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THE PROCESS OF RATIFICATION OF THE CASE CHEVRON IN BRAZIL:

AN ANALYZES OF SEC NO. 8542 AND THE IMPORTANCE OF AN INTERNATIONAL TREATY ON BUSINESS AND HUMAN RIGHTS

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INTRODUCTION

In terms of Human Rights and Business, the Chevron case in Ecuador is one of the most emblematic and representative of the damages and human rights violations that can be caused by transnational corporations, as well as the impunity that those corporations enjoy. It is paradigmatic the struggle waged by the affected population in the search for reparation and justice, which has already accumulated years of dispute in several jurisdictions.

In this scenario, this document is dedicated to the analysis of the attempt of ratification of the judgment against Chevron in Brazil, through the prosecution SEC No. 8542, adjudicated by the Superior Court of Justice (STJ) in November 2017. For this purpose, the work is divided into four main sections. At first, a brief history of the Chevron case is presented, from the filing of the lawsuit in Ecuador to its arrival in Brazil through a ratification process. Subsequently, the procedural requirements for the ratification of foreign judgments in Brazil are presented so that, in the following topic, one can move on to the analysis of SEC No. 8542, presenting counter-arguments to the grounds used by STJ to reject the request. Finally, the points of contact between the case analyzed and the need to prepare a binding international instrument on Human Rights and Business are pointed out.

THE CHEVRON CASE IN ECUADOR - A BRIEF HISTORY

In the early 1960s, Texaco established itself as an oil explorer in the Ecuadorian Amazon, specifically in the provinces of Orellana and Sucumbíos, in an area of about one and a half million hectares, remaining in the country for almost 30 years, until 1992, when it ended its activities.

To extract the product, deep wells were dug, called "fango de perforación", which contains toxic residues whose handling requires special care to avoid contamination of the area. However, although the company had enough technology to reduce, and even avoid, the effects, it was never used by the company, which employed only a rudimentary drainage system and thus saved on production costs.

As a result of their operations, huge pools of toxic material were dumped into nature and thus contaminated the rivers and the soil around them, without the

responsible company taking any action to solve the problem, even after the completion of their activities.

Because it has been so harmful and extensive, it is difficult to account for the real dimension of the damages caused by Texaco's actions. However, the estimate includes 450,000 hectares of forest destroyed, 60,000 million liters of toxic waters thrown into rivers, 880 waste pits of hydrocarbon residues and 6.65 million cubic meters of natural gas burned outdoors. Add to this the decrease in biodiversity, the large number of deaths, the increase in the number of cases of cancer and other diseases in the region and even the extinction of indigenous tribes. This scenario demonstrates only some of the serious violations to Human Rights caused by the company's activities, such as the right to health, food, environment and others.

In 1993, thirty thousand Ecuadorians, including indigenous and natives affected directly or indirectly, filed a lawsuit in the United States, Texaco's headquarters country, asking for the company's liability and compensation for the environmental crime. The lawsuit, entitled Aguinda vs. Chevron, was extinguished in 2002 without a merit resolution. The U.S.court applied the forum non conveniens doctrine, pleading that Ecuadorian jurisdiction would be the competent court to evaluate the case. As a result, in 2003 a new lawsuit was filed, this time to the Ecuadorian judiciary. In this new lawsuit, Chevron already figured as defendant, since in the previous year it was already incorporated to Texaco, inheriting the litigation and contractual responsibilities, despite its allegations during the process that it had never operated in Ecuadorian lands and, therefore, could not bear the aforementioned damages.

Reacting to the new proposal, Chevron appealed to the Court of Arbitration in The Hague, accusing the Ecuadorian government of violating a bilateral investment protection treaty signed between the government of Ecuador and the United States in 1997.

Even so, the struggle for reparations continued until 2012, when the Sucumbios Provincial Court ordered Chevron to pay $8.6 billion for the impacts, including punitive damages. This money would be used to finance the clean-up of the affected area and to recover the health and biodiversity lost, given the extent of the damages and the company's behaviour.

However, the company no longer operated in the country, having removed all of its assets and property from Ecuador, thus preventing the execution of the

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judgment which, in 2012, was confirmed by Ecuador's National Court of Justice, the highest court of that country.

After the case was finalized, in an attempt to not satisfy the judgment, Chevron began to attack the plaintiffs in order to defame their narratives and dispute their legitimacy through accusations of fraud and extortion, and even claiming to have cleaned the forest before the end of the activities.

Finally, faced with the impossibility of executing the judgment in Ecuador, the man and women affected turned to foreign jurisdictions in search of a way to make the company liable for the violations committed and, therefore, achieve redress for the damages. Thus, requests for the ratification of the judgment were filed in Brazil, Argentina and Canada.

