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Ancillary Discovery in Aid of Foreign or International Proceedings

Roger Alford (General Editor) (Notre Dame Law School) · Friday, February 8th, 2013

I have posted on SSRN my latest article, "Ancillary Discovery to Prove Denial of Justice" just published in the Virginia Journal of International Law. It analyzes Section 1782 discovery proceedings in the context of BIT arbitration and argues that there is now uniform agreement among federal courts that investment arbitration panels are "international tribunals" within the meaning of Section 1782.

But the article has salience outside that context, and could be applied to many foreign or international proceedings. One plaintiff involved in a French proceeding, for example, served a discovery subpoena on a French party while he was visiting a museum on vacation in the United States, thereby incorporating American discovery into the French proceeding. A German defendant in a German proceeding issued a Section 1782 discovery subpoena on the American plaintiff, and thereby incorporated non-reciprocal American-style discovery into the German proceeding.

The article presents several conclusions regarding the growing use of ancillary discovery in international adjudication, particularly in the context of investment arbitration claims against respondent states.

First, ancillary discovery under Section 1782 reflects a congressional intent to allow interested parties to avail themselves of liberal discovery under the Federal Rules of Civil Procedure, resulting in the indirect incorporation of American-style discovery into foreign or international proceedings. If this trend continues, American discovery will become an important ancillary mechanism to gather evidence, in addition to and perhaps in lieu of the traditional evidence gathering procedures utilized by foreign or international tribunals. For example, I outline in the article how all the important fraud information Chevron received against Ecuador came from Section 1782 proceedings, not evidence gathering pursuant to foreign or international proceedings.

Second, liberal discovery pursuant to Section 1782 promotes evidentiary forum shopping, encouraging parties to pursue ancillary discovery in the United States rather than rely on the discovery procedures available in foreign or international proceedings. If parties can rely on the liberal discovery standard of FRCP Rule 26, requiring only that the requested information is "reasonably calculated to lead to the discovery of admissible evidence," then why opt for narrow discovery approaches of foreign or international tribunals?

Third, the use of Section 1782 in aid of international tribunals reflects sensitivity to the comity of

courts, not the comity of nations, such that federal courts determining whether to order ancillary discovery should consider the international tribunal's receptivity to such assistance, but not the attitude of the foreign sovereign responding to allegations of international law violations. International tribunals thus far have been extremely passive in their role in this regard, whereas respondent state's have protested vigorously, but to no avail.

Fourth, in the specific context of investment arbitration, providing foreign investors with a remedy for denial of justice, together with a robust means to prove such a violation, alters the host State's incentives and requires it to play a two-level game that reconciles international obligations with domestic political preferences. Robust evidence gathering at the international level increases the likelihood that respondent states will be liable for international law violations.

Finally, the article outlines the possible abuse of ancillary discovery under Section 1782. Chevron's recent subpoena of Kevin Jon Heller's email logs is an example. Email providers such as Google, Yahoo, and Microsoft are becoming obvious targets for discovery by parties seeking access to email account information of individuals involved in domestic, foreign, or international proceedings. Section 1782 is particularly vulnerable to abuse where one party is situated (or transiently found) in the United States, while all the relevant information of the other party is located abroad.

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