UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Application of CHEVRON CORPORATION,

Petitioner.

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M-19-111

In re Application of RODRIGO PEREZ PALLARES and RICHARD REIS VEIGA,

Petitioners.

- x

MEMORANDUM OPINION

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LEWIS A. KAPLAN, *District Judge*.

These are applications pursuant to 28 U.S.C. § 1782 to issue subpoenas in connection with a multi-billion dollar Ecuadorian litigation against Chevron Corporation ("Chevron"), the threatened criminal prosecution in Ecuador of two of its attorneys, and an international arbitration. Specifically, Chevron and the attorneys seek to subpoena the "outtakes" of a documentary film entitled *Crude*, the making of which was solicited by the plaintiffs' lawyers and depicts events relating to the litigation. Respondents, the Ecuadorian plaintiffs and the documentary filmmaker, oppose the applications principally on the grounds that the discovery would undermine the Ecuadorian proceedings and that the material sought is protected by the journalists' privilege.

Facts

I. Background

These applications arise in the context of three decades of oil exploration and extraction in Ecuador by Texaco, Inc. ("Texaco"), which became a wholly-owned subsidiary of Chevron in 2001. The following is a brief summary of Texaco's activities in Ecuador and the nine-year litigation that ensued in this District.[1]

A. Texaco's Oil Operations in Ecuador

In 1964, Texaco Petroleum Company ("TexPet"), a subsidiary of Texaco, began oil

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[1] The background of this matter is described in detail in the decisions of this District and the Second Circuit. *See Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 341 (S.D.N.Y. 2005); *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

exploration and drilling in the Oriente region of eastern Ecuador. In the following year, TexPet started operating a petroleum concession for a consortium owned in equal shares by TexPet and Gulf Oil Corporation (the "Consortium"). The government of Ecuador ("GOE") thereafter obtained Gulf Oil's interest through its state-owned oil company, Petroecuador, and became the majority stakeholder in the Consortium in 1976. TexPet operated a trans-Ecuadorian oil pipeline and the Consortium's drilling activities until 1990, when Petroecuador assumed those functions. Two years later, TexPet relinquished all of its interests in the Consortium, leaving it owned entirely by Petroecuador.[2]

B. The Aguinda *Action*

In 1993, a group of residents of the Oriente region of Ecuador brought a class action suit in this Court against Texaco arising from TexPet's operations in the Consortium. The complaint in the action, captioned *Aguinda v. Texaco*, alleged that "between 1964 and 1992 Texaco's oil operation activities polluted the rain forests and rivers in Ecuador." The plaintiffs sought billions of dollars in damages on a variety of theories, including negligence, strict liability, and equity to "redress contamination of the water supplies and environment."[3]

C. Settlement and Release Agreements

While the *Aguinda* litigation was pending, TexPet entered into a 1995 settlement agreement with the GOE and Petroecuador (the "Settlement") whereby TexPet agreed to perform

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[2] *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002).

[3] *See Republic of Ecuador*, 376 F. Supp. 2d at 341.

specified environmental remedial work in exchange for a release of claims by the GOE. The release, which covered TexPet, Texaco, and other related companies, encompassed "all the Government's and Petroecuador's claims against the Releasees for Environmental Impact from the Operations of the Consortium, except for those related to the obligations contracted" under the Settlement, which were to be "released as the Environmental Remedial Work is performed to the satisfaction of the Government and Petroecuador."[4]

Three years later, the GOE entered into an agreement with TexPet (the "Final Release") according to which the GOE deemed the Settlement to have been "fully performed and concluded" and "proceede[ed] to release, absolve, and discharge" TexPet and related companies "from any liability and claims . . . for items related to the obligations assumed by TexPet" in the Settlement.[5]

D. Dismissal of the Aguinda *Action*

In the meantime, Texaco worked in earnest to transfer the *Aguinda* action from this district to the courts of Ecuador on the grounds of *forum non conveniens* and international comity. Texaco touted the ability of the Ecuadorian courts to "provide a fair and alternative forum" for the plaintiffs' claims.[6] It argued also that the case did not belong in this district because the evidence and witnesses were predominantly in Ecuador. After nine years of litigation, this Court dismissed

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4 *Id.* at 341-42.

5 *Id.* at 342.

6 *See, e.g.*, Maazel Decl. Ex. 1, Martinez Aff. ¶ 2 ("The Courts in Ecuador still represent a totally adequate forum . . . ."); *Id.* Ex. 4-8 (Texaco briefs).

the case on *forum non conveniens* grounds in 2001.[7] The Second Circuit affirmed the dismissal the following year.[8]

II. Ecuadorian Litigation and Criminal Prosecutions

A. The Lago Agrio Litigation

In 2003, following the dismissal of the *Aguinda* action, a group of Ecuadorians including "a substantial number of the *Aguinda* Plaintiffs" brought an action against ChevronTexaco[9] in Lago Agrio, Ecuador (the "Lago Agrio Litigation"). Plaintiffs asserted claims for, among other things, violations of an Ecuadorian environmental law enacted in 1999. The defendants contended that the law in effect impermissibly allowed plaintiffs to assert, as private attorneys-general, claims that belonged to the GOE but were released pursuant to the Settlement and Final Release.[10] The GOE announced that it would receive ninety percent of any recovery.[11]

The Lago Agrio court ordered a "global" assessment of damages to be conducted by a team of expert witnesses led by Richard Stalin Cabrera Vega, who was required to "perform his work in an impartial matter" and to "maintain strict independence with regard to the parties."[12] Dr.

