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The *Forum Non Conveniens* Decision

Part One of a Two-Part Article

By Eric Lasker

Over the past 15 years, there has been a surge of litigation in U.S. courts brought by foreign plaintiffs alleging harm from actions purportedly taken by U.S. companies in foreign countries. These lawsuits are generally brought under the Alien Torts Statute, 28 U.S.C. § 1350 ("ATS"), a statute enacted in 1789 to provide U.S. jurisdiction for "violations against the law of nations." The ATS was first enacted in response to attacks on U.S. ships by the Barbary pirates, and it lay dormant until the 1970s, when human rights lawyers began using it to prosecute human rights claims against foreign dictators and repressive regimes. In the mid-1990s, however, plaintiffs' attorneys started using the ATS to target multinational corporations that allegedly injured residents in foreign countries, and the theories of liability began expanding to include, *inter alia*, environmental tort claims and product liability litigation. Since that time, over 120 ATS lawsuits have been brought by foreign plaintiffs against a wide array of U.S. corporations, including companies in the oil, mining, financial services, food and beverage, transportation, and communications industries. *See* U.S. Chamber of Commerce Institute for Legal Reform, Think Globally Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases, at 17-18 (June 2010), available at http://www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf.

Traditionally, the standard approach for a U.S. company sued by foreign plaintiffs for actions taken outside the United States was a motion to dismiss on the grounds of *forum non conveniens*. However, with apologies to the British punk band The Clash, recent developments in ATS litigation suggest that the traditional answer to the question "Should I Stay or Should I Go Now?" may no longer be the best answer. While it is true that if a defendant stays in U.S. court "there may be trouble," the trouble facing a defendant that goes the *forum non conveniens* route and submits to jurisdiction in a foreign country, "may be double."

This two-part article addresses the strategic question of whether defendants sued by foreign plaintiffs for alleged foreign misconduct should pursue *forum non conveniens* dismissals. Section 1 discusses the considerations both for and against *forum non conveniens* motions and explains why the traditional calculus favoring such motions is changing. Section 2 presents two recent case studies in which successful *forum non conveniens* motions backfired against the defendants and placed them in a far more dangerous litigation posture. Section 3 will conclude by explaining how defendants who have elected to stay in U.S. courts have used the strengths of the U.S. judicial system to expose the factual gaps, and in some cases outright fraud, that formed the basis of many of the foreign claims that have been imported to U.S. shores.

The *Forum Non Conveniens* Decision

The traditional strategic arguments in favor of *forum non conveniens* motions are facially powerful.

- U.S. tort law offers many advantages to plaintiffs that did not exist in most foreign countries. Plaintiffs can prevail with less stringent showings of fault, can pursue punitive damages, and generally can expect much higher compensatory damages awards if they prevail.
- U.S. procedural rules place far greater power and control in the hands of plaintiffs' attorneys. Plaintiffs' counsel can use the liberal U.S. discovery rules to secure production of huge volumes of internal company materials and impose costly collection and processing costs on defendants. Further, unlike under the inquisitorial judicial systems used in many foreign countries, where the judges run the show, in the U.S., plaintiffs' counsel can maintain far more control over trials.
- Again, unlike in many foreign countries, there is no "loser pays" doctrine in the United States, so the downside risk of pursuing marginal claims in U.S. courts is less significant.
- Plaintiffs' counsel face fewer logistical hurdles pursuing claims in their home courts than they do overseas. Historically, the advantages of a U.S. forum have been so significant that a defendant who prevailed in a *forum non conveniens* motion could reasonably expect that the lawsuit might never be refiled abroad.

The sweet elixir of the *forum non conveniens* motion, however, requires defendants to swallow a bitter pill: In 1981, the United States Supreme Court ruled that a defendant seeking *forum non conveniens* dismissal must show that it is "amenable to process" in the foreign country. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981).

Eric Lasker, a member of this newsletter's Board of Editors, is a partner in the Washington, DC, law firm Hollingsworth LLP, where he specializes in toxic tort, environmental, pharmaceutical products liability, and Alien Tort Statute litigation. Mr. Lasker is currently defending an ATS case in which thousands of South American farmers are claiming personal injuries and property damages for alleged exposure to an agricultural herbicide. Mr. Lasker is the Vice Chair in charge of programming for the Toxics and Hazardous Substances Committee of the International Association of Defense Counsel.

