

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY  
3 CIVIL ACTION NO. 10-2675(SRC)

4 In Re Application of CHEVRON CORPORATION for an Order APPLICATION FOR DISCOVERY  
5 Pursuant to 28 U.S.C. Section and ORDER OF COURT  
6 1782 to Conduct Discovery for  
7 Use in Foreign Proceedings.

8 June 11, 2010  
9 Newark, New Jersey

10  
11 B E F O R E: HONORABLE STANLEY R. CHESLER, USDJ  
12

13 Pursuant to Section 753 Title 28 United States Code, the  
14 following transcript is certified to be an accurate record  
15 as taken stenographically in the above-entitled  
16 proceedings.

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For Ecuadorian Plaintiffs

1           THE CLERK: This is In Re Application of Chevron  
2 Corporation for an Order Pursuant to 28 U.S.C. Section  
3 1782, Docket 10-2675. Please note your appearances for the  
4 record.

5           MR. STERN: Herb Stern and Steve Plotnick, Stern &  
6 Kilcullen, for Chevron.

7           MS. HENDRICKS: Kristen Hendricks from Gibson, Dunn &  
8 Crutcher for Chevron.

9           MR. WILSON: Good morning, your Honor. O. Andrew F.  
10 Wilson of Emery, Celli, Brinckerhoff & Abady for the  
11 Respondents and the interested parties.

12          THE COURT: And good morning to all of you. I  
13 understand there are some pro hac vice applications which  
14 have been made here. Is that correct?

15          MR. WILSON: Yes, your Honor. Both my colleague,  
16 Kristen Hendricks, and I have submitted pro hac vice  
17 applications. Ours was granted in camera the last time we  
18 appeared.

19          MR. STERN: I move.

20          THE COURT: Any objection?

21          MR. WILSON: No, your Honor.

22          THE COURT: All right. The applications are all  
23 granted. All right. Who's going to be arguing for  
24 Chevron?

25          MR. STERN: I am, your Honor.

1 THE COURT: All right, Mr. Stern. Go ahead.

2 MR. STERN: Thank you, your Honor. This is a very  
3 straightforward application under 28 U.S.C. Section 1782.

4 THE COURT: I love the way you put that, Mr. Stern,  
5 so straightforward. With how many piles of certifications  
6 here?

7 MR. STERN: Well, there's a lot of piles but let me  
8 see if I can strike right through because I know your Honor  
9 is busy, I know you have a jury trial and I promise not to  
10 waste much of or any of your time.

11 THE COURT: Okay.

12 MR. STERN: I think that everything I'm about to say  
13 is virtually undisputed.

14 First of all, there's an Ecuadorian court, that's  
15 true. Chevron is being sued for a phenomenal amount of  
16 money, no one disputes it. The court there has appointed a  
17 Mr. Cabrera to be a testifying expert. I don't think that  
18 anybody disputes that.

19 There's no question about the fact that the court  
20 order which appointed him is very specific, and you'll find  
21 in Exhibit J admonitions at page six that Mr. Cabrera must  
22 be impartial. I quote, "He must be independent with  
23 respect to the parties", and most particularly at page ten  
24 it says that his assistance, and I quote now, "must be  
25 independent from the two parties." Of course, the two

1 parties are before you on this application.

2 There's no question about any of that. He's a  
3 testifying expert, he's supposed to be impartial and he's  
4 supposed to not -- withdrawn -- he's supposed not to be  
5 contacting the parties independently.

6 Now, there's no dispute about the fact as well from  
7 the papers of my adversary that UBR is in fact consulting  
8 experts for the plaintiff. They concede that. It's beyond  
9 dispute.

10 There is no dispute that Mr. Villao is an employee of  
11 UBR. They don't dispute that, either. Indeed, they  
12 submitted a certification from him, and he's represented by  
13 the same counsel that represents UBR. He's employed by UBR  
14 as an associate, no question about that. You'll find that  
15 in Exhibit Y.

16 Now, there's no question about the fact, it's  
17 undisputed, it's admitted, that Mr. Villao, while  
18 simultaneously in the employ of UBR, the plaintiffs in this  
19 case suing Chevron, was also employed by Mr. Cabrera, who  
20 is forbidden from doing exactly that. You'll find that in  
21 Exhibit W.

22 Mr. Cabrera actually lists Mr. Villao as one of his  
23 consultants on the project. Mr. Villao's CV is attached to  
24 Mr. Cabrera's statements, and you will find that in Exhibit  
25 Y. The same Mr. Villao is listed as an assistant expert to

1       UBR.

2               So, we have a testifying expert in Ecuador who is  
3 forbidden from having ex parte contacts with either of the  
4 parties, and it is indisputable that both the plaintiffs'  
5 counsel is employing UBR which has a presence not only as  
6 its, what they term consulting expert, but it's also  
7 helping Mr. Cabrera in his efforts. All of this  
8 surreptitious, all of this ex parte.

9               Now, if there were any doubt about it, that has crept  
10 into Mr. Cabrera's reports in which he's, you know, seeking  
11 to recommend \$27 billion against Chevron, has crept into  
12 his reports actual materials furnished by UBR, which is, of  
13 course, the consulting expert for the plaintiffs, and  
14 you'll find that, if your Honor please, at Exhibits C and  
15 D.

16              So, all of that I have said so far is indisputable.  
17 But if there were any doubt about it, the cherry on the top  
18 about it is in Exhibit K. Mr. Cabrera admits that he, in  
19 fact, used Mr. Villao, only he says he did it just a  
20 little, not a lot. You'll find that in Exhibit K.

21              I'm not going to burden you by actually reading this  
22 stuff because you have it all up there and you can verify  
23 that what I'm telling you is accurate.

24              So, we want obviously to take discovery on UBR and  
25 Mr. Villao, and we want to find out what information has

1       been passing back and forth from plaintiffs' counsel to Mr.  
2       Cabrera using the vehicle of their so-called consulting  
3       expert, UBR.

4               Now, in the face of that clear demonstration of need,  
5       what do we hear? We hear that there's a privilege and the  
6       privilege that we hear is that Mr. Villao and UBR are  
7       consulting experts to the plaintiffs and, therefore, their  
8       communications between one and the other are privileged.

9               Well, this is exactly the issue that was posed in the  
10       Chevron v. 3TM case in the Southern District of Texas, and  
11       I see from your Honor's body motions that you're aware of  
12       the case, and the holding is absolutely clear. I  
13       understand it's not binding, it's a court of the same  
14       level, but I think it's informative, and I'd recommend it  
15       very highly to your Honor because it makes a lot of sense.

16              And he says very clearly, the judge, that while  
17       3TM -- which, if you could substitute UBR for 3TM for our  
18       purposes -- "While 3TM may well have been originally hired  
19       to serve only in a consulting expert capacity, as soon as  
20       his report was given to the court, or at least an auxiliary  
21       of the court, to be used in preparing Cabrera's expert  
22       report, that shield was lost. By the very nature of  
23       Cabrera's role, his report is testimony. Additionally, by  
24       providing consulting expert reports to a testifying expert,  
25       the privilege is lost," citing case.