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7 *See Aguinda*, 142 F. Supp. 2d 534.

8 *See Aguinda*, 303 F.3d 470.

9 Chevron merged with Texaco in 2001.

10 *Aguinda*, 376 F. Supp. 2d at 342.

11 Hendricks Decl. Ex. UU, at 2.

12 Mastro Decl. Ex. S, at 11; Ex. V (Oct. 3, 2007 Order) at 6, 10, 16.

Carlos Beristain, who was appointed to Cabrera's team of expert witnesses, contributed to Cabrera's damages assessment for cancer deaths by meeting in "focus groups" with inhabitants of the region allegedly polluted by Chevron. As we shall see, Chevron maintains that Dr. Beristain failed to maintain "strict independence" with respect to counsel for the Lago Agrio plaintiffs.

B. Criminal Prosecution of Pallares and Veiga

The same year that the Lago Agrio Litigation was filed, the GOE filed a criminal complaint against Pallares, Veiga, and former GOE and Petroecuador officials, alleging that they had falsified public documents in connection with the Settlement and Final Release and had violated Ecuador's environmental laws.

In 2004, the Ecuadorian Prosecutor General began an investigation of the criminal charges. The District Prosecutor, however, found that "there [was] not sufficient evidence to pursue the case against . . . Mr. Ricardo Reis Veiga and Mr. Rodrigo Perez Pallares, representatives of TexPet."[13] The Ecuadorian Deputy Attorney General nevertheless explained in an email to plaintiffs' counsel in the Lago Agrio Litigation that the criminal prosecutions were a potential "way to nullify or undermine the value of the" Settlement and Final Release, though "evidence of criminal liability established by the Comptroller [General's] Office was rejected by the prosecutor."[14]

C. Plaintiffs' Counsel Solicits a Documentary Film

In 2005, Steven Donziger, one of the lead counsel for the plaintiffs in the Lago Agrio

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13 Dans Decl. Ex. 2, at 8, 10.

14 *Id.* Ex. 1.

Litigation, solicited award-winning producer and filmmaker Joseph Berlinger to create a documentary depicting the Lago Agrio Litigation from the perspective of his clients. Berlinger recounted that:

> "During the summer of 2005, a charismatic American environmental lawyer named Steven Donziger knocked on my Manhattan office door. He was running a class-action lawsuit on behalf of 30,000 Ecuadorian inhabitants of the Amazon rainforest and was looking for a filmmaker to tell his clients' story."[15]

For the next three years, Berlinger shadowed the plaintiffs' lawyers and filmed "the events and people surrounding the trial,"[16] compiling six hundred hours of raw footage.

D. President Correa Takes Office

In 2006, while the Lago Agrio Litigation was pending, Rafael Vincente Correa Delgato was elected President of Ecuador on a platform of economic and social reform. President Correa, who describes himself as a "humanist," a "Christian of the left," and a proponent of twenty-first century socialism,[17] condemned Ecuador's oil contracts as "true entrapment for the country."[18]

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15 *Id.* Ex. 9 ("*Crude* Realities").

16 Berlinger Mem. at 4 (citing Berlinger Decl. ¶ 14).

17 *'Socialismo' en el discurso de Correa*, EL UNIVERSO, July 23, 2007, http://www.eluniverso.com/2007/07/23/0001/8/52BB6011269D4A87B7E96771F48D4A62.html; *see also Rafael Correa Biography*, GUERRILLERO, June 29, 2009, http://www.guerrillero.cu/english/index.php?option=com_content&view=article&id=577:rafael-correa-biography&catid=41:varieties&Itemid=61.

18 *Ecuador Candidate Correa to Redraw Private Oil Contracts*, MARKETWATCH, Oct. 13, 2006, http://www.marketwatch.com/story/story/rescue?SourceUrl=http%3A%2F%2Fwww.marketwatch.com%2Fstory%2Fstory%2Fseoindex%3Fseoheadline%3D%26dist%3Dnewsfinder%26siteid%3Dgoogle; *Rafael Correa Biography*, *supra* note 17.

He accused oil companies of failing to meet environmental regulations and sought to divert a portion of their revenue to fund social programs.[19]

A short time after President Correa took office, he issued a press release "urg[ing] the Office of the Prosecutor to permit the Prosecution of the Petroecuador officials who accepted the remediation carried out by Texaco."[20] He thereafter appointed a new Prosecutor General, who decided that the criminal case against Pallares, Veiga, and former GOE officials should proceed.[21]

In 2009, Correa became the first Ecuadorian president in thirty years to be elected to a second term. He pledged that:

> "Socialism will continue. The Ecuadorian people voted for that. We are going to emphasize this fight for social justice, for regional justice. We are going to continue the fight to eliminate all forms of workplace exploitation within our socialist conviction: the supremacy of human work over capital. Nobody is in any doubt that our preferential option is for the poorest people, we are here because of them. Hasta la victoria siempre!"[22]

E. The International Arbitration

The year that President Correa was reelected, Chevron commenced an arbitration pursuant to the Bilateral Investment Treaty between the United States and Ecuador ("BIT") and

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19 *Ecuador Candidate Correa to Redraw Private Oil Contracts*, *supra* note 18; *Rafael Correa Biography*, *supra* note 17.

