Notes from NYU's Forum on the Chevron-Ecuador dispute

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As Roger Alford mentioned previously, New York University Law School hosted a discussion of the Chevron-Ecuador dispute on October 24th.

The event was subject to the Chatham House rules, so my notes below should not be attributed to any particular panelist or audience members. However, in the case of moderator Michael Goldhaber, his views have been publicized in his magazine columns, one of which is referenced below. (Roger intends to blog about his own talk, so I'll leave him to weigh in further in this space).

In no particular order, here a couple things that caught my ear at the NYU event:

• Until recently, arbitrators had been able to ride in the slipstream of the U.S. Courts, to borrow Michael Goldhaber's expression. For instance, mere days after a U.S. Judge issued a preliminary injunction against enforcement of an 18 Billion (U.S.) Ecuadorian court judgment, an arbitral tribunal sitting in the Chevron v. Ecuador BIT arbitration issued its own interim measures. However, the U.S. injunction was overturned in September by a U.S. Appeals Court. That means, according to Goldhaber, that the BIT arbitration may have become Chevron's "first or only line of defense".

• And, as you may have heard, Chevron's BIT claims may test the boundaries of available relief in such arbitrations. Based on the evidence of last week's NYU event, there is a full spectrum of opinion as to the propriety of investment arbitration tribunals ordering states to do (or refrain from doing) certain things. Some advocates and arbitrators are keen to see such tribunals award non-pecuniary forms of relief. Others warn that they threaten to undermine the support of certain states for investment treaty arbitration. While a forthcoming decision on jurisdiction could touch on the available forms of relief, another possible flash-point could arise if Chevron were to ask for more clarity as to the types of actions required of Ecuador pursuant to an earlier (but notably terse) interim measures order.

• Many of the juiciest revelations and allegations in the Chevron-Ecuador saga have stemmed from the use of a U.S. statute (28 U.S.C. § 1782) that permits judicial discovery in the aid of foreign proceedings. Views differ as to whether such court-aided discovery complicates and lengthens arbitral proceedings. However, there was some suggestion last Monday night that the use of that statute will continue to grow – unless the U.S. Supreme Court curtails its availability – and that lawyers might risk a "malpractice" suit if they don't brief their clients about the statute.

• Apparently, some corporate clients are so keen to avoid any use of U.S. judicial discovery that these

companies are negotiating contracts whose arbitration provisions exclude such an option. One wonders if governments will begin to negotiate investment treaties that prohibit (or condone) such a discovery tool.

• Mind you, if a party *does* plan to use the 1782 statute – and their contract or treaty does not exclude such a possibility – they might want to tell their arbitral tribunal at the earliest possible juncture. Not only will this help to determine whether such evidence is likely to be admitted in the arbitration, it might also help to persuade a Federal Court Judge that the discovery request is not a vain exercise.

• Perhaps most intriguing is the potential for non-parties to an arbitration to use the U.S. statute to procure evidence that might be relevant to a given arbitration. The statute is worded so as to permit "interested persons" to petition a U.S. Federal Court for discovery. To date, a would-be *amicus curiae* in an international arbitration has not attempted to use this tool to gather evidence. But, watch this space.

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