

## Questions, Questions and More Questions: Foreign Courts and the FCPA

Inspired by our colleague, the FCPA Professor, this post will pose several questions regarding the Foreign Corrupt Practices Act (FCPA) in connection with one of the most Byzantine litigation matters of current renown, that being Chevron's legal tangle in Ecuador. Most companies which do business outside the United States understand that the FCPA applies to them, directly or through representatives. We also believe that most everyone understands that the FCPA also applies to US citizens who might do business overseas. We wondered if this might also apply to US lawyers who bring litigation outside the US. With this in mind, we ask the following:

1. Does the FCPA apply to judicial proceedings overseas?
2. Is a judge a "governmental official" as defined by the FCPA?
3. Is a private individual, who is appointed by court, a "foreign official" under the Act?
4. Is such a private official an "instrumentality thereof" of a foreign government?
5. Does "ghosting" or writing a report for a court-appointed neutral expert violate any of the following: "(i) influencing any act or decision of such foreign official in his official capacity; (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official; or (iii) securing any improper advantage"?
6. If a private citizen attempts to bribe a foreign governmental official, can it be classified as an undercover sting operation under the FCPA?

We pose these questions in the context of Chevron's ongoing legal dispute in Ecuador regarding a multi-plaintiff environmental claim. There have been prior allegations of attempted bribery in this matter. In a New York Times article, dated August 31, 2009, entitled, "*Chevron Offers Evidence of Bribery Scheme in Ecuador Lawsuit*" reporters Simon Romero and Clifford Krauss wrote that Chevron allegedly "*had obtained video recordings of meetings in Ecuador this year that appear to reveal a bribery scheme connected to a \$27 billion lawsuit the company faces over environmental damage at oil fields it operated in remote areas of the Amazon forest in Ecuador.*" They further reported that these allegations, "*appear to implicate Ecuadoran officials and political operatives, including possibly Juan Núñez, the judge overseeing the lawsuit, and Pierina Correa, the sister of Ecuador's president, Rafael Correa.*" After review of the tapes, the reporters noted that "*It was not clear from the recordings and transcripts provided by Chevron, however, whether any bribes discussed in the recordings were actually paid or whether Judge Núñez was even aware of plans to try to bribe him. The tapes also did not demonstrate whether the president's sister was aware of the scheme or had participated in it.*"

The FCPA Blog wrote in a posting entitled, "*Clueless in Quito*" that one of the men who made the tape recordings "was a Chevron contractor providing logistics services." The article noted that Chevron said "it did not pay him for the tapes but did provide money so that the person who made the tapes could leave Ecuador with his family because of safety concerns." A Chevron spokesman denied that the company had any involvement in the

videotaping. While the US government has used undercover crime fighting techniques in the FCPA context, notably in the Gun Sting Case, there are no reported cases where a private company or individual has done so.

We recently we saw an article in the San Francisco Chronicle, by reporter David Baker dated December 29, 2010, entitled, “*Legal Foes Feel Heat*” about Chevron's ongoing legal tangle in Ecuador. In the January 3, 2011 edition of the New York Times was an article by reporters John Schwartz and Dave Itzkoff, entitled “*Scenes Cut From Film Find New Role in Court*”. Both pieces focused on Chevron’s success in obtaining outtakes from the director of the film, **Crude**, which is a documentary focusing on the long running legal dispute. One of the issues raised in both articles is the authorship of an expert report, written by Richard Cabrera, who was appointed by the Ecuadorian Court as a neutral expert to assess oilfield contamination. The NY Times article reports that Chevron contends some of the outtakes from the film show that the plaintiff “ghostwrote” his report. The San Francisco Chronicle reported that diary entries by one of the plaintiffs’ counsel “discussed meeting with” Cabrera prior to his court appointment.

So if a court appointed expert is an “instrumentality thereof” is meeting with him a FCPA violation? What about assisting said expert in writing his report? What about a defendant who sends a private individual to meet with a judge and offer a bribe in a private undercover sting operation?

As a threshold matter, the FCPA requires an action “in order to assist such domestic concern in *obtaining or retaining business* for or with, or directing business to, any person”. We could not find any FCPA enforcement actions relating to US lawyers involved in overseas litigation so there does not appear to be any case law, enforcement actions or Opinion Releases discussing this issue, US courts might find that the FCPA does not apply to foreign judicial proceedings. However, the Department of Justice might take the position that it does and given the severe sanctions which can be brought against an individual who loses a FCPA case at trial, we may never know the answer.

So the answer is questions, questions and more questions....

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