1           Now, from our point of view, we respectfully submit  
2           that there is no privilege any more given the conduct, and  
3           I would respectfully suggest the misconduct of the  
4           plaintiffs in this case and they're so-called consulting  
5           expert, UBR.

6           Now, the interesting thing is that Mr. Villao has  
7           submitted a certification himself, and he is represented in  
8           these proceedings by the same counsel that is representing  
9           UBR, and if your Honor will take a look at paragraph seven  
10          of Mr. Villao's certification, he says that all and any of  
11          the work that he did on this case and project he did in  
12          Ecuador.

13          Well, who was he working for? I think we're entitled  
14          to find out. We know he was simultaneously employed by  
15          both our adversary and the so-called neutral testifying  
16          expert. We want to know what was going on.

17          Now, we have therefore, based upon that, requested  
18          that this Court issue a subpoena pursuant to 28 U.S.C.  
19          1782.

20          We ask a little more. We are in an emergent  
21          situation, from our point of view. We are before this  
22          foreign tribunal and our adversaries are doing their utmost  
23          to shut down the proceedings before we can adduce the  
24          evidence that we need to demonstrate to that court that  
25          this arrangement is essentially corrupt between Mr. Cabrera



1       and the plaintiffs.

2               So, not only do I suggest to you that we are correct  
3       in our application, but I respectfully submit to you that  
4       there is a need for speed and, so, it is our request not  
5       only that the subpoena issue, but that we set a timetable  
6       here today so that there isn't the comings and goings back  
7       and forth, because our experience in every one of the other  
8       five cases which are going on simultaneously throughout the  
9       country, when we win them, which we have been fortunate  
10      enough to do up till now, what happens is our adversary  
11      seeks stays. If they get it, fine. If they don't, they go  
12      to the appropriate circuit. And it is part, in our view,  
13      of the pattern of delay while the proceedings in Ecuador go  
14      chug, chug, chugging along.

15             And therefore, we would ask, number one, that the  
16      Court set, if it agrees with our position, that we set a  
17      schedule for their compliance and, number two, we would  
18      like an immediate 30(b)(6) witness as to Mr. Villao, his  
19      whereabouts, the ability of the UBR and plaintiffs' counsel  
20      to control his movements, so that we can get some  
21      information about this gentleman who has certified that he  
22      has worked on the project, that he's done all of his work  
23      in Ecuador while simultaneously, obviously, employed by  
24      both UBR, that is the plaintiffs in this case, and Mr.  
25      Cabrera.

1           You've been very patient with me and I've tried my  
2           best to do this quickly because I do know that you have a  
3           proceeding pending.

4           THE COURT: Thank you, Mr. Stern. All right. I'm  
5           sure, Mr. Wilson, that you agree with everything which Mr.  
6           Stern has said.

7           MR. WILSON: We agree on some things and we disagree  
8           on others.

9           THE COURT: Okay.

10          MR. WILSON: Good morning, your Honor.

11          THE COURT: Good morning. And good to see you.

12          MR. WILSON: I have several responses to my  
13          colleague's presentation but I want to step back before I  
14          do that and put this application in context. This  
15          application for discovery brought by Chevron doesn't fit  
16          within 1782.

17                 1782 was designed to provide assistance to foreign  
18          tribunals for documents and depositions that are not within  
19          the foreign jurisdiction's subpoena power, and the premise  
20          of the statute is to encourage international comity by  
21          allowing foreign litigants to gain discovery in the United  
22          States in the hopes that foreign jurisdictions will provide  
23          reciprocal discovery.

24                 Here, Chevron fought for ten years to bring its case  
25          to Ecuador, litigated seven years in Ecuador, and is now

1 using 1782 in a coordinated manner to open a new case  
2 sprawling over seven states in the United States.

3 So, what we have here is a radical expansion of 1782  
4 that's trying to sweep in, as materials that are available  
5 in Ecuador, materials from people who are subject to  
6 subpoena power in Ecuador, people who are otherwise covered  
7 by privilege, documents that are not in aid of the foreign  
8 tribunal, and materials that circumvent foreign proof  
9 gathering.

10 So, let me focus in on the two subpoenas that you  
11 have before you today. The first seeks the deposition and  
12 discovery from Mr. Cristobal Villao.

13 Now, Chevron's application for this subpoena fails  
14 quite literally at the threshold. The first line of their  
15 brief provides that pursuant to 1782, quote, "The district  
16 court of the district in which a person resides or is found  
17 may order him to give testimony."

18 THE COURT: And Mr. Wilson, as I understand the  
19 applicant's papers, at this point they've essentially  
20 withdrawn that application pending discovery or further  
21 efforts to determine whether or not that gentleman, in  
22 fact, can be found or resides in the United States and, as  
23 I would understand Mr. Stern's argument, it is that's one  
24 of the reasons why he is seeking his 30(b)(6) deposition of  
25 the business entity, among other things, to establish the

1        bona fides of that certification. Is that correct, Mr.  
2        Stern?

3                MR. STERN: Yes, your Honor.

4                THE COURT: But at this point, at least, whether or  
5        not that individual is or is not indeed to be found or  
6        resides in the United States is not before me because that  
7        application is essentially withdrawn, may be renewed.

8                MR. WILSON: Well, just to be perfectly clear, your  
9        Honor, the application is before you. They have asked,  
10       they have sought to issue that subpoena. Their brief says  
11       that they want to, quote, defer that, so, my understanding  
12       is that at the end of the day you will deny that  
13       application without prejudice and that they can bring it  
14       again.

15               But just for clarity, this Court doesn't have  
16       jurisdiction to issue that subpoena, so, my understanding  
17       is that the Court will deny that subpoena without  
18       prejudice. I mean --

19               THE COURT: Mr. Stern.

20               MR. WILSON: -- I'm sure my colleague doesn't have  
21       any opposition to that.

22               MR. STERN: First of all, I don't think that any  
23       lawyer should be telling you what your ruling should be,  
24       but I do believe that it can be held in abeyance. We are  
25       asking for a ruling at this time. If it's convenient to

1 your Honor simply to dismiss this and make us refile, we'll  
2 do that, but I don't know why we're getting hung up on  
3 essentially a housekeeping issue.

4 THE COURT: Whatever way we describe it, all right,  
5 the applicant is not at this point requesting any further  
6 relief with regard to that individual, Mr. Wilson. Quite  
7 frankly, the Court would be inclined purely for its own  
8 purposes to indeed deny it without application subject to  
9 being renewed. All right.

