergence of private actors on the global stage and the peculiarities of huge multinational business conglomerates. The current doctrine of the corporate veil leads to almost the impossibility to make complex multinational conglomerates accountable for any violation (CORTI VARELA, 2013, p. 209). In this way, a new doctrine regarding the piercing of the veil could offer a jurisdictional reaction towards the affront to human rights and avoid the impunity of multinational corporations.

As Pigrau (2014, p. 39-40) states,

> [f]undamentally, the [Chevron] case shows how getting a sentence in the Host State can be cancelled in the implementation phase when the company has ceased its activity in that country. Similarly when the courts of third states reuse to lift the veil between parent and subsidiary companies or when international courts prevail to maintain the *status quo* over any consideration on human rights or environmental protection.

In the decisions issued from the Brazilian and Argentinian Courts, the national subsidiaries where considered different legal entities from Chevron Corporation, avoiding the possibility of enforcement in anywhere except in the United States. In both cases, unfortunately, the possibility of piercing the corporate veil and the possible patrimonial linkage between the subsidiary and the conglomerate was not approached.

The argument presented by Judge Nordheimer in the most recent decision in Canada follows the path of opening exceptions to the corporate separateness in cases of gross human rights violations in order to fulfil equity and justice. It could represent a very advanced position to assure the accountability of multinational conglomerates, even though it was a minority position for very exceptional cases.

In relation to the public policy argument, it is mandatory that this central doctrine for the private international law have a wider application, particularly in regard to the global harmonization of human rights protection. The proportionality principle should be applied to incentivize the pursuit of global human rights standards (OSTER, 2015).

The analyses of the procedures raises several questions for private international law, all of which should be developed in future research. The first relates to the points of connection between enforcement procedures in different countries relating to the same foreign judgment. The connection can occur in the usefulness of adduced evidence (such as the use of the North-American evidence in the Brazilian procedures) and also covers the possibility of several enforcement decisions at the same time.

Another question is the relation that is to be established between arbitration decisions in bilateral agreements and judgment enforcements in third party countries. As mentioned above, The Hague Tribunal of Arbitration had decided that Ecuador should avoid the enforcement of the legal judgment in its own territory and in other countries. The question remaining is the applicability of this decision in third party countries (such as Canada, Argentina and Brazil), mainly when proposed by private actors, and not by countries.

Finally, special attention should be placed on the possibility of reviewing the foreign judgment in the enforcement procedures in aspects related to public order or public policy. In general, it is not allowed in the enforcement procedure to review the merits of the judgment, but instead only to analyse the regularity of the procedure. However, in some situations, the public order element could become an instrument to review the judgment arguments. This is what happened in the precautionary procedure in Argentina.

The case offers an example of how the narrow vision in private international law can lead to the impunity of private actors. It has become mandatory that the field undertake the responsibility for their governance implications, overcoming the schism between technique and politics. As Watt states, it is essential to quarry the human rights in cases of abuse by private actors, promoting a progressive integration of human rights into the methodology of private international law.

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Como citar este artigo

(ABNT)
NAVARRO, Gabriela Cristina Braga. A comparative analysis of the attempts to enforce the Ecuadorian decision in the Chevron case: multinationals and impunity. *Revista de Informação Legislativa*: RIL, Brasília, DF, v. 56, n. 224, p. 205-228, out./dez. 2019. Disponível em: http://www12.senado.leg.br/ril/edicoes/56/224/ril_v56_n224_p205

(APA)
Navarro, G. C. B. (2019). A comparative analysis of the attempts to enforce the Ecuadorian decision in the Chevron case: multinationals and impunity. *Revista de Informação Legislativa: RIL*, *56*(224), 205-228. Recuperado de http://www12.senado.leg.br/ril/edicoes/56/224/ril_v56_n224_p205

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