Thus, in seeking *forum non conveniens* dismissal, a corporate defendant must abandon the one advantage that perhaps plays the largest role in foreign plaintiffs' decision to forego their home jurisdictions and bring claims in U.S. courts: The defendant must submit to the jurisdiction of the foreign plaintiff's home court and thus provide a means for the foreign plaintiff to enforce a judgment against the defendant's assets anywhere in the world.

The decision to submit to a foreign country's jurisdiction has become increasingly risky in recent years because a number of factors have combined to erode the traditional advantages to defendants of proceeding in foreign courts.

1. As the world has become increasingly flat, many of the liberal tort recovery and procedural rules in U.S. courts favored by plaintiffs have been adopted in foreign jurisdictions. *See* Lawsuits Go Global, Institute for Legal Reform, available at http://instituteforlegal reform.com/lawsuits-go-global.html. Plaintiffs' attorneys have become increasingly well-financed and, accordingly, are in a much stronger position to pursue large scale tort litigation in foreign courts.
2. The judicial systems in many developing countries are significantly less advanced than the judicial system in the U.S. and more susceptible to abusive litigation tactics and outright fraud, in some cases with the covert (or overt) support of the foreign governments.

As a result, a defendant who succeeds in dismissing a claim from a U.S. court through a *forum non conveniens* motion may find itself in an unfriendly foreign jurisdiction looking longingly back to the U.S. for a way back home.

Case Studies of Homesick U.S. Defendants

Two ongoing legal battles illustrate the dangers of following the traditional *forum non conveniens* strategy in response to a foreign plaintiff/foreign tort lawsuit filed in the U.S.: 1) environmental claims against Texaco (and its successor Chevron) for alleged damages arising from its historical petroleum operations in Ecuador; and 2) product liability claims against various defendants brought by Nicaraguan plaintiffs allegedly exposed to the pesticide Dibromochlorpropane (DBCP) on banana plantations.

Litigation Arising from Texaco's Ecuadorian Operations

In the mid-1960s, Texaco began oil exploration activities in Ecuador through a subsidiary (TexPet). The latter participated in drilling operations in Ecuador in a consortium with Ecuador's state oil company (now known as Petroecuador) until the early 1990s, when TexPet sold its remaining ownership interest and Petroecuador assumed full control over the consortium's activities. As part of its divestiture, Texaco entered into an agreement with the Ecuadorian government to remediate its portion of the oil fields. This remediation program was completed in 1998 at a cost of $40 million, and the Ecuadorian government and Petroecuador released TexPet from any future liability for environmental damage.

In 1993, plaintiffs in Ecuador brought a class action in U.S. district court in the Southern District of New York alleging that Texaco had polluted the rain forests and rivers in the Oriente region of Ecuador. Plaintiffs sought recovery under the ATS. Texaco filed a *forum non conveniens* motion, and the district court dismissed the lawsuit. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996). The Second Circuit reversed because Texaco had not consented to personal jurisdiction in Ecuador. *Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2nd Cir. 1998) (*forum non conveniens* dismissal inappropriate, "at least absent a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts"). On remand to the district court, Texaco renewed its *forum non conveniens* motion, this time consenting to jurisdiction in Ecuador, and the district court again dismissed the litigation. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001). The Second Circuit affirmed. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2nd Cir. 2002).

Without the benefit of hindsight, there were strong arguments in favor of Texaco's decision to consent to jurisdiction in Ecuador in order to secure dismissal of the U.S. litigation. At the time it filed its renewed *forum non conveniens* motion in January 1999, Texaco had just completed its remediation program and it had secured a full release from the Ecuadorian government for environmental damages. Texaco's relationship with the Ecuadorian government appeared secure, and Ecuadorian law did not allow individuals to sue for environmental remediation of public lands.