10 Given this wonderful world now of e-filing, it will  
11 only require the press of another button for this  
12 application to be filed if the movants believe that they  
13 now have a basis to establish the gentleman is a resident  
14 of the United States or can be found here. All right. So  
15 let's proceed to --

16 MR. WILSON: UBR.

17 THE WITNESS: -- UBR.

18 MR. WILSON: Well, your Honor, let me just address  
19 briefly a few of the prefatory remarks by my colleague  
20 about the process in Ecuador.

21 Mr. Cabrera was a court-appointed expert but he  
22 was -- his attorney's fees were paid for by the plaintiffs  
23 because they elected to have a damages expert. He is a  
24 civil law expert, so, he is in the course of that  
25 proceeding entitled to go out and seek materials as he sees

1 fit to prepare his report.

2 The court sanctioned a process where he was available  
3 to both parties in the course of his field work where he  
4 was doing sampling out in the Amazon. Both parties had  
5 access to him.

6 The court also provided that he could request  
7 documents from the parties, which he did, and the parties  
8 were both open to deliver documents to him.

9 THE COURT: Okay. Now, as I understand it, however,  
10 from Chevron's papers, the documents before the Court  
11 indicate that there was one and only one such sanctioned  
12 and reported delivery of documents to the court-appointed  
13 expert. Now, is that incorrect?

14 MR. WILSON: The record right now has one cover  
15 letter of about 3,000 pages that were delivered to the  
16 court ex parte and the underlying documents were given to  
17 Cabrera. That's the only cover letter in the record, but  
18 those documents were given sort of ex parte insofar as  
19 Chevron received the cover letter but did not receive the  
20 underlying documents.

21 Chevron has since requested from the Ecuadorian court  
22 to receive those documents and those requests have been  
23 denied. So, what we have here, if you step back, and I  
24 will refer the Court, my colleague referred to a number of  
25 exhibits to lay out the record here, exhibits O through S

1 of our papers give the plaintiffs' context for what the  
2 procedure was from some affidavits from local counsel and  
3 an Ecuadorian expert.

4 The question is looking at UBR and understanding what  
5 documents that Chevron is looking for, those documents  
6 could be broadly characterized into two camps; documents  
7 that were given to Cabrera to the extent that Cabrera  
8 reviewed them, and Chevron seeks those documents, and  
9 Chevron also seeks a series of other documents that were  
10 not given to Cabrera but that were circulated amongst  
11 plaintiffs' litigation team, and our submission is that to  
12 the extent that any documents were given to Cabrera, those  
13 documents are by definition in Ecuador because Mr. Cabrera  
14 is in Ecuador and that is where, to the extent that he  
15 received any documents, they would be in Ecuador and beyond  
16 the scope of 1782.

17 So, the second category of documents --

18 THE COURT: Let's stop right there. Chevron's  
19 argument, as I understand it, is that Mr. Cabrera has  
20 affirmed that he hasn't received any additional documents  
21 or material. I assume that affirmation is that he hasn't  
22 received anything other than that which was listed and  
23 provided to the court.

24 MR. WILSON: I don't think it's that clear, your  
25 Honor. I don't think it's that clear. I think Chevron

1 has -- Chevron is proceeding in all of these cases under  
2 the premise that there was improper contacts between the  
3 plaintiffs and Mr. Cabrera.

4 Our position has consistently been that to the extent  
5 that there were any contacts between the plaintiffs' team  
6 and Cabrera, it was pursuant to the process that was set up  
7 by the court which afforded plaintiffs the opportunity to  
8 presents documents to Mr. Cabrera.

9 But focusing on the application before you today in  
10 terms of what documents that they want from UBR, I think  
11 that Chevron -- Chevron asserts that there are two  
12 categories of documents; documents that they think were  
13 given to Cabrera and documents that were circulated amongst  
14 the plaintiffs' litigation team.

15 I just want to focus you, if you look at the universe  
16 of documents in those two camps, one category are in  
17 Ecuador beyond 1782.

18 THE COURT: But they're also here.

19 MR. WILSON: Well, to the extent that Chevron is  
20 seeking redundant discovery of those documents here, it  
21 seems to be an abuse of 1782 insofar as 1782 is for the  
22 purpose of obtaining documents that are beyond the subpoena  
23 power of the Ecuadorian court.

24 The Ecuadorian court can certainly order the  
25 production of documents if it needs them. But 1782 is



1       designed to obtain documents that are not available to the  
2       foreign jurisdiction, so, our view is that those documents,  
3       to the extent that what they're seeking is documents  
4       reviewed by Cabrera, they should ask Cabrera for those  
5       documents and they can get those documents because those  
6       documents are in Ecuador.

7               The second category of documents is also precluded by  
8       1782 because 1782 has within the statute a requirement that  
9       any material sought by 1782 not transgress privileges, and  
10      certainly documents that were not reviewed by Cabrera, that  
11      were only considered within the plaintiffs' litigation team  
12      are covered by that privilege.

13             There are two other aspects of this application  
14      which, when you're considering the Intel factors, militate  
15      against discovery. The first is receptivity of the foreign  
16      tribunal, and here there is a pending application in  
17      Ecuador to ask the Ecuadorian court whether the Ecuadorian  
18      court wants discovery. That hasn't been resolved yet but  
19      there is some indication from the fact that Chevron has  
20      made applications for additional documents in Ecuador and  
21      the Court has rebuffed a lot of the challenges that Chevron  
22      has made.

23             THE COURT: Let me ask you one other question. Let  
24      me stop you there for a second. As I understand the  
25      application, it is really an application pursuant to 1782

1 for documents in connection with two proceedings. One, as  
2 I understand it, is the Ecuadorian proceeding. The other  
3 is an international arbitration which was initiated by  
4 Chevron.

5 Now, I will candidly admit, you folks have inundated  
6 me with papers, but I gather that the gist of the  
7 arbitration that Chevron has initiated essentially seeks  
8 some type of declaration that the Ecuadorian proceedings  
9 are flawed, either on due process grounds or some other  
10 type of claim. Is that essentially correct?

11 MR. WILSON: That's right, your Honor. Effectively  
12 what they're doing in the BIT arbitration is asking,  
13 pursuant to this Bilateral Investment Treaty, they're  
14 litigating against Ecuador about whether or not our case,  
15 the plaintiffs' case in Ecuador, should be able to proceed.

16 THE COURT: Okay. And as I understand it, the  
17 application is that -- the application by Chevron is  
18 directed to obtaining documents in support of both claims.  
19 Correct?

20 MR. WILSON: That's right, your Honor.

21 THE COURT: Okay. Now, would it be your contention,  
22 for example, that the arbitration, the arbitrable  
23 proceeding would have the power to order Mr. Cabrera to in  
24 fact produce this stuff?

25 MR. WILSON: I certainly think that they can make

1 the -- they can make the application that Ecuador produce  
2 documents. Ecuador is the sovereign there and, to my  
3 knowledge, they have not made that application.

