

The Relationship Between Enforcing Judgments and Denial of Justice Claims?

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My colleague Trey Childress has a [nice summary](#) of the recent decision by a federal court in Florida in *Osorio v. Dole Food Company* to refuse to enforce a \$97 million Nicaraguan judgment. Here's the key excerpt of the decision:

“the evidence before the Court is that the judgment in this case did not arise out of proceedings that comported with the international concept of due process. It arose out of proceedings that the Nicaraguan trial court did not have jurisdiction to conduct. During those proceedings, the court applied a law that unfairly discriminates against a handful of foreign defendants with extraordinary procedures and presumptions found nowhere else in Nicaraguan law. Both the substantive law under which this case was tried, Special Law 364, and the Judgment itself, purport to establish facts that do not, and cannot, exist in reality. As a result, the law under which this case was tried stripped Defendants of their basic right in any adversarial proceeding to produce evidence in their favor and rebut the plaintiffs' claims. Finally, the judgment was rendered under a system in which political strongmen exert their control over a weak and corrupt judiciary, such that Nicaragua does not possess a 'system of jurisprudence likely to secure an impartial administration of justice.'”

As Childress notes, the decision is important for three reasons:

This case is interesting on multiple levels. First, the district court applied an “international concept of due process.” This standard was seen to be in concert with, but different than, US notions of due process. Second, the court found that Nicaragua does not have impartial tribunals. In so doing, the court relied not only on US State Department pronouncements but also on expert testimony regarding what law is like on the ground in Nicaragua “on paper and in practice.” Finally, this case is perhaps most interesting because the general understanding is that it is hard to resist enforcement. This case shows that US courts, if presented with appropriate evidence, are willing to ascertain the validity of foreign judgments, especially in countries facing political and social turmoil that may negatively impact the administration of justice in those countries.

But the case also raises a host of issues on the nexus between enforcing judgments and pursuing denial of justice claims in investment arbitration. Can Dole now bring a “denial of justice” claim against Nicaragua under the U.S.-Nicaragua BIT? What effect, if any, would the district court judgment have in such a case? Or consider the *Dole* case in light of Chevron’s litigation woes in Ecuador. I’m curious what relationship, if any, there is between its investment arbitration claim of denial of justice and attempts to prevent enforcement of foreign judgment for failure to provide due process. Does a successful “denial of justice” claim preclude enforcement as a matter of res judicata? Or is it persuasive authority for a future federal court? Is the opposite also true? If the claim for denial of justice is not successful, does that suggest the Ecuador judgment should be enforced? Finally, if the Ecuador court rules against Chevron and a U.S. court enforces the judgment prior to the issuance of an award, what impact would that have on the denial of justice claim in arbitration?

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