PROCEDURAL REQUIREMENTS FOR FOREIGN JUDGMENT RATIFICATION IN BRAZIL

The rendered judgments would only have effect on its country of origin, in which the jurisdiction was exercised. In this way, the ratification procedure must be used so that the judgments can be recognized and executed in countries other than those with the original jurisdiction. Otherwise, the court order will not, as a rule, generate any effects in other countries.

In Brazil, the Constitutional Amendment (EC) No. 45/2004 transferred the competence for the ratification of foreign judgments - previously in the hands of the Brazilian Supreme Court (STF) - to the Brazilian Superior Court of Justice (STJ). The Brazilian legislation also establishes criteria and requirements to be complied with in order to have the referred ratification, having foreseen in articles 15 and 17 of the Law of Introduction to the Brazilian Rights Norms (LINDB), in the Internal Rules of the STJ and in Resolution No. 9/2005 of the same court. More recently, CPC/2015 gathered all the necessary criteria in its article 963:

Article 963. Requirements needed for the ratification of the decision:
I - To be issued by a competent authority;
II - To be preceded by a service of summons, even if it is verified in default;
III - To be effective in the country in which it was pronounced;
IV - To not offend the Brazilian res judicata;
V - To have an official translation, unless there is a provision that does not require it;
VI - To not contain evident offense to public policy.

STJ adopts a broad understanding for the term foreign judgments, considering its material meaning and covering in the term decisions that have content and effects of judgments - so that they should not necessarily have been rendered by the Judiciary. Thus, the assessment of the authority's competence is made based on foreign laws, which means that it is considered whether the authority that rendered the judgment in the respective country is competent according to its own system (and not based in Brazil's).

In its turn it is required that the service of summons be made under the Brazilian law by means of a rogatory letter to be effective. Furthermore, it is a requirement for the ratification that the judgment has become final, in order to have a definitive and stable character in its country of origin.

Another point to be considered is the fact that the decision, as well as the documents necessary for the process, must be translated by a sworn translator in Brazil. In addition, the foreign judgment must have an authentication in order to be ratified, which consists of having the seal of the Brazilian consulate located in the country where the decision originates (a requirement that is waived only if the sentence is processed through diplomatic channels).

The ratification of the judgment may also be rejected if the content of the decision goes against Brazilian public policy, national sovereignty or human dignity. According to the most recent doctrine, the notion of public policy is closely linked to the respect for human rights, in view of the very guarantee of human dignity and the universal character of certain fundamental values. Moreover, it should be emphasized that such doctrine should be used with caution, both because of the legislator's concern in indicating the need for "evident offense", and because this is a concept with wide and often imprecise amplitudes, which has made it possible to use it for the most diverse purposes in recent Brazilian history.

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Finally, it deserves especial attention the formal character of which the ratification procedure is based on. That way, it is due to the court to analyse only the fulfilment of the requirements in article 963, not being its responsibility to go into the original case, or to justify any extra argument that is not related to the requirements for ratification.

THE CHEVRON CASE AND THE ATTEMPT OF RATIFYING IT IN BRAZIL - SEC NO. 8542

Given the impossibility of executing the judgment in Equator, the victims of environmental damage committed by Chevron in that country turned to many different jurisdictions to propose the ratification of said court decision. Only then it would be possible to achieve the liability of the company, as well as the redress for the damages caused.

In this sense, the Brazilian jurisdiction was one of the bets of those affected, and the petition for ratification of the judgment was assigned by the Superior Court of Justice system on March 25th, 2013, with Justice Nancy Andrighi as the initial judge-rapporteur. Shortly afterwards, on March 26 of the same year, the then rapporteur decided monocratically to grant access of the record to the Brazilian Prosecution Service, since it was a "foreign judgment concerning liability for environmental damage".

Later, on September 4th, 2014, the case was received for reassignment by succession, in discretion to the prevention criteria, on 8th of the same month, to Justice Felix Fisher. The following year, on May 15th, 2015, the then judge-rapporteur, as court of first instance, recused himself from the case due to being "biased by personal reason", based on article 135, sole paragraph, of the 1973, Código de Processo Civil, Code of Civil Procedure, ordering the reassignment of the cases. In this way, the case was reassigned again, and Justice Luís Felipe Salomão became the new judge-rapporteur.