4 I will say that that BIT arbitration is in its  
5 infancy. It's subject to the Second Circuit right now.  
6 We've brought an application to stay the application.  
7 That's subject -- the briefing is undergoing in the Second  
8 Circuit.

9 THE COURT: And that's because I understand that your  
10 application to enjoin the arbitration --

11 MR. WILSON: That's right.

12 THE COURT: -- was denied by, was it Judge Sand?

13 MR. WILSON: That's right, your Honor.

14 THE COURT: Okay.

15 MR. WILSON: The arbitrators have also set briefing  
16 in that case that will culminate in a November hearing on  
17 jurisdiction, whether or not the panel has jurisdiction to  
18 proceed or not.

19 THE COURT: Okay. Now, getting back to where we  
20 were -- all right -- would I be totally misguided in my  
21 assumption that then the documents which Chevron is seeking  
22 in this particular proceeding, which they contend would  
23 demonstrate the existence of improper ex parte  
24 communications between UBR and Mr. Cabrera, would be at  
25 least arguably part of what they might be presenting to an

1       arbitrable proceeding to demonstrate that they had been  
2       denied due process in the Ecuadorian proceedings?

3               MR. WILSON: That's right, your Honor. But they're  
4       still subject to the same requirements of 1782, which means  
5       that to the extent that they seek any of those documents,  
6       they can't transgress a privilege, and those documents need  
7       to be in the jurisdiction of the court issuing the  
8       subpoena.

9               THE COURT: Okay.

10              MR. WILSON: And there can't be an end run around  
11       foreign proof-gathering mechanisms. So, having not even  
12       applied to the BIT arbitration, it would appear to be  
13       premature for them to be seeking discovery here in aid of  
14       that arbitration, which, I'll say again, is subject to our  
15       application to stay and hasn't even found it has  
16       jurisdiction to proceed yet.

17              THE COURT: Now, as I recall it, the courts in --

18              MR. WILSON: -- Texas?

19              THE COURT: Texas, the 3TM.

20              MR. WILSON: Exhibit -- where are we? Yes, Exhibit  
21       OO.

22              THE COURT: That court had concluded, as Chevron  
23       argues, that at least to the extent that the consultant,  
24       the consulting --

25              MR. WILSON: Consultant's consultant, that's right.

1       That shows you how broad the scope of these applications  
2       are, your Honor.

3               THE COURT: All right. -- had provided material to  
4       Mr. Cabrera, that waived any work product claim. You  
5       disagree with that?

6               MR. WILSON: Yes, we do, your Honor, and I can --

7               THE COURT: Why is that?

8               MR. WILSON: I can explain why. First of all, all  
9       documents that are prepared by a consulting expert are  
10      covered by the attorney-consultant privilege. That's black  
11      letter law and these -- so, ordinarily if an attorney hires  
12      a consultant, all of those communications are protected.

13              There is an exception to that when a party can show  
14      extraordinary circumstances where, in a U.S. context, if  
15      those documents are shared with a testifying expert, so,  
16      the question is --

17              THE COURT: Well, that would not be extraordinary  
18      circumstances. That would essentially be regarded as a  
19      waiver of any such privilege.

20              MR. WILSON: Well, I think --

21              THE COURT: Isn't that correct?

22              MR. WILSON: I think those are treated the same.  
23      Under 26 -- under Federal Rule of Civil Procedure 26, the  
24      rule requires exceptional circumstances for the disclosure  
25      of consulting expert materials, but this is -- it's

1 effectively a waiver if you give your work product to  
2 someone who's going to be testifying.

3 THE COURT: In short, basic discovery law under 26 is  
4 also that material which the testifying expert considered  
5 in formulating his opinion is in fact subject to discovery.  
6 Correct?

7 MR. WILSON: Exactly. So, our argument is that in  
8 order to show a waiver of the consulting privilege, Chevron  
9 has to show that this material was disclosed in a manner  
10 that would be analogous to the disclosure of that material  
11 to a testifying expert in the United States.

12 In Ecuador, however, you have an expert who never  
13 provides oral testimony. He provides written testimony  
14 which is subject to written questions and then he provides  
15 written responses and, so, the purpose in the United States  
16 of disclosing materials that are given to a testifying  
17 expert so that they can be used for cross examination in  
18 the course of their testimony at trial.

19 In Ecuador, Chevron has already propounded questions,  
20 interrogatories on Mr. Cabrera for which he has already  
21 responded fully to and, so, given that there is a process  
22 in Ecuador whereby parties can provide in an ex parte  
23 manner documents to Mr. Cabrera, our argument is that the  
24 nature of those communications is not analogous to the  
25 delivery of documents in the United States context.

1           THE COURT: And the countervailing argument would be  
2           that regardless of the manner in which his conclusions and  
3           opinions are ultimately presented to the court, whether he  
4           presents it in writing or orally in testimony, it is  
5           testimonial since it, in fact, is considered by the trier  
6           of fact in reaching a decision.

7           So that would not be fundamentally any different  
8           from, for example, one judge of this court used to provide  
9           that in patent cases the plaintiff's expert report was  
10          deemed to be the plaintiff's -- I'm sorry, not the  
11          plaintiff's, but the party's expert report was deemed to be  
12          the witness' direct testimony and the parties immediately  
13          proceeded to cross examination. That was, I think in that  
14          judge's view, an expeditious way of proceeding. I think he  
15          was disabused of that ultimately when he discovered exactly  
16          how voluminous an expert report could be, but --

17          MR. WILSON: Certainly.

18          THE COURT: -- is there any fundamental difference?

19          MR. WILSON: Well, our position is that there is a  
20          fundamental difference and the nature of the fundamental  
21          difference is the civil law proof-gathering process where  
22          the expert is able to go out and independently gather  
23          materials and those materials are not in and of themselves  
24          subject to discovery in Ecuador until his final report.

25          THE COURT: Doesn't Intel vs. Microsoft teach that we

1 are to evaluate this under U.S. discovery rules, that the  
2 effort to do this transliteration to foreign procedures  
3 ends up in fact being such a convoluted process that it is  
4 ultimately dysfunctional, and I think frankly the Supreme  
5 Court says that, which is for purely pragmatic reasons that  
6 we don't want to get involved in wheels within wheels,  
7 we're going to in fact view it under U.S. discovery rules  
8 per se. Correct?

9 MR. WILSON: Well, your Honor, Intel says two things.  
10 It certainly says that there's no discoverability  
11 requirement, as you properly summarized, but it says  
12 another thing, too. Intel says that courts should not be  
13 granting 1782 applications that are an effort to circumvent  
14 foreign proof-gathering mechanisms.

15 So, the Court needs to also consider whether or not  
16 this application is antithetical to the proof gathering  
17 that would be taking place in Ecuador, and when you have a  
18 court in Ecuador that has received these same applications  
19 that Chevron has made here today and has denied those  
20 applications, our submission is that Chevron is seeking  
21 materials that are antithetical to the process that was set  
22 up in Ecuador, which it bears noting that Chevron selected  
23 itself to submit itself to.