20 Dans Decl. Ex. 5.

21 *Id.* Ex. 7.

22 Enrico Tortolano, *Revolution on March as Correa Makes History*, TRIBUNE MAGAZINE, Apr. 30, 2009, http://www.tribunemagazine.co.uk/2009/04/30/revolution-on-march-as-correa-makes-history/.

United Nations Commission on International Trade Law ("UNCITRAL") rules (the "Arbitration").[23] Chevron there asserts that the GOE "abuse[d] the criminal justice system" in connection with the Lago Agrio Litigation and the criminal prosecutions and violated the BIT and the American Convention on Civil Rights.[24] It seeks, among other things, dismissal of the Lago Agrio Litigation and a declaration that it "has no liability or responsibility for environmental impact . . . arising out of the former Consortium that was jointly owned by TexPet and Ecuador."[25]

III. *Berlinger Releases* Crude

In 2009, Berlinger released his documentary, entitled *Crude*, which, according to its own press package, "captures the evidentiary phase of the Lago Agrio trial, including field inspections and the appointment of independent expert Richard Cabrera to assess the region."[26] The film depicts also the environmental damage allegedly caused by TexPet and interviews with Ecuadorians dying of diseases perhaps caused by oil spills. Petitioners highlight the following scenes in connection with their applications.

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23 Mastro Decl. Ex. S.

24 *Id.*, ¶¶ 55-65.

25 *Id.* ¶¶ 76(1), 76(3).

26 Mastro Decl. Ex. AA (*Crude* Press Package) at 9-11. Berlinger received over twenty international awards from film, environmental, and human rights organizations for *Crude*, which was named one of the Top Five Documentaries of the Year by the National Board of Review and Best International Green Film at Berlin's Cinema for Peace. *See* Berlinger Decl. ¶ 18.

A. Plaintiffs' Counsel Meets with Expert Witness

Crude contains footage of a number of meetings that took place in the Dureno community of the indigenous Cofan people. A version of *Crude* "streamed" over Netflix depicts one such meeting, at which Dr. Beristain, an expert who contributed to Cabrera's neutral damages assessment, is shown working directly with both the Cofan people and plaintiffs' counsel.[27] Berlinger, however, altered the scene at the direction of plaintiffs' counsel to conceal all images of Dr. Beristain before *Crude* was released on DVD.[28] The interaction between plaintiffs' counsel and Dr. Beristain therefore does not appear in the final version of *Crude* sold on DVD in the United States.

B. Plaintiff's Counsel Interferes with Judicial Inspection

In another scene of *Crude*, Donziger, one of plaintiffs' lead counsel, persuades an Ecuadorian judge, apparently in the presence of Chevron's lawyers and news media, to block the judicial inspection of a laboratory allegedly being used by the Lago Agrio plaintiffs to test for environmental contamination. Donziger describes his use of "pressure tactics" to influence the judge and concedes that "[t]his is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it's dirty."[29]

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27 Mastro Decl. Ex. G, at 1.

28 Berlinger Decl. ¶ 33.

29 Mastro Decl. Ex. G, at 2.

C. Plaintiffs' Representatives Meet with the Ecuadorian Government

In another scene, a representative of the plaintiffs informs Donziger that he had left the office of President Correa "after coordinating everything."[30] Donziger declares, "Congratulations. We've achieved something very important in this case . . . . Now we are friends with the President." The film then offers a glimpse of a meeting between President Correa and plaintiffs' counsel that takes place on a helicopter. Later on, President Correa embraces Donziger and says, "Wonderful, keep it up!"

Donziger explains also that President Correa had called for criminal prosecutions to proceed against those who engineered the Settlement and Final Release. "Correa just said that anyone in the Ecuador government who approved the so-called remediation is now going to be subject to litigation in Ecuador. Those guys are shittin' in their pants right now."[31]

IV. The Applications

Chevron and its attorneys, Pallares and Veiga, file these applications pursuant to 28 U.S.C. § 1782 to obtain "the production of all 'Crude' footage that was shot, acquired, or licensed in connection with the movie 'Crude.'"[32] They assert that the *Crude* outtakes are "highly likely to be directly relevant" to the Lago Agrio Litigation, the Arbitration, and the criminal proceedings

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30 *Id.* Ex. G, at 3.

31 *Id.* Ex. G, at 4.

