Ecuador Granted Section 1782 Discovery Over Chevron's Objection

January 23, 2012 by Louis M. Solomon

In re Republic of Ecuador and Dr. Diego Garcia Carrion's Application Under 28 U.S.C. Sec. 1782, 2:11-mc-00052 (GSA) (E.D. Cal. 2011), is an application the Ecuador among others to take the testimony in the U.S. of one Douglas M. Mackay. Chevron moved to stay the discovery application. The use to be made of the discovery is in connection with the international arbitration invovling Chevron under the Ecuador-U.S. Bilateral Investment Treaty. Chevron's opposition is based on the allegation that the non-U.S. proceeding is a sham, "contending the foreign court was neither independent nor impartial".

The District Court applied Section 1782 as written and broadly. (For a general discussion of this crucially important tool in international dispute resolution, see our treatment of Section 1782 in our e-book, *International Practice: Topics and Trends*).

Understanding that the statute "authorizes, but does not require, a federal district court to provide assistance to a complainant" in a non-U.S. proceeding, the Court identified the commonly employed factors in judging the issue, including

(1) whether the material sought is within the foreign tribunal's jurisdictional reach and thus accessible absent Section 1782 aid; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court jurisdictional assistance; (3) whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the subpoena contains unduly intrusive or burdensome requests. In addition, district courts must exercise their discretion under Section 1782 in light of 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 to our courts.

The Court granted the application and denied Chevron's application to stay. Said the Court, it was not willing to ignore the governing factors by indulging in a discussion of what effect its ruling would have on the efficient disposition of the non-U.S. proceeding. In part this was du to the Court's finding that it was not "persuaded that granting the [discovery] application would contravene any proceedings or discovery schedule in the Tribunal". In part the Court relied on the fact that the non-U.S. Tribunal would "decide in due course what discovery is permissible and what is not".