24 I mean, there is some irony to this proceeding that  
25 we're now litigating in seven states in the United States



1       discovery issues here when Ecuador demanded for a decade  
2       from 1993 to 2003 that the facts were in Ecuador and we  
3       needed to go to Ecuador. So, your Honor is exactly right,  
4       there's no discoverability requirement, but we urge you to  
5       consider the extent to which Chevron's massive discovery  
6       effort in the United States right now is an effort to  
7       circumvent foreign proof gathering.

8           THE COURT: And let me ask you this. With regard to  
9       the arbitrable proceeding, is it an effort to circumvent  
10      the proof-gathering proceedings of the arbitration?

11          MR. WILSON: Our position is that it is insofar as  
12      they have not sought this material pursuant to the  
13      arbitration and that they could make that application, they  
14      haven't made that application --

15          THE COURT: Let me stop you. I like to be educated  
16      by this type of arbitration proceeding because, generally  
17      speaking, for example, in the United States an arbitrator  
18      has no power to compel non-parties to produce anything.  
19      Now, is that different in this arbitration?

20          MR. WILSON: Well, this arbitration, the party is the  
21      Republic of Ecuador and, so, I think it's -- the question  
22      about whether or not the BIT arbitrators can prevail upon  
23      Ecuador to produce documents that are in Ecuador is a  
24      question which hasn't been presented to the BIT arbitration  
25      as of yet because that arbitration is in its infancy. It

1       hasn't even determined that it has jurisdiction yet.

2               THE COURT:   And of course, when you say they're in  
3       the possession of Ecuador, they're in the possession of the  
4       courts of Ecuador, which would raise the issue of whether  
5       or not the central government of Ecuador would have any  
6       power to direct its courts to produce this stuff.

7               MR. WILSON:   Well, Chevron, I think somewhat  
8       cynically, seeks as part of its relief that the Republic of  
9       Ecuador direct its judiciary to make a finding of no  
10      liability in the underlying case, so, if one is to take  
11      Chevron at its word, Chevron perceives that Ecuador can  
12      just snap its fingers and tell the judiciary to do what it  
13      likes.

14              Of course, our position, to the extent that we have  
15      one given that we're not parties to that, is that what --  
16      the argument that we've advanced in the Second Circuit is  
17      that it's improper for Chevron to be seeking relief that  
18      would extinguish our rights, and that is the grounds upon  
19      which we are seeking to stay that proceeding.

20              I think my colleague did refer to this Texas judgment  
21      and the two things that I wanted to say about that opinion  
22      are what you would expect, which is that this Court should  
23      use its own judgment to determine whether or not to issue  
24      the 1782 proceedings in New Jersey and, secondly, and I  
25      think not insignificantly, that that court, like the court

1 in Colorado, has raised concerns about the scope of the  
2 discovery sought, and at the end of its opinion at page  
3 seven the court states that, "However, given the broad  
4 scope of the subpoena, it's quite possible some of the  
5 documents requested have not been turned over to Cabrera  
6 and, therefore, one or more privileges may apply."

7 THE COURT: Okay. So let's stop there for a second.  
8 All right. Now, if I recall correctly, the procedures  
9 which the Ecuadorian court developed with regard to Mr.  
10 Cabrera according to your papers are that, in fact, once  
11 the documents and material which he used in formulating his  
12 opinion and report become at least public in terms of the  
13 parties end up being released. Is that correct?

14 MR. WILSON: My understanding is that to the extent  
15 that he reviewed documents, that those documents are -- can  
16 be made available through the Ecuadorian court process.

17 I think it's at the end of having concluded his  
18 report, I think there is the anticipation that documents  
19 that he reviewed would be either reflected in his report,  
20 as here you have the report reflecting at least one panel  
21 from the UBR.

22 THE COURT: Okay. Anything further?

23 MR. WILSON: Your Honor, I would like to briefly  
24 address the concerns expressed by exigency in this case.  
25 This is a battle that Chevron and the plaintiffs have been

1 going back and forth with with some regularity.

2 I will just give the Court the update that in the  
3 Ecuadorian case, since the expert reports that had  
4 previously been extant have been submitted, the next thing  
5 that's going to happen in that proceeding is that at  
6 sometime the court in Ecuador will issue a statement that  
7 the case is moving towards final arguments.

8 The parties will then have the opportunity to present  
9 closing arguments and then after their closing arguments  
10 are submitted, then the court has the opportunity to enter  
11 a judgment. So, we're not on the eve of a judgment in that  
12 proceeding, as Chevron continues to represent, insofar as  
13 the BIT arbitration.

14 THE COURT: But let me ask you this. Have you been  
15 urging the Ecuadorian court to issue an opinion and a  
16 decision as quickly as possible?

17 MR. WILSON: Absolutely. But your Honor, the point  
18 is that Chevron has been delaying that case and so we have,  
19 of course, as the plaintiffs, as every plaintiff is, are  
20 trying to move that procedure along as fast as possible.

21 The most recent submissions that we made were to  
22 request that the court direct that the outstanding expert  
23 reports be submitted because Chevron had been holding back  
24 those reports and that was a barrier to advancing to the  
25 next stage in the litigation.

1           So, the courts responded to that application and  
2           provided a schedule for the submission of those outstanding  
3           expert reports. Those outstanding expert reports have now  
4           been submitted and, of course, the plaintiffs want that  
5           procedure to move forward.

6           But what I'm submitting to the Court is that the  
7           process that will take place, that is inevitable, is that  
8           the court in Ecuador has not yet issued the statement that  
9           invites the submission of closing arguments and we are  
10          still two steps away from getting that judgment.

11          THE COURT: And I'm curious. I assume this is a  
12          proceeding in which the judge issues a decision and an  
13          opinion. Correct?

14          MR. WILSON: Ultimately, the judge issues an opinion,  
15          yes, and then that opinion goes up to -- is not an  
16          enforceable judgment until it is reviewed by a secondary  
17          panel, I believe it's a three-judge panel in the local  
18          area, and after that panel considers it, then it's an  
19          enforceable --

20          THE COURT: And I'm just curious. After that, what  
21          happens?

22          MR. WILSON: After that, there are additional appeals  
23          available to either party within Ecuador.

24          THE COURT: Okay. Thank you very much. Mr. Stern.

25          MR. STERN: Very, very briefly, your Honor. My

1 colleague, as he puts it, seemed to focus most of his  
2 attention on that portion of the subpoena which sought  
3 communications between UBR and Mr. Cabrera. He said very  
4 little about, if anything, that I've heard, about  
5 communications between UBR and the plaintiffs' counsel.