32 Chevron Mem. at 3.

against Pallares and Vega.[33]

Discussion

I. Judicial Code Section 1782

Section 1782 of the Judicial Code provides in pertinent part:

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a . . . request made by a foreign or international tribunal or upon the application of any interested person . . . . A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."[34]

A district court is authorized to grant a Section 1782 application where (1) the person from whom discovery is sought resides or is found in the district of the district court to which the application is made, (2) the discovery is for use in a proceeding before a foreign tribunal, and (3) the application is made by a foreign or international tribunal or "any interested person."[35] A district court, however, is not required to grant a Section 1782 application simply because it has the authority to do so.[36] "Once the statutory requirements are met, a district court is free to grant

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33 *Id.*

34 28 U.S.C. § 1782.

35 *Schmitz v. Bernstein, Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83 (2d Cir. 2004) (quoting *In re Esses*, 101 F.3d 873, 875 (2d Cir. 1996) (per curiam)).

36 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264, 124 S. Ct. 2466 (2004); *In re Application of Microsoft Corp.*, 428 F. Supp. 2d 188, 192 (S.D.N.Y. 2006).

discovery in its discretion."[37]

The Supreme Court has identified four factors to guide the Court's determination whether to grant a Section 1782 application: (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.[38] 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.'"[39]

A. Statutory Requirements

Joseph Berlinger, the producer of *Crude*, is located in New York and concededly is in sole possession of the film's raw footage. Chevron is an "interested person" because it is a party to the Lago Agrio Litigation and the Arbitration. Pallares and Veiga likewise are "interested" because they are threatened with criminal charges in Ecuador. Petitioners therefore have satisfied

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37 *Schmitz*, 376 F.3d at 83-84.

38 *Intel*, 542 U.S. at 264-65; *Microsoft Corp.*, 428 F. Supp. 2d at 192-93.

39 *Schmitz*, 376 F.3d at 84 (quoting *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997)).

the first two factors.

As to the third factor, respondents do not dispute that the Ecuadorian court is a foreign tribunal. They nevertheless contend that the arbitral tribunal does not constitute a "foreign or international tribunal" within the meaning of Section 1782. Respondents rely on *National Broadcasting Co. v. Bear Stearns & Co.*,[40] in which the Second Circuit held that a commercial arbitration panel in Mexico conducted under the auspices of the International Chamber of Commerce was beyond the scope of Section 1782 because "Congress did not intend for that statute to apply to an arbitral body established by private parties."[41] Respondents' argument is without merit.

As an initial matter, the arbitration here at issue is not pending in an arbitral tribunal established by private parties. It is pending in a tribunal established by an international treaty, the BIT between the United States and Ecuador, and pursuant to UNCITRAL rules.[42] Further, in *Intel Corp. v. Advanced Micro Devices, Inc.*,[43] which postdated *National Broadcasting*, the Supreme Court in *dictum* quoted a law review article for the proposition that "[t]he term 'tribunal' . . . includes investigating magistrates, *administrative and arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[44] In the wake of

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40 165 F.3d 184, 191 (2d Cir. 1999).

41 *Id.*

42 Mastro Decl. Ex. S.

43 542 U.S. 241 (2004).

44 *Id.* at 258 (quoting Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026-27 (1965)) (emphasis added).

Intel, at least two district courts in our Circuit and one in the Third Circuit have followed the Supreme Court's *dictum* and held that international arbitral bodies operating under UNCITRAL rules constitute "foreign tribunals" for purposes of Section 1782.[45] This Court agrees.

In consequence, petitioners have satisfied the threshold requirements of Section 1782.

B. Discretionary Factors

Respondents assert that the discretionary factors cut in their favor. They argue that petitioners have attempted to circumvent the policies and restrictions of the Ecuadorian court and that their discovery request is unduly burdensome. Petitioners respond that courts have granted Section 1782 applications routinely in connection with the Lago Agio Litigation and, in any event, that the discovery sought would place "little or no burden" on respondents.[46]

1. The Jurisdictional Reach of the Foreign Tribunal

"A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce the evidence."[47] The first factor therefore weighs against granting discovery where

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45 *See, e.g.*, *Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *4 (D. Conn. Aug 27, 2009); *In re Oxus Gold PLC*, No. MISC 06-82-GEB, 2007 WL 1037387, at *5 (D. N.J. Apr. 2, 2007) (holding that a bilateral investment treaty governed by UNCITRAL rules constituted a foreign tribunal under §1782); *see also Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co.*, LLC, No. 08-135-GMS, 2008 WL 4809035, at *1 (D. Del. Oct. 14, 2008) ("[T]he Supreme Court's decision in *Intel* (and post-*Intel* decisions from other district courts) indicate that Section 1782 does indeed apply to private foreign arbitrations.").

46 Chevron Mem. at 18.

47 *Intel*, 542 U.S. at 264.

the person from whom discovery is sought is a participant in the foreign proceeding. On the other hand, "nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid."[48]

Berlinger, who is in sole possession of the raw footage of *Crude*, is located in this district and is not a party to any of the foreign proceedings. The Ecuadorian court and the arbitral tribunal lack jurisdiction to compel Berlinger to produce the material. The first of the discretionary factors therefore favors petitioners.

