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US Courts Order Discovery for Use Overseas in Chevron-Ecuador Disputes

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Context: The Chevron-Ecuador Litigation

A high profile and complex dispute involving a group of Ecuadorian residents, Chevron Corporation and the Republic of Ecuador is forcing courts and the media to focus on an arcane provision of federal law that authorizes federal courts in the United States to order testimony or the production of documents for use in a foreign or international tribunal. This once-obscure statute, 28 U.S.C. § 1782(a), authorizes, but does not require, U.S. courts to compel U.S.-style discovery in aid of non-U.S. proceedings. Federal courts on opposite sides of the United States recently ordered parties on opposite sides of the Chevron-Ecuador disputes to provide discovery under section 1782(a).

The statute has been around for many years, but it took the extraordinary circumstances of the Chevron-Ecuador litigation to thrust it into the headlines. The litigation started in 1993, when a group of residents from the Oriente region in Ecuador brought a class action against Chevron's predecessor, Texaco, in the Southern District of New York, *Aguinda v. Texaco, Inc*. The plaintiffs alleged that between 1964 and 1992, Texaco's oil operations polluted the rain forests and rivers of Ecuador. The court in New York dismissed the case on *forum non conveniens* grounds, with a condition that Texaco submit to jurisdiction in Ecuador. In the meantime, a Texaco subsidiary entered into a settlement with Ecuador whereby the subsidiary agreed to perform specified environmental remediation in exchange for a release of claims by the government.

In 2003, after appellate wrangling in *Aguinda* concluded and the case was dismissed, an overlapping but not identical group of Ecuadorians sued Chevron (which by then had acquired Texaco) in domestic court in Ecuador, the so-called "Lago Agrio litigation." The plaintiffs in the Lago Agrio litigation assert claims for deterioration of their health and the environment. Further complicating things, the Government of Ecuador filed criminal charges against several individuals, including two of Texaco's lawyers in Ecuador, alleging falsification of public documents in connection with the Texaco-Ecuador settlement, as well as violation of Ecuador's environmental laws.

In 2005, one of the plaintiffs' lawyers solicited the making of a documentary film about the litigation. The film, *Crude,* came out in 2009. Also in 2009, Chevron initiated an international arbitration proceeding against Ecuador in the Permanent Court of Arbitration in the Hague under the Bilateral Investment Treaty ("BIT") between Ecuador and the United States. Chevron alleges that the Government of Ecuador improperly colluded with the plaintiffs in the Lago Agrio litigation, abused the criminal justice system, and violated its treaty obligations under the BIT.

Thus three sets of related proceedings are pending outside the United States: (1) the Lago Agrio litigation; (2) the criminal proceedings in Ecuador; and (3) the BIT arbitration.

The Statute

Title 28, section 1782(a) of the United States Code provides:

> The district court in the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

The statute thus empowers district courts to grant requests for discovery where the requesting party satisfies three statutory criteria: (1) the person from whom discovery is sought must reside or be found in the district in which the district court sits; (2) the discovery must be for use in a "proceeding in a foreign or international tribunal;" and (3) the discovery must be sought by a foreign or international tribunal or an "interested person."

If a requesting party satisfies the three-part test, the reviewing court then must exercise its discretion based on a multi-factor analysis articulated by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004). Under *Intel*, a court must consider: (1) whether the material sought is within the overseas tribunal's jurisdictional reach and thus accessible without section 1782; (2) the nature of the overseas tribunal, the character of the proceedings, and the receptivity of the foreign tribunal or foreign government or agency to U.S. judicial assistance; (3) whether the request constitutes an attempt to circumvent foreign or domestic proof-gathering restrictions or policies; and (4) whether the request is unduly intrusive or burdensome. The court must also factor in the twin aims of the statute: "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance."

East Coast Application – The Southern District of New York

In an effort to obtain evidence for use in the matters pending outside the U.S., Chevron and two of its Ecuadorian lawyers applied to the Southern District of New York under section 1782 for production of documents from and permission to take the deposition of Steven R. Donziger, a U.S. lawyer representing the Ecuadorian plaintiffs, and the one who had solicited the making of *Crude*. The applicants based their request on outtakes from *Crude,* which they had previously obtained from the filmmaker pursuant to another (hotly contested) application under section 1782. Donziger and the Ecuadorian plaintiffs moved to quash the application.

Donziger, a member of the New York bar, first became involved in the litigation as counsel for the plaintiffs in *Aguinda*. He continued his involvement in the Lago Agrio litigation. The applicants argued that Donziger had information and documents that would support their cases against the plaintiffs and the government of Ecuador. The court determined that the film outtakes supported the applicants' arguments that Donziger played a key role in the cases in Ecuador and that he is also key to identifying any misconduct by the government.