Following the prosecution of the lawsuit, the Federal Prosecution Service (MPF) entered its report No. 2811/2015 to the lawsuit on May 13, 2015. In the document, in which it positions itself contrary to the ratification of the judgment, the MPF recognizes that the ratification procedure should not enter into the merits of the case

already discussed in the foreign jurisdiction. However, it relies on the requirement that the decision may not contain an evident offense to public policy (item VI, article No. 963 of CPC/15) to protect the non-ratification of the decision, pleading that "of other papers that make up the present procedure, there are numerous elements that point to the great probability that the decision of ratification was the result of a series of frauds".

To support its accusation that the case was fraudulent, the Prosecution Service relies on decisions pronounced by the U.S. judiciary. It also argues that foreign decisions that are not ratified would have validity as evidence in Brazilian jurisdiction, a controversial point in the doctrine. It is also observed that the MPF does not support discussions about the trustworthiness of the decisions used as evidence, nor does it observe whether they followed or not the due North-American legal procedure.

Following the process, before the main question regarding the ratification of the judgment was decided, it was filed a petition for waiver of the ratification procedure on September 19, 2017. The request was preliminarily rejected by the rapporteur, and later confirmed by the majority of the ministers, alleging that the lawyer who filed the request had no authority to do so. It should be noted that the argument presented by the Justice is extremely formalistic, contrary to the CPC/15, which favours less formalism and the autonomy of the will of the parties; also in this sense, the divergent vote of Justice Nancy Andrighi suggested that "the trial be converted into a diligence to grant applicants a 15-day period for the production of record of the power of attorney with specific powers to waiver".

After the initial proceedings were concluded, the judgment on the case was finally pronounced on November 29, 2017, which unanimously decided not to ratify the decision. The vote of the rapporteur, Justice Felipe Solomon, who was followed by the others, based his decision on two central arguments: a) the absence of Brazilian jurisdiction and, consequently, lack of standing for the ratification and lack of interest of the authors to act; and, failing that, b) the offense to "national and international" public policy.

The Justice argues that the foreign ratification process is an autonomous action and, therefore, must meet the assumptions of the case, namely, the legitimacy, the interest in acting and the legality of the claim. In this sense, he advocated over the absence of standing to be sued of the defendant, alleging that: first, Chevron Brasil Petróleo, mentioned in the initial petition by the plaintiffs, is an indirect subsidiary and

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a legal entity distinct from Chevron Corporation, which was the party convicted by the Ecuadorian judgment; second, he pointed out that if Chevron Corporation really had standing to be sued, Brazil would not have jurisdiction to enforce its assets, since such company does not have any assets or property in the country.

This attitude presented by the magistrate concurs with a traditional perspective of normative interpretation. Thus, the case could have been analysed from different perspectives. Among these options would be the possibility of using the doctrine of universal jurisdiction, allowing the recognition of the court as competent to judge issues related to Human Rights violations committed by a foreign company and, consequently, also having jurisdiction to ratify the Ecuadorian judgment. Thus, within the framework of universal jurisdiction, the State would be able to accept accusations and proceed with actions regarding violations that occurred both within its territory and extraterritorially, favouring the principle of the centrality of the victim.

Furthermore, in this case another argumentative school of thought is possible. It is broadly accepted that the ratification is an autonomous action that must have its admissibility requirements analyzed. However, it is possible to understand that all these requirements have been met. The legitimacy could be assessed only in relation to the plaintiff, making the plaintiffs who proposed the ratification of the judgment incontrovertibly legitimized in this case. To analyze whether or not the convicted party has assets to be enforced in the country can be considered to be entering in the merits of the enforcement action, which is not up to the STJ to execute. The ratification procedure transforms the foreign judgment into a valid decision in the domestic territory, so that an execution action can be filed. Thus, there would be interest in acting, since the purpose of such procedure is simply to validate the decision so that it can be effective in Brazilian jurisdiction.

Therefore, the final comprehension of STJ should be made under court of admissibility of the execution action that, in case it recognized the absence of assets of the defendant, and the following lack of Brazilian jurisdiction in relation to it, then the action could be dismissed because of lack of interest to act. The court recognition of the judgment is only the instrument enforceable in court, which shall be executed as the rules for the execution of all the remaining domestic judgments.

In his second thesis, the rapporteur defended that the ratified decision would represent a violation of "national and international public policy". To this end, and following what does the MPF, he bases his argument on the decisions made by the US

courts, which supposedly proved the existence of fraud during the Ecuadorian judicial process.

The allegation that the process has been permeated by fraud and corruption is based exclusively on the North-American decisions, without having been made any judgment about the trustworthiness of such decision process and of the production of evidences. Besides that, it is important to stress that the National Court of Ecuador, the highest jurisdiction of that country, approved the entire process, having on appeal, only denied provision to the part regarding punitive damages, since it was understood that it was not applicable to the case. Thus, by accepting the argument that the Ecuadorian process was fraudulent, the STJ seems to place first instance decisions of the US judiciary at a higher level than the highest court in Ecuador, and also seems to suggest that this court would have taken part in the alleged acts of corruption, calling into question Ecuadorian sovereignty to conduct judicial processes in its country.