6 There are two separate items of the subpoena. As far  
7 as Mr. Cabrera is concerned, Mr. Cabrera has said he has no  
8 such documents, so, how are they prejudiced? If there be  
9 no such documents, the answer is simple, and if there are,  
10 then Mr. Cabrera has not told the truth and, obviously, you  
11 will be in great aid of the tribunal in Ecuador, which my  
12 adversary would say, I would suppose, would be very  
13 interested to find out whether or not his court-appointed  
14 expert has told the truth.

15 So, his answer should be we have no such documents,  
16 tell Chevron to go away. But he doesn't say that. He says  
17 you won't be helping the Ecuadorian court under the  
18 statute.

19 Now, as far as the subpoena which he hasn't talked  
20 about which calls for communications between UBR and the  
21 plaintiffs, that is not available in any Ecuadorian court.  
22 UBR is not there, as your Honor has pointed out, and most  
23 particularly, if your Honor does follow the decision in the  
24 Southern District of Texas, there is absolutely no  
25 privilege remaining between UBR and plaintiffs' counsel.

1 They waived it by their conduct and, in our view, their  
2 misconduct.

3 So, that may be why my adversary has not said  
4 anything at all about that portion of the subpoena which  
5 calls for UBR to produce documents and testimony concerning  
6 its contacts with the plaintiffs' counsel in reference to  
7 Mr. Cabrera. And --

8 THE COURT: Let me stop you there for a second.

9 MR. STERN: Sure.

10 THE COURT: The court in the 3TM case, as I  
11 understand it, held that to the extent that 3TM materials  
12 were provided to Cabrera, the attorney-client privilege is  
13 waived as to those materials.

14 I didn't understand the opinion as stating that all  
15 communications between 3TM and plaintiffs' counsel were  
16 waived. Now, did I miss that in the opinion?

17 MR. STERN: No, I don't know that you did, but you  
18 know, all I have is an opinion. I don't have the  
19 underlying papers. But I think that the situation in 3TM,  
20 I would be surprised if it were exactly the same as ours.

21 We have here a situation where UBR's employee is  
22 listed as an employee of Mr. Cabrera. This is not a  
23 situation where we simply are seeking some documents that  
24 they go back and forth.

25 We have here plaintiffs' counsel, through its

1 consulting expert, having a representative on the so-called  
2 independent expert staff.

3 Now, we haven't even discussed, because I didn't  
4 think it was necessary, the crime-fraud exception to  
5 privilege, but if there was ever a showing on a preliminary  
6 basis that there has been a violation, this is it.

7 I haven't heard one word denying in this court, not  
8 one word written on a piece of paper that denies that. In  
9 fact, their employee was in fact employed simultaneously by  
10 Mr. Cabrera.

11 Now, I think we're absolutely entitled to discover  
12 respectfully what went on between UBR and its employee, Mr.  
13 Villao, in terms of Mr. Cabrera.

14 THE COURT: Mr. Wilson.

15 MR. WILSON: Your Honor, Mr. Cabrera was employed by  
16 the plaintiffs. I think that --

17 THE COURT: Mr. Cabrera was employed?

18 MR. WILSON: Mr. Cabrera was employed by the  
19 plaintiffs. The expert in this case, the damages expert,  
20 his fees were paid by the plaintiff.

21 THE COURT: But to say that his fee was paid by the  
22 plaintiff is not to say that he is employed by the  
23 plaintiff.

24 MR. WILSON: That's exactly right, your Honor. And I  
25 think that's the sort of thing, that's the semantic canyon



1       that we've been brought into by --

2               THE COURT:   But have we?   The individual -- I forget  
3       his name so please refresh.

4               MR. STERN:   Villao.

5               THE COURT:   -- Villao, Mr. Villao, was he in fact  
6       retained by Mr. Cabrera to provide expert support for Mr.  
7       Cabrera's report?

8               MR. WILSON:   Your Honor, my understanding from Mr.  
9       Cabrera's report, and it's submitted by my colleagues, that  
10      he's listed as one of the technical experts.

11              THE COURT:   Fine.

12              MR. WILSON:   I don't actually know today what the  
13      import of that is, but he's certainly listed as one of the  
14      technical experts, absolutely.

15              THE COURT:   And there is no doubt that he's listed as  
16      an employee of UBR.   Correct?

17              MR. WILSON:   He is -- he is one of the consultants to  
18      UBR, that's right.

19              THE COURT:   Okay.   Now, that is an entirely different  
20      situation from your telling me that Mr. Cabrera's fees were  
21      paid by the plaintiffs in this case.   As I understand the  
22      procedure as you describe it in your papers, that arose  
23      from the fact that Chevron never sought to have an  
24      independent expert appointed, waived their time period to  
25      seek to try to have it, so, ultimately the court appointed

1 an expert because the plaintiffs had sought the appointment  
2 of an independent expert.

3 Chevron abdicated its role in the selection process  
4 and Ecuadorian procedures required that if only one party  
5 was seeking a court-appointed expert, they paid for it. Is  
6 that correct?

7 MR. WILSON: That's right, your Honor.

8 THE COURT: Okay. That does not make Mr. Cabrera an  
9 employee -- all right -- or does not make Mr. Cabrera  
10 plaintiffs' expert or, let's put it this way. If it did,  
11 then we all know that, in fact, he's not an independent  
12 court expert. He'd in fact be a plaintiff's expert.

13 MR. WILSON: Your Honor, I think that the situation  
14 that we have is that Mr. Cabrera was appointed in the court  
15 process and his fees were paid for by the plaintiffs and  
16 all I was pointing out to the Court is that to the extent  
17 that there are -- well, that was the modest point that I  
18 was making.

19 THE COURT: Okay. Anything further? All right. The  
20 Court will be issuing a decision very shortly. We'll get  
21 it out quickly.

22 MR. STERN: I'm sorry?

23 THE COURT: The Court will be issuing its decision  
24 very quickly and get it out to you folks.

25 MR. WILSON: Thank you.

1           MR. STERN: I appreciate that. Your Honor, without  
2           anticipating what it would be, what I'm trying to avoid is  
3           an opinion and then further proceedings to set dates  
4           because for us, for us delay is defeat in some ways, and  
5           I'm not trying to jostle your arm in terms of your opinion  
6           but, rather, to work out some early dates because I  
7           anticipate that my adversary is going to seek a stay and so  
8           forth. So, I don't know if you can help me, maybe you  
9           can't, but that's my problem.

10          THE COURT: Tell you what, Mr. Stern.

11          MR. STERN: I'm sorry, sir? I just don't hear so  
12          well.

13          THE COURT: I'll tell you what, Mr. Stern. I'll be  
14          issuing an oral decision on this case at three o'clock  
15          today. Reappear. I'll issue my opinion and my order. All  
16          right.

17          MR. STERN: That's wonderful. Thank you, your Honor.

18          THE COURT: All right. Thank you very much.

19          (A recess is taken.)