Unfortunately for Texaco, however, while its relationship with the Ecuadorian government may have been secure, the government itself was not. Starting with the election of Abdalá Bucaram in August 1996, Ecuador had seven different presidents in a ten-year period, ending with the election of the leftist-leaning administration of Rafael Correa in late 2006. During this period, as the government officials with whom Texaco had worked were replaced or lost power, the legal environment for Texaco in Ecuador deteriorated sharply.

In July 1999, in response to lobbying efforts by plaintiffs' counsel in the *Aguinda* litigation¸ Ecuador enacted a new law — the Environmental Management Act — authorizing individuals to sue for environmental remediation of public lands. In 2003, following the Second Circuit's affirmance of the dismissal of *Aguinda* (and Texaco's consent to jurisdiction in Ecuador), plaintiffs filed suit against Texaco's successor Chevron (hereinafter Chevron/Texaco) in Superior Court of Nueva Lojo in Lago Agrio, Ecuador. Chevron/Texaco thus found itself in litigation in a remote courthouse in the Sucumbios province of Ecuador, a region that is currently subject to a U.S. State Department travel advisory due to the significant presence of narcoterrorist organizations.

In this author's opinion, the Lago Agrio litigation should have been dismissed at its inception. Chevron/Texaco had a release from the Ecuadorian government and from Petroecuador. Texaco had remediated its historical oil operations, and any continuing contamination was the responsibility of Petroecuador, which had been in complete control of the oil operations in the region for over a decade and which notably had never remediated its portion of the historical oil operations. Moreover, the Lago Agrio lawsuit was based on a retroactive application of the 1999 Environmental Management Act, in direct contravention to Article 7 of the Ecuadorian civil code. Nonetheless, the court rejected Chevron/Texaco's motion to dismiss and the lawsuit was allowed to proceed.

During the first three years of the litigation, the Ecuador Court did proceed with a rigorous scientific process to test the validity of the plaintiffs' claims. The court ordered judicially supervised inspections of 122 historical Texaco sites, and appointed a team of independent experts to review evidentiary submissions form the two sides regarding these sites. These inspections demonstrated that Texaco's remediation efforts had been successful. More than 99% of soil and water samples met Ecuadorian safety standards, and the first (and only) report by the court-appointed expert panel concluded that the remediation had been successful and that the specific site at issue in the report — the Sacha-53 site — posed a low health risk.

With the election of Rafael Correa, however, the litigation took a distinct turn against Chevron/Texaco. A new judge was

appointed and — at the behest of plaintiffs — the judicial site inspection process was terminated. The court dismissed the previous court–appointed expert panel and appointed a new single expert, Richard Cabrera, to conduct his own analysis of plaintiffs' claims and to prepare his own assessment of the alleged damages. On April 2008, Mr. Cabrera issued his first expert report and recommended that the court assess damages against Chevron/Texaco in the amount of $16 billion. Chevron/Texaco immediately attacked the scientific bases for Mr. Cabrera's report, which flew in the face of the scientific evidence gathered over the three years of court-supervised site inspections. In November 2008, Mr. Cabrera filed a second report in which he recommended additional damages for purported adverse health effects — bringing his total damages assessment to $27 billion.

Over the past two years, there has been increasing evidence that the legal and judicial process in Ecuador is hopelessly incompetent or corrupt. Despite two previous investigations finding no wrongdoing, the Ecuadorian government brought criminal charges against two Chevron/Texaco attorneys who had negotiated the release with the Ecuadorian government and Petroecuador following the 1998 remediation. Then, in August 2009, a series of videos surfaced that suggested that the court and the Ecuadorian government were involved in a massive bribery scheme in exchange for a judgment against Chevron/Texaco. More recently, Chevron/Ecuador has presented evidence that the court's purported "independent" expert, Mr. Cabrera, has been working side-by-side with plaintiffs and lifted much of his expert reports from materials provided to him by plaintiffs' experts.

Chevron/Texaco is now engaged in a massive effort to counter the corrupt legal process in Ecuador. Ironically, having successfully moved for dismissal of *Aguinda* on the ground that the litigation did not belong in the United States, Chevron/Texaco has now filed a series of actions in U.S. courts in which it is seeking to enforce the terms of its release agreement with Petroecuador and the Ecuadorian government and to obtain third-party discovery from various U.S.-based plaintiffs' experts regarding Mr. Cabrera's alleged misconduct. While the ultimate resolution of this multi-pronged legal effort is still unclear, there can be little doubt that Chevron/Texaco would not have filed its *forum non conveniens* motion if it had known the whirlwind that it was reaping with its "successful" dismissal of the *Aguinda* litigation in the United States.