Moreover, it is not possible to ignore that the concept of public policy only exists because of the guarantee of protection of fundamental rights. From this point of view, private international law and consequently the ratification process should no longer be thought of as a way of preserving the sovereignty of States, but rather as a method of realizing individual rights in a cross-border manner. In this sense, it is not the ratification of the judgment that will cause a violation of public policy, but its non-validation. This is because the existence of this decision is only justified to repair the damage and serious violations of Human Rights and Fundamental rights committed by Chevron. Thus, by hindering the effectiveness of the decision through its non-validation, the perpetuation of these violations is allowed, directly affecting the preservation of the public policy.

THE NEED FOR IMPLEMENTING AN INTERNATIONAL BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

The defeat of those affected by Chevron's activities in the attempt to ratify the judgment in Brazil is only one of many examples of how the current domestic and international normative paradigm is insufficient to hold companies accountable for the perpetration of human rights in the public and private sphere. As in the case presented,

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companies hide behind legal artifices, complex corporate structures, investment treaties, and their distinct corporate veils.

In this scenario, a binding international instrument on transnational corporations and human rights is becoming increasingly urgent. Provisions related to international legal cooperation and to holding companies accountable for violations throughout their entire production chain, regardless of whether they act as a direct or indirect subsidiary would, without a doubt, allow the judgment to be ratified by the Brazilian jurisdiction and Chevron to be duly held accountable for the violations committed.

Thus, the textual change brought about by EC No. 45/2004 deserves attention: while the original text expressed the need for foreign judgments to be ratified by the Brazilian Supreme Court; the text written by the Emenda states that the Brazilian Superior Court of Justice would be responsible for the ratification of foreign judgments. This small change in the text gave rise to the possibility of having foreign judgments enforced even in the absence of their ratification, without, therefore, incurring in any kind of unconstitutionality.

The idea of enforcing a foreign judgment without the need for domestic ratification allows for much faster access to justice, eliminating bureaucratic obstacles which are even provided for in many international treaties. Therefore, the adoption of a mechanism in the binding instrument that allows for the immediate recognition of foreign judgments in cases of human rights violations would make it possible to achieve effective accountability of transnational corporations in the various countries in which they operate.

In addition, the future binding instrument has the important role of defining forms of corporate liability that overcome the barriers imposed by the corporate veil and legal personality. Transnational corporations operate, as in the case under review, through complex corporate arrangements that prevent the parent company from being held liable for the actions of its subsidiaries and vice-versa. In relation to this point, the approval of the binding instrument is also essential, as it will allow the overcoming of such legal obstacles, making it possible to repair the damage caused and compensate the affected victims.

Finally, we emphasize that the decision taken by the Brazilian court not to ratify the judgment, even if not intentionally, repeats the world pattern that perpetuates impunity for corporate entities for Human Rights violations committed, reinforcing a

model of economic development that relegates the rights of individuals to the background. In this way, the elaboration and approval of an international treaty that regulates the matter and makes possible the primacy of Human Rights over the lex mercatoria is even more urgent.

TIME LINE OF EVENTS

1964 Texaco (American) began its activities in an area granted by the Ecuadorian government: about half a million hectares of Indigenous Provinces of Orellana y Sucumbíos.

1992 End of activities in Ecuador → Texaco withdraws from the country and claims to have cleaned 2 million hectares of old-growth forest where it had operated.

1993 Indigenous communities (Sucumbíos province) filed a lawsuit in the US against Texaco.

1997 Mutual Inversion Protection Treaty between Equator and the United States

1998 Ecuador signs with Texaco a "Process of liquidation → resigns Texaco's responsibility for future consequences of its oil excesses.

2001 Chevron acquires Texaco → inherits the case.

2002 The U.S. accepts Chevron's argument by forum non conveniens (Ecuador as the most appropriate to address the case).,

2003 New demand presented in Ecuador. Chevron argues that it has never operated in Ecuador

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2012 Sucumbios Provincial Court sentenced Chevron to pay $8.6 billion in damages for environmental impacts, to finance soil and water cleanup, a health program for those affected and victims of cancer, and also to recover lost biodiversity.

2013 Ecuador's National Court of Justice partially confirms the sentence rendered by the Provincial Court of Sucumbios

March Petition for ratification of the judgment is distributed by the STJ system in Brazil.

2017 The ratification claim was denied by STJ

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