20          THE COURT: Good afternoon, counsel. Please enter  
21          your appearances.

22          MR. STERN: Good afternoon, your Honor. Herb Stern  
23          and Steve Plotnick from Stern & Kilcullen for Chevron.

24          MR. WILSON: Andrew Wilson of Emery -- I apologize.  
25          Go ahead.

1 MS. HENDRICKS: Kristen Hendricks from Gibson, Dunn &  
2 Crutcher for Chevron.

3 MR. WILSON: And O. Andrew F. Wilson from Emery  
4 Celli, Brinckerhoff & Abady for the Respondents, your  
5 Honor.

6 THE COURT: Okay. Thank you. All right. The Court  
7 indicated that it would give an oral opinion this  
8 afternoon. The Court has reviewed this matter and has  
9 indeed concluded that discovery sought by the applicant,  
10 Chevron Corporation, pursuant to the provisions of Title 28  
11 U.S.C. Section 1782 should be conducted.

12 As the Court will indicate later, the Court, as did  
13 the court in 3TM Consulting, LLC, does have some concerns  
14 that documents covered by the subpoena may nevertheless  
15 still remain privileged and the Court will deal with that  
16 as we proceed.

17 Chevron Corporation initiated this action pursuant to  
18 the provisions of Title 28 U.S.C. Section 1782, seeking an  
19 order permitting the issuance of subpoenas for the  
20 production of documents and depositions which it contends  
21 related to two proceedings pending outside this district  
22 and, indeed, outside the American judicial system.

23 Section 1782 authorizes the district court for the  
24 district in which a person resides or is found to "order  
25 him to give his testimony or statement or to produce a

1 document or other thing for use in a proceeding in a  
2 foreign or international tribunal", 28 U.S.C. Section 1782.

3 One of the proceedings at issue here is a lawsuit  
4 pending in the Ecuadorian court and venued in Lago Agrio,  
5 Ecuador, and the Court will refer to that action as the  
6 Lago Agrio litigation.

7 The Lago Agrio litigation is a class action initiated  
8 in 2003 by residents of Ecuador against Chevron seeking  
9 relief under Ecuadorian environmental law for the alleged  
10 pollution of Amazonian rain forests and rivers committed in  
11 connection with the oil exploration and extraction  
12 activities of Texaco, which had become a wholly-owned  
13 subsidiary of Chevron in 2001.

14 The other proceeding is an international arbitration  
15 filed by Chevron against the Republic of Ecuador under the  
16 United Nations Commission of International Trade Law Rules  
17 pursuant to a Bilateral Investment Treaty between the  
18 United States and Ecuador, and the Court will refer to this  
19 arbitration as the Treaty Arbitration.

20 The Treaty Arbitration relates to Chevron's  
21 contention that the Republic of Ecuador has engaged in  
22 improper conduct in the Lago Agrio litigation.

23 At the time Chevron filed the instant application, it  
24 sought two subpoenas; one to be issued to a consulting firm  
25 known as Uhl, Baron, Rana & Associates, which I will refer

1 to as UBR, and one to an individual employee of UBR named  
2 Juan Cristobal Villao Yopez, whom we'll refer to as Mr.  
3 Villao in the future references.

4 Both UBR and Villao specifically contributed to an  
5 expert report issued by Richard Stalin Cabrera Vega, and  
6 this will be referred to as the Cabrera report, who was  
7 appointed by the Ecuadorian court in the Lago Agrio  
8 litigation to serve as the neutral and independent expert.  
9 Although Cabrera was supposed to remain strictly  
10 independent of the parties to the Lago Agrio litigation,  
11 Chevron contends that mounting evidence demonstrates that  
12 Cabrera's work and his report were completed in secret  
13 collaboration with the Lago Agrio plaintiffs and their  
14 representatives. As such alleged illicit cooperation  
15 concerns the instant application, Chevron contends that UBR  
16 and/or Villao also had been employed by the Lago Agrio  
17 plaintiffs.

18 The documents and depositions sought by Chevron  
19 relate to the alleged relationship and communications  
20 between the Lago Agrio plaintiffs, including their counsel,  
21 and UBR and/or Villao.

22 The Court notes that, acknowledging that Villao may  
23 not be found in this district, Chevron has requested that  
24 the Court defer its 1782 application with respect to Villao  
25 until such time as Chevron takes discovery from UBR that

1 may shed light on the location of Villao and/or the  
2 location of the work he did for the Lago Agrio litigation.

3 The Court will thus proceed to evaluate whether  
4 Chevron's application is warranted only as to UBR.

5 As to the application with regard to Mr. Villao, that  
6 application will be dismissed without prejudice to being  
7 resubmitted should Chevron choose to do so.

8 Now, a district court is authorized to grant a  
9 Section 1782 application where, one, the person from whom  
10 discovery is sought resides or is found in the district of  
11 the district court to which the application is made; two,  
12 the discovery is for use in a proceeding before a foreign  
13 tribunal; three, the application is made by a foreign or  
14 international tribunal or any interested person; and four,  
15 the materials or statements sought are not covered by any  
16 legally applicable privilege.

17 Once these statutory requirements are met, the  
18 district court may grant the application in its discretion.  
19 *Intel v. Advanced Micro Devices, Inc.*, 542 U.S. 241 at 264  
20 (2004).

21 In *Intel*, the Supreme Court identified four factors  
22 to guide the Court's exercise of its discretion to grant or  
23 deny the application. Those factors are: One, whether  
24 the material sought is within the jurisdictional reach of  
25 the foreign tribunal; two, the nature of the foreign

1        tribunal, the character of the proceedings underway abroad,  
2        and the receptivity of the foreign tribunal to the United  
3        States federal court assistance; three, whether the 1782  
4        application is an attempt to circumvent the foreign  
5        proof-gathering restrictions or policies; and four, whether  
6        the request is unduly intrusive or burdensome.

7                The Court finds that the statutory requirements of 28  
8        U.S.C Section 1782 have been met. UBR maintains an office  
9        in Lambertville, New Jersey, and there's no dispute that  
10       it's thus found in this district. The materials are sought  
11       for use in proceedings pending in a foreign tribunal, the  
12       Lago Agrio litigation and the Treaty Arbitration which is  
13       pending before a tribunal established by international  
14       treaty between the United States and Ecuador.

15               There is also no dispute that Chevron is an  
16       interested party within the meaning of Section 1782, as it  
17       is a party to both of the foreign proceedings underlying  
18       the instant application. And finally, despite plaintiff's  
19       argument to the contrary, the Court finds that the  
20       information sought from UBR is not shielded by any  
21       applicable privilege under the laws or rules of this  
22       jurisdiction.

23               In particular, with regard to privilege, Respondents  
24       have argued that the subpoena cannot issue because it seeks  
25       to uncover documents which are covered by the work product



1 privilege and documents which were circulated and  
2 communicated and engaged in amongst plaintiffs' litigation  
3 team.