*2. The Nature and Receptivity of the Foreign Tribunal*s

In April 2010, respondents filed an application with the Lago Agrio court requesting a ruling "concerning its receptivity to evidence gathered in Chevron's various Section 1782 applications."[49] That court has not yet ruled. Respondents nevertheless assert that granting petitioners' applications would undermine the Ecuadorian court and therefore frustrate the comity interests underlying the statute.[50]

The first point to be made is that respondents point does not even address the fact that the applications are made not only for the Ecuadorian litigation, but also for the Arbitration. In consequence, even if their argument were persuasive as respects Ecuador, it would not carry the day.

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48 *Id.*

49 Maazel Decl. Ex. 13; Pl. Mem. at 15.

50 Respondents neither contend that granting the applications would undermine the Arbitration nor suggest that the arbitral tribunal would oppose the discovery sought here.

And it is not persuasive as to Ecuador in any case.

While the views of the Ecuadorian court could be helpful, even opposition by it to these applications would not be dispositive.[51] District courts have granted Section 1782 applications routinely in connection with matters pending in Ecuadorian courts, including the Lago Agrio Litigation.[52] Moreover, it must be borne in mind that the petitioners seek relief here in part out of concern that political influence may have been brought to bear in Ecuador in an inappropriate way.

In all the circumstances, this factor surely favors petitioners insofar as the Arbitration is concerned and does so, albeit perhaps less strongly, with respect to the Lago Agrio litigation.

3. Whether Petitioners Attempt to Circumvent Foreign Proof-Gathering Restrictions and Policies

Respondents assert that petitioners have attempted to circumvent the proof-gathering restrictions of the Ecuadorian court because they "did not even try to get discovery" from it before filing the instant applications. But the case on which respondents rely, *Aventis Pharma v. Wyeth*,[53] is distinguishable because the foreign tribunal there had "jurisdictional reach of the[] documents."[54] Here, neither the Ecuadorian court nor the arbitral tribunal could compel Berlinger to produce the outtakes because he is not a party to the foreign proceedings or subject to their writs. Respondents'

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51 *See Intel Corp.*, 542 U.S. at 265 (holding that § 1782 application could be granted though the "European Commission has stated in *amicus curiae* briefs to this Court that it does not need or want the District Court's assistance").

52 *See, e.g.*, Mastro Decl. Ex. O-Q (court orders granting Chevron § 1782 applications).

53 No. M-19-70, 2009 WL 3754191 (S.D.N.Y. Nov. 9, 2009).

54 *Id.* at *1.

argument therefore is without merit.

4. Whether the Discovery Would Be Intrusive or Burdensome

Respondents argue that complying with a subpoena to produce six hundred hours of *Crude* raw footage would be unduly burdensome because it would (1) impose administrative costs on Berlinger and (2) inhibit Berlinger's ability to obtain material from sources in confidence. These arguments are unpersuasive.

Requiring Berlinger to make the raw footage available to petitioners would impose minimal administrative costs on him. Petitioners, not Berlinger, would bear the burden of copying, editing, and reviewing the material. Indeed, the burden of resisting the subpoenas undoubtedly already has imposed a greater burden on Berlinger than would compliance.

Nor would the production of the outtakes compromise Berlinger's ability to obtain material from sources in confidence. For reasons discussed in connection with Berlinger's claim of journalist privilege, the Court does not credit any assertion that the discovery of the outtakes by petitioners would compromise the ability of Berlinger or, for that matter, any other film maker, to obtain material from individuals interested in confidential treatment. These subpoenas would impose no undue burden on respondents.

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In sum, petitioners have satisfied the *Intel* discretionary factors.

II. The Journalist Privilege

Under Section 1782, "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."[55] Respondents assert that the *Crude* raw footage is protected from disclosure by the journalists' privilege. Petitioners rejoin that they overcome the qualified privilege on the ground that the material sought is highly likely to be relevant to the foreign proceedings.

The Second Circuit "has long recognized the existence of a qualified privilege for journalistic information."[56] The privilege protects against "the wholesale exposure of press files to litigant scrutiny," "the heavy costs of subpoena compliance," and the likelihood that "potential sources [would be] deterred from speaking to the press, or [would] insist[] on remaining anonymous, because of the likelihood that they would be sucked into litigation."[57]

The threshold issue is whether *Crude* falls within the journalists' privilege. Petitioners contend that the privilege does not apply to documentary films and, in any event, that *Crude* "was not the result of a newsgathering process, but rather . . . is a piece of theater deliberately designed to win over audiences to the Plaintiffs' side and to facilitate the Lago Agrio Litigation."[58]

The Second Circuit has not addressed squarely whether the journalists' privilege encompasses a documentary film. It nevertheless has stated that "an individual successfully may

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55 28 U.S.C. § 1782.

56 *Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29, 32 (2d Cir. 1999); *see also von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987).

57 *Gonzales*, 194 F.3d at 35.

58 Chevron Reply Mem. at 10.

assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press."[59]

To create *Crude*, Berlinger investigated "the events and people surrounding" the Lago Agrio Litigation, a newsworthy event, and disseminated his film to the public. The Court therefore assumes that the qualified journalists' privilege applies to Berlinger's raw footage.

