



Judicial Estoppel Trumps Judicial Precedent

By: Ann Ryan Robertson

The recent case by the United States Fifth Circuit of Appeals, *Republic of Ecuador v. Connor, Nos.* 12-20122, 12-20123, 2013 WL 539011 (5th Cir. Feb. 13, 2013), highlights that the application of judicial estoppel, an equitable doctrine designed to protect the integrity of judicial proceedings, can be a powerful tool.

At the heart of the *Ecuador* decision is whether the term “foreign and international tribunals,” as used in 28 U.S.C.A. §1782, a statute authorizing district courts to assist discovery efforts of litigants before foreign and international tribunals, includes private international arbitration. There is a split among the Circuits on this issue. It has long been the rule in the Fifth Circuit that the phrase “foreign and international tribunals” does not include private international arbitration. See *Republic of Kazakhstan v. Biedermann International*, 168 F. 3d 880 (5th Cir. 1999). Despite this long-standing precedent, the Republic of Ecuador, using the doctrine of judicial estoppel, was successful in persuading the Fifth Circuit that discovery in aid of a private international arbitration could issue.

As has been widely reported, Chevron Corporation and the Republic of Ecuador have been engaged in a litigious battle spanning almost two decades over alleged environmental contamination of oil fields in Ecuador. A court in Lago Agrio, Ecuador, finally issued a multi-billion dollar judgment against Chevron. During the *Lago Agrio* litigation, Chevron filed for arbitration under the rules of UNCITRAL, as is allowed by the U.S.-Ecuador Bilateral Investment Treaty (“BIT”). In the BIT arbitration, Chevron alleges that miscarriages of justice in the courts of Ecuador and participation by Ecuador in the plaintiffs’ fraud violated Chevron’s rights.

For use in the BIT arbitration, Ecuador applied to the district court for ancillary discovery from John Connor and GSI Environmental pursuant to 28 U.S.C.A. § 1782. Chevron intervened and opposed the application, contending that the BIT arbitration was not an “international tribunal” within the meaning of 28 U.S.C.A. §1782. The district court, compelled by the Fifth Circuit’s *Biedermann* decision, denied the discovery request. On appeal, Ecuador argued that Chevron was judicially estopped to contend that the BIT arbitration was not an “international tribunal.”

The Fifth Circuit agreed. Stating “Why shouldn’t the sauce for Chevron’s goose be sauce for the Ecuador gander as well?,” the Court noted that in connection with the BIT arbitration and ongoing *Lago Agrio* litigation in Ecuador, both parties had repeatedly sought discovery in the United States courts through the use of 28 U.S.C.A. §1782. At least 20 orders were issued on behalf of Chevron



and no previous discovery request had been denied on the basis that the BIT arbitration was not an “international arbitration.”

The Fifth Circuit observed that “in numerous district courts, and on appeal in other circuits, Chevron asserted that the BIT arbitration was an international proceeding” and was successful in obtaining “such discovery by persuading courts to reject Ecuadorian (and related parties’) objections and by contending, opposite to its current position, that the BIT arbitration is an “international tribunal.” The Court also opined: “[i]f Chevron is permitted to shield itself under *Biedermann* against Ecuador’s current requests, it will have gained an unfair advantage over its adversary.”

The Court thus concluded that Chevron was judicially estopped from asserting its legally contrary position and stated “we need not and do not opine on whether the BIT arbitration is in [*sic*] an ‘international tribunal.’” Consequently, the Court ordered the district court on remand to proceed in its discretion to evaluate Ecuador’s request for discovery pursuant to 28 U.S.C.A. §1782.

What may be gleaned from this decision is that a party’s failure to take a consistent legal position may result in a court’s taking a position inconsistent with its own established law in an effort to protect the integrity of the judicial process.

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