In a 54-page opinion issued November 5, 2010, Judge Lewis A. Kaplan denied the motions to quash, thereby approving the requested discovery. *In re Application of Chevron Corporation,* Case N. 10-MC-00002 (S.D.N.Y. Nov. 5, 2010). The court first addressed the statutory requirements of 28 U.S.C. § 1782, finding (1) that Donziger is located in New York; (2) that Chevron and its lawyers are "interested persons," because all are parties in the overseas litigation; and (3) that the Ecuadorian civil and criminal courts qualify as foreign tribunals and the BIT arbitration qualifies as an international tribunal, because it was established pursuant to an international treaty.

Having found that it *could* order the requested discovery, the court then turned to the four *Intel* factors to determine whether it *should* order the discovery. The court held that the first factor supported the request, because Donziger was present in the district, not a party to the foreign proceedings, and was therefore beyond the jurisdiction of the Ecuadorian courts and the BIT arbitration tribunal. The second factor, focusing on the nature and attitude of the overseas tribunal, also weighed in favor of allowing discovery. Other district courts had already granted requests under section 1782 in connection with the same proceedings, and even if the Ecuadorian courts opposed the assistance, which they had not, that would not be dispositive, especially in light of the charges of judicial misconduct by Chevron against the court in Ecuador.

The court held that the third factor (circumvention of foreign restrictions on discovery) supported discovery because neither the Ecuadorian courts nor the arbitral tribunal could compel Donziger to produce documents or testify. The court concluded that the request was not likely to undermine Ecuadorian proof gathering policies, because it enabled a more complete picture of all of the evidence. The court's logic on this point seems a bit strained, for if neither the Ecuadorian courts nor the arbitration tribunal could authorize the discovery, then allowing it *would* seem to circumvent proof-gathering restrictions in those proceedings.

Finally, on the fourth factor, whether the discovery would be intrusive or burdensome, the court focused on Donziger's status as an attorney. The court held that much of the work Donziger did for the plaintiffs in Ecuador was not legal work and thus was not protected from discovery. Donziger could object to specific questions if answering would violate attorney-client privilege or attorney work product protections.

West Coast Application – The Northern District of California

Meanwhile, on September 15, 2010, clear across the United States, the Republic of Ecuador launched a counter-attack, filing its own request for discovery under 28 U.S.C. § 1782 in the Northern District of California. Ecuador sought testimony and documents from Diego Fernando Borja Sanchez, an Ecuadorian individual living in the United States who made secret video recordings of meetings allegedly showing bias and corruption in the Lago Agrio litigation, for use in the BIT arbitration. *In re the Republic of Ecuador,* Case No. 10-80225 (N.D. Cal. Sept. 15, 2010). The magistrate judge approved issuance of a subpoena, and invited a motion to quash. Borja accepted the invitation.

On December 1, 2010, Magistrate Judge Edward M. Chen issued an order granting in part and denying in part Borja's motion to quash. The court rejected Borja's argument that the Republic of Ecuador, as a sovereign government, could not be an "interested person" under the statute. The court reviewed the legislative history of section 1782, noting that the statute originally authorized *only* sovereign states to request discovery, and subsequent amendments were intended to broaden, not narrow, its scope. The court also granted Ecuador's motion to join the country's attorney general, who is a natural person, and noted it would make no sense to deny a sovereign state discovery when an official acting on its behalf indisputably would qualify as an interested person.

The court assessed the relevance of each specific discovery request to the BIT arbitration and exercised its discretion to narrow some of the requests. The court, however, rejected Borja's contention that the Republic of Ecuador was seeking to use the requested information to harass him and his family, holding that the possibility that the Republic might use the information for the purpose of initiating criminal proceedings against him in Ecuador did not make the information less relevant to the BIT arbitration. The court did not address, but apparently assumed, that use of the information in a BIT arbitration qualifies as "use in a foreign or international proceeding."

Conclusion

In New York, Judge Kaplan methodically applied the tests articulated by the Supreme Court in *Intel*. In

exercising his discretion, the judge repeatedly expressed concern that Donziger had engaged in misconduct. In California, Magistrate Judge Chen also relied on *Intel,* but he devoted the bulk of his analysis to the determination that the Republic of Ecuador qualifies as an "interested person" entitled to request discovery under section 1782. Given the successful joinder of Ecuador's Attorney General, that issue was not dispositive. Based on the litigious pattern of all concerned, some aspect of the Chevron-Ecuador disputes will likely make their way to the courts of appeal and maybe even the Supreme Court, which would provide a post-*Intel* opportunity for the High Court to explicate the contours of discovery under section 1782.

In the meantime, the rulings in New York and California continue a trend of allowing discovery for use in international arbitration proceedings when requested by a party, and when the arbitration involves a treaty and/or a government party. Qualification of the arbitral tribunal as a "foreign or international tribunal" under section 1782 was not contested in either case, so the muddle created by other courts that have based decisions on inaccurate understanding of the structure of international arbitration will persist. In particular, the applicability of section 1782 to private commercial arbitration remains unclear, largely due to judicial misconceptions about the status of UNCITRAL, a UN Agency that formulates rules on international business, but does not itself administer arbitrations. Perhaps some of these issues will surface as the Chevron-Ecuador parties continue their legal battles in the United States, Ecuador, and beyond.

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