A. Confidentiality

The protection afforded by the journalists' privilege turns on whether the material sought is confidential or nonconfidential. "[W]hile nonconfidential press materials are protected by a qualified privilege, the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought."[60] It is the journalist's burden to demonstrate that the material he or she seeks to protect from disclosure is confidential.[61]

Respondents argue that the outtakes of *Crude* are confidential because Berlinger (1) "entered into agreements with some of [his] sources, promising that [he] would not use *certain*

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59 *von Bulow*, 811 F.2d at 142; *see Gonzales*, 194 F.3d at 35 (holding that journalists' privilege attached to *NBC Dateline* footage).

60 *Gonzales*, 194 F.3d at 36. Under *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982), where the litigant seeks confidential material, the litigant must make a "clear and specific showing [that] the information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."

61 *See von Bulow*, 811 F.2d at 145-46.

footage in which they appeared without first obtaining their express authorization,"[62] and (2) in all cases "built a foundation of trust with the subjects of his film," who were depicted in "sensitive, painful and conflict-ridden situations."[63] They therefore contend that there was an "implicit (and sometimes explicit) understanding that the materials Berlinger decides to leave out of the finished product would remain confidential and not turned over to third parties."[64] Respondents' contentions are not persuasive.

First, Berlinger's assertion that he is prohibited by confidentiality agreements from using "certain footage" absent the consent of "some" of his sources is conclusory. He does not identify any source or subject with whom he has such an agreement. He does not identify any particular footage allegedly covered by any such agreements. He does not even state whether the footage allegedly subject to such understandings is included in the outtakes or, instead, already is in the publicly available documentary. And he makes no effort to reconcile the claim of explicit assurances of confidentiality with the standard form of release he obtained from his subjects, which granted him *carte blanche* to use all of the footage in his production.[65] He therefore has not sustained his burden of establishing that any of the material sought is subject to any confidentiality

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62 Berlinger Aff. ¶¶ 19, 21 (emphasis added).

63 Berlinger Mem. at 15.

64 *Id.*

65 *See* Hendricks Decl. Ex. PP (Standard Release) ("I understand and acknowledge that the filmmakers may use my Contribution in connection with the creation of a nonfiction production, which may be released theatrically, non-theatrically, [or] on television . . . . I acknowledge that the Producer and/or Licensed Parties may edit or alter my Contribution to the Production as they wish.").

agreement.[66]

This leaves for consideration two other categories of footage. The first is that involving subjects to whom no explicit assurances were given at all. The second is footage involving those to whom explicit assurances were given, but that is not included in the portion as to which those assurances were provided. The argument, however, is the same in each case, viz., that Berlinger had tacit understandings of confidentiality based on "trust." This argument is even less persuasive.

Berlinger no doubt won the confidence of many of his subjects. The standard release that his subjects signed, however, expressly disclaims any expectation of confidentiality.[67] In any event, all of Berlinger's subjects appeared on camera for the very purpose of having their images and words shown publicly in whatever film Berlinger decided to create.[68] With perhaps some exceptions as to some footage, Berlinger alone retained control of the content of the film and determined what footage would be made public. To that extent, there could not possibly have been any understanding of confidentiality, as Berlinger had the uncontrolled right to make public all or

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66 *See von Bulow*, 811 F.2d at 145-46.

67 *Supra* n. 65.

68 *See, e.g., Gonzales*, 194 F.3d at 39 ("*United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993), . . . did not involve confidential materials, as the attorney's pronouncements were made publicly in front of television cameras."); *see also Saperstein v. Palestinian Auth.*, No. 09-mc-00619 (SLT)(ALC), 2010 WL 1371384, at *2 (E.D.N.Y. Apr. 6, 2010) (holding that outtakes of a BBC documentary were nonconfidential).

The cases upon which respondents rely are unavailing because they predate *Gonzales*, in which the Second Circuit articulated separate standards applicable to confidential and nonconfidential material. *See In re Application to Quash Subpoena to NBC, Inc.*, 79 F.3d 346 (2d Cir. 1996); *United States v. Karen Bags, Inc.*, 600 F. Supp. 667 (S.D.N.Y. 1985).

any part of the footage that he desired. I therefore find that Berlinger has not sustained his burden of demonstrating confidentiality for purposes of the journalist privilege.

B. Protection of Nonconfidential Material

"Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalist privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources."[69]

1. Relevance

Chevron contends that there is ample reason to believe that the *Crude* outtakes would be relevant to the Lago Agio Litigation and the Arbitration given that Berlinger was solicited by plaintiffs' counsel to create the film, had vast access to events relating to the litigation, and filmed extraordinary interactions between plaintiffs' counsel, on the one hand, and an expert witness and the GOE, on the other. Pallares and Veiga likewise contend that the outtakes would be relevant to their criminal proceedings because they likely would show that those proceedings are tainted by plaintiffs' counsel's influence and improper meddling with the Ecuadorian judiciary on the part of the GOE. Respondents argue that petitioners' have not met their burden of demonstrating relevance because they are engaged in a "fishing expedition" based purely upon speculation about the content of the outtakes.

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[69] *Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999).

a. The Lago Agrio Litigation and the Arbitration

Chevron contends that three scenes of *Crude* are "concrete evidence" that the outtakes of the film are "more than likely relevant" to Chevron's claims and defenses in the Lago Agrio Litigation and the Arbitration.