The DBCP Litigation in Nicaragua

In the mid-1980s, a series of lawsuits was filed in U.S. courts by foreign plaintiffs alleging that they had been rendered sterile by exposure to the pesticide DBCP on banana plantations in Central and South America. The defendants, a group including Dole Food Company, The Dow Chemical Company, Shell Oil Company, and others, succeeded in getting these lawsuits dismissed, largely on *forum non conveniens* grounds. Among these successful *forum non conveniens* dismissals was a lawsuit brought in the Southern District of Texas by a group of Nicaraguan farmers. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1362 (S.D. Tex. 1995). In securing this dismissal, however, defendants were required to consent to jurisdiction in Nicaragua.In October 2000, plaintiffs' counsel successfully lobbied the Nicaraguan government for enactment of a new statute, "Special Law 364," which is applicable only to the defendants in the *Delgado* lawsuit and governs all DBCP personal injury claims brought against those defendants in Nicaraguan courts. The provisions of Special Law 364 are Orwellian. The law:

- Creates an irrefutable presumption of causation upon a presentation of medical tests demonstrating that a plaintiff is sterile;
- Eliminates the statute of limitations defense;
- Sets the minimum damages award of $125,000 per plaintiff and provides that the court may impose a higher damages award if necessary to bring it on par with verdicts in comparable actions brought in the United States;
- Requires defendants to post bond of $100,000 if they seek to defend any individual lawsuit and deposit $15 million with the court to guarantee payment of any damages award; and
- Establishes a schedule whereby defendants have only three days to answer a complaint, the parties have only eight days to present evidence, and the court has only three days to issue a verdict, which is immediately executable notwithstanding the pendency of an appeal.

Special Law 364 does provide defendants with one theoretical escape clause. The statute provides that it is not applicable to any defendant that agrees to waive its *forum non conveniens* defense and submit to the jurisdiction of a U.S. court. However, even this "escape" is illusory, as Nicaraguan courts have repeatedly refused to honor defendants' "opt-out" requests and issued large monetary judgments in favor of plaintiffs. *See Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), motion for reconsideration denied, No. 07-22693-CV, 2010 WL 571806 (S.D. Fla. Feb. 12, 2010).

Special Law 364 provided the fuel for an even wider conflagration of fraud and corruption aimed against the defendants in Nicaraguan courts. As further discussed next month, certain plaintiffs' attorneys in the United States teamed up with a group of Nicaraguan lawyers to create an elaborate scheme to fabricate false claims against the defendants. The attorneys and their co-conspirators created false employment records placing plaintiffs at banana plantations where DBCP was used and provided training manuals to plaintiffs with information about banana plantation work and the use of DBCP so that plaintiffs could offer credible-sounding stories in support of their fabricated claims. The attorneys also enlisted Nicaraguan laboratories to provide false test results in support of plaintiffs' alleged sterility. As a result, these attorneys were able to secure massive damages awards on behalf of individual plaintiffs who had never worked on banana plantations, never been exposed to DBCP, and who had no problems with sterility whatsoever.

During the past decade, over 10,000 plaintiffs have brought claims under Special Law 364, and Nicaraguan judges have awarded over $2 billion in damages. To date, however, defendants have not been required to pay any of these damages awards. Once again, defendants have found relief in the same venue that they had rejected in their motions for *forum non conveniens* dismissal: In each case in which a Nicaraguan plaintiff has sought to enforce a Special Law 364 damages award in the United States, the U.S. courts have rejected the enforcement action. *See Osorio*, 655 F. Supp. 2d 1307; *Franco v. Dow Chemical Co.*, No. CV 03-5094, 2003 WL 24288299 (C.D. Cal. Oct. 20, 2003).

The conclusion of this article will discuss the ways in which the Chevron/Texaco and DBCP cases provide potent illustrations of the strengths of the U.S. judicial system.

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