First, Chevron asserts that *Crude* contains footage of plaintiffs' counsel's participation in one of Beristain's supposedly "neutral" focus groups, which he conducted in furtherance of his damages assessment. It argues that Beristain therefore was "biased by the direct participation of the plaintiff's counsel" in the performance of his task. Berlinger, moreover, concededly edited the scene at the direction of plaintiffs' counsel to remove all images of Beristain before *Crude* was released on DVD, a fact suggestive of an awareness of questionable activity. Chevron therefore contends that the outtakes are likely to depict plaintiffs' counsel's interaction with at least one supposedly neutral expert who was engaged pursuant to court direction.[70]

Second, *Crude* depicts plaintiffs' counsel Steven Donziger's use of what he called "pressure tactics" to influence a judge to prevent the judicial inspection of a laboratory allegedly being used by the Lago Agrio plaintiffs to test for environmental contamination. Donziger declares that "[t]his is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it's dirty."[71] Chevron argues that the *Crude* outtakes are highly likely to depict plaintiffs' improper influence on the Ecuadorian judicial system.[72]

Third, petitioners highlight the *Crude* scene in which a representative of plaintiffs

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70 Chevron Mem. at 8.

71 Mastro Decl. Ex. G.

72 Chevron Mem. at 11.

visits the office of the president of Ecuador "after coordinating everything." Donziger responds that "We've achieved something very important in this case . . . . Now we are friends with the President." Chevron argues that the outtakes are likely to depict plaintiffs' attempts to "curry favor" with the GOE.[73]

Respondents rejoin that Chevron has failed to meet its burden of demonstrating the relevance of the outtakes. First, they argue that the meeting between Beristain and plaintiff's counsel was not one of Beristain's independent focus groups because Beristain had not yet begun his damages "field work" at the time the meeting took place.[74] They assert that Berlinger edited the scene so that it would not be "taken out of context" and viewed as a meeting conducted in furtherance of Beristain's damages assessment. They therefore maintain that Chevron's "assumption that unreleased footage not in the film is also relevant is entirely speculative."[75] Second, respondents argue in the alternative that petitioners have failed "to particularize a specific portion of th[e] footage . . . that they believe is relevant."[76] These arguments are not persuasive.

Any interaction between plaintiffs' counsel and a supposedly neutral expert in the Lago Agrio Litigation would be relevant to whether the expert is independent and his damages assessment reliable. Plaintiffs' counsel's interactions with the Ecuadorian judiciary and government officials likewise would be relevant to Chevron's Arbitration claims for denial of due process and

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73 *Id.* at 11 (citing Mastro Decl. Ex. G, at 3).

74 Berlinger Mem. at 19 (citing Mastro Decl. Ex. U, at 1.).

75 *Id.* at 16.

76 Apr. 30, 2009 Hr'g Tr. 22:21-23:3.

violations of the Settlement and Release agreements and the BIT.[77] The fact that *Crude* contains only excerpts of footage depicting such interactions amply supports an inference that the outtakes contain additional relevant material.

Further, Donziger in fact solicited Berlinger to create a documentary of the litigation from the perspective of his clients. Berlinger in turn was given "extraordinary access to players on all sides of the legal fight and beyond."[78] Plaintiffs' counsel indeed are on the screen throughout most of *Crude*,[79] which contains less than one percent of the total footage Berlinger shot in connection with the litigation. Berlinger concededly removed at least one scene from the final version of *Crude* at their direction.[80] In these circumstances, there is considerable reason to believe that the outtakes are relevant to significant issues in the Lago Agrio Litigation and the Arbitration, including whether plaintiffs' counsel improperly influenced expert witnesses and the GOE.[81]

Finally, respondents' assertion that the applications are insufficiently particular is unavailing. As an initial matter, there is no uncertainty as to the type of evidence petitioners seek. Respondents, however, have refused to provide any information whatsoever as to the content of the outtakes. Petitioners cannot reasonably be expected to identify with particularity the outtakes that

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77 In addition, the presence of Berlinger and his crew would destroy any privilege attached to conversations among plaintiffs' counsel. Chevron may be entitled to discovery concerning the content of otherwise privileged discussions conducted in the presence of Berlinger's crew.

78 Mastro Ex. AA (*Crude* press package).

79 *See* Hendricks Decl. ¶¶ 2-5.

80 Berlinger Decl. ¶ 33.

81 *See Gonzales*, 194 F.3d at 36.

they seek where knowledge of their content lies exclusively with Berlinger.[82]

b. The Criminal Proceedings

Pallares and Veiga assert that the outtakes are relevant to their criminal proceedings because the outtakes are likely to depict (1) efforts "to bring unfounded criminal charges," (2) the "joint strategy" of plaintiffs' lawyers and the GOE, and (3) "procedural irregularities in the criminal case."[83] Respondents maintain that *Crude* contains only one passing reference to criminal proceedings and that there is no basis upon which to infer that the outtakes contain any relevant material.[84]

The released version of *Crude* nevertheless depicts interactions which suggest the possibility of misconduct on the part of both plaintiffs' counsel and GOE. In all the circumstances, it is likely that the outtakes will be relevant to significant issues in the prosecutions, including whether the prosecutions were motivated by a desire to put pressure on Chevron in the Lago Agrio Litigation and the role, if any, that plaintiffs' counsel and the GOE played in those proceedings.

2. Availability from Other Sources

Respondents argue that petitioners have failed to meet their burden because the outtakes would be "cumulative or duplicative of the decades-worth of scientific reports and analyses

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82 Respondents' claim that petitioners must identify "particular scene[s]" in fact would require them to review the entirety of Berlinger's raw footage, an approach respondents assuredly would not entertain. *See* Tr., Apr. 30, 2009 at 23:6-8.

83 Pallares/Veiga Mem. at 16.

84 Berlinger Mem. at 23-24 n.9.

performed by Chevron."[85] Their argument is inapposite. The issue is here is not whether the evidence petitioners seek would shed light on issues such as the existence and source of any pollution in the Ecuadoran Amazonian forests. It is whether there is sufficient ground to believe that the footage petitioners seek would not reasonably be obtainable elsewhere.[86]

Respondents argue that petitioners have not satisfied their burden with respect to footage of plaintiffs' alleged interference with judicial inspections because those events allegedly were witnessed by "Chevron's attorneys, often accompanied by their own cameras."[87] The argument, however, is not persuasive, as indicated by *Gonzales v. National Broadcasting Co*.[88]

In that case, NBC asserted that outtakes of *Dateline* were protected from disclosure by the journalist privilege on the ground that evidence of the event in question was available elsewhere. The Second Circuit, however, was "persuaded that the outtakes contain information that is not reasonably obtainable from other available sources, because they can provide unimpeachably objective evidence of [defendant's] conduct." It found also that "a deposition is not an adequate substitute for the information that may be obtained from the videotapes."[89]

The same rationale applies here. Berlinger, who is in sole possession of the *Crude* outtakes, concededly was "shocked at the almost unprecedented access" he was granted "behind the

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85 *Id.* at 21.

86 *Gonzales*, 194 F.3d at 36.

87 Berlinger Mem. at 22; Berlinger Decl. ¶ 34.

88 194 F.3d 29 (2d Cir. 1999).

89 *Id.* at 36. *See also Schiller v. City of New York*, 245 F.R.D. 112, 120 (S.D.N.Y. 2007).

scenes of" the Lago Agrio Litigation.[90] The raw footage he compiled would be "unimpeachably objective" evidence of any misconduct on the part of plaintiffs' counsel, expert witnesses, or the GOE. Petitioners therefore have shown that the material they seek would not reasonably be obtainable from other sources.

In consequence, petitioners have overcome the qualified journalists' privilege.

Conclusion

The Court is not blind to the broader context in which the current applications appear.

Chevron fought a long and ultimately successful battle to obtain dismissal of plaintiffs' original lawsuit in this Court on *forum non conveniens* grounds. During that battle, it extolled the virtues of the Ecuadorian legal system while the plaintiffs questioned its abilities and rectitude.[91] The present positions of Chevron and the plaintiffs – Chevron's claim that it is or is about to become a victim of political influence on the Ecuadorian courts and prosecutors or worse and plaintiffs' pleas for deference to those institutions – thus represent dramatic reversals that are in considerable tension, to say the least, with their past arguments. The reason for these reversals, however, perhaps is not difficult to understand.

Ecuador in recent years has seen the ascendency of a socialist government that is not as well disposed to private oil interests as its predecessor. Moreover, the State Department last year observed:

"While the constitution [of Ecuador] provides for an independent judiciary, in

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90 Dans Reply Decl. Ex. 11.

91 *See* Maazel Decl. Ex. 7-8 (*Aguinda* briefs).

> practice the judiciary was at times susceptible to outside pressure and corruption. The media reported on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parceling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent them back to the presiding judge for signature. Judges occasionally reached decisions based on media influence or political and economic pressures."[92]

It went on to note that "there continued to be problems in . . . corruption and denial of due process within the judicial system."[93] Thus, one readily sees why Chevron and the lawyer petitioners now might be concerned about their fate in the Ecuadorian courts, regardless of whether events ultimately will prove those concerns to be justified. And, indeed, so too was the concern that undoubtedly motivated plaintiffs, at least in part, previously to resist Chevron's earlier effort to force this dispute into Ecuadorian courts during the tenure of a previous and (to Chevron) perhaps more favorably disposed government.

The Court expresses no view as to whether the concerns of either side are supported by proof of improper political influence, corruption, or other misconduct affecting the Ecuadorian proceedings. As Justice Brandeis once wrote, however, "sunlight is said to be the best of disinfectants."[94] Review of Berlinger's outtakes will contribute to the goal of seeing not only that justice is done, but that it appears to be done.

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92 U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, *2009 Human Rights Report: Ecuador* (available at http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136111.htm) (last visited May 6, 2010).

93 *Id.*

94 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933).

In all of the circumstances, petitioners' applications pursuant to 28 U.S.C. § 1782 to subpoena the raw footage of Joseph Berlinger's *Crude* and for a deposition to authenticate it are granted.

SO ORDERED.

Dated: May 6, 2010

Lewis A. Kaplan
United States District Judge