4 They take the position that because UBR was a  
5 consulting expert to the Lago Agrio plaintiffs, it is  
6 shielded from discovery by the non-testifying expert  
7 privilege embodied in Federal Rule of Civil Procedure  
8 26(b)(4)(B). That rule provides that absent "exceptional  
9 circumstances, a party may not, by interrogatories or a  
10 deposition, discover facts known or opinions held by an  
11 expert who has been retained or specially employed by  
12 another party in anticipation of litigation or to prepare  
13 for trial and who is not expected to be called as a witness  
14 at trial."

15 Respondents also contend that the documents sought by  
16 the subpoena were prepared in furtherance of UBR's work on  
17 the Lago Agrio litigation and are thus protected by the  
18 work product doctrine and, moreover, to the extent that  
19 they reflect the thoughts, mental impressions or opinions  
20 of the Lago Agrio plaintiffs' counsel, by the  
21 attorney-client privilege.

22 Assuming any privilege would apply to some or all of  
23 the discovery sought by Chevron in this case, Chevron has  
24 demonstrated in general that the privileges have been  
25 waived or, alternatively, that pursuant to the crime-fraud

1       exception, the attorney-client privilege should not be  
2       honored.

3               The Court notes that with regard to work product and  
4       non-testifying expert privileges asserted by the  
5       Respondents in this case, similar issues were presented to  
6       the U.S. District Court for the Southern District of Texas,  
7       Houston Division, in the matter of the application of  
8       Chevron Corporation vs. 3TM Consulting, LLC and 3TM  
9       International, Inc., docketed as Miscellaneous Action No.  
10      H-10-134. In that particular case the court considered the  
11      non-testifying expert privilege contention which was  
12      asserted in a virtually identical manner to that which is  
13      asserted here and the court in 3TM concluded the Ecuadorian  
14      plaintiffs' argument on this point is unavailing. While  
15      3TM may well have originally been hired to serve only in a  
16      consulting expert capacity, as soon as its report was given  
17      to the court or at least an auxiliary of the court to be  
18      used in preparing Cabrera's expert report, that shield was  
19      lost by the very nature of Cabrera's report, his role, his  
20      testimony that the Ecuadorian court will consider in making  
21      its ruling.

22              Additionally, the question before this Court is  
23      whether, under U.S. law, not Ecuadorian law, the  
24      information is privileged. By providing consulting expert  
25      reports to a testifying expert, the privilege is lost.

1           The Court concludes that that same analysis applies  
2 here to the extent that any information or any material was  
3 provided by UBR or any of its employees to Cabrera.

4           Likewise, with regard to the work product privilege,  
5 to the extent that this material might constitute work  
6 product, it is clear that to the extent that the material  
7 was given voluntarily to Cabrera, again, an agent of that  
8 court, the privilege was destroyed.

9           Likewise, with regard to an attorney-client  
10 privilege, to the extent that material was again provided  
11 to Mr. Cabrera, a third party under U.S. law, the privilege  
12 would likewise be destroyed.

13           Moreover, in this case, to the extent that documents  
14 reflect communications between Mr. Villao and counsel for  
15 plaintiffs, the Court is satisfied that an adequate prima  
16 facie demonstration of the operation of the crime-fraud  
17 exception indeed has been established here. It appears at  
18 a minimum from the documentation presented to this Court  
19 that Mr. Villao not only had an employment relationship  
20 with UBR but at the same time was listed by Mr. Cabrera as  
21 one of the consultants providing information to that  
22 independent court-appointed expert.

23           As far as the Court is concerned, the concept of an  
24 employee of a party covertly functioning as a consultant to  
25 a court-appointed expert in the same proceeding can only be

1 viewed as a fraud upon that tribunal. Although Cabrera's  
2 report identifies Villao as one of the experts who assisted  
3 in the preparation of the report, there is no suggestion  
4 that Mr. Villao's relationship with UBR or plaintiffs'  
5 litigation team was openly disclosed.

6 Under those circumstances, this Court must conclude  
7 that Mr. Villao's communications with Cabrera likewise are  
8 not protected by any privilege and, moreover, Mr. Villao's  
9 communications with plaintiff's counsel would not be  
10 covered by any privilege.

11 In short, the provision of materials and information  
12 by consultants on the litigation team of the Lago Agrio  
13 plaintiffs in what appears to be a secret and an  
14 undisclosed aid of a supposedly neutral court-appointed  
15 expert in this Court's view constitutes a prima facie  
16 demonstration of a fraud on the tribunal.

17 Respondents also argue that the Intel factors  
18 militate against granting the Section 1782 application. In  
19 particular, they argue that the documents sought by Chevron  
20 - documents provided to the Ecuadorian court-appointed  
21 expert Cabrera - are within the jurisdictional reach of the  
22 foreign tribunal, which may order Cabrera to supply the  
23 documents Chevron requests in this application.

24 The problem with that argument is two-fold: First,  
25 there is no contention that the arbitration tribunal in

1 fact has the power to order the production of any such  
2 records and, secondly, it ignores the fact that Mr. Cabrera  
3 has apparently indicated that he has not been in receipt of  
4 any documents from UBR except, I presume, to the extent  
5 that they have been formally listed and provided to the  
6 court. Thus, directing Mr. Cabrera to produce documents  
7 which he says he did not have would be pointless and  
8 fruitless as an exercise by the Ecuadorian court.

9 Respondents also take the position that Chevron's  
10 instant application constitutes an effort to circumvent the  
11 rulings and jurisdiction of the Ecuadorian court,  
12 apparently based upon the denial of prior efforts to have  
13 such material ordered to be produced by the Ecuadorian  
14 court.

15 This again, however, ignores the fact that in the  
16 Treaty Arbitration, the arbitrable body does not have the  
17 authority to order such a production. The documents are  
18 clearly, in this Court's view, relevant to the proceedings  
19 before the arbitration and, therefore, there cannot be any  
20 realistic argument that this application is an effort to do  
21 an end-run around or circumvent the decisions of that  
22 particular body.

23 In short, Respondent's argument completely side-steps  
24 the need for the UBR discovery in aid of the Treaty  
25 Arbitration and Chevron's application is made not only for

1 the Lago Agrio litigation, but also for the Treaty  
2 Arbitration.

3 The jurisdictional reach of the Treaty Arbitration  
4 tribunal does not extend to either UBR or Cabrera and  
5 documents provided by UBR to Cabrera and any documents or  
6 testimony concerning the allegedly improper and collusive  
7 relationship existing between those on the Lago Agrio  
8 plaintiff's legal team and the Ecuadorian court-appointed  
9 expert would not be obtainable for use in the Treaty  
10 Arbitration absent discovery under Section 1782(a).

11 An additional factor favoring granting Chevron's  
12 application is that UBR is not a party to either of the  
13 foreign proceedings and, as the Court has indicated, both  
14 UBR and Cabrera are beyond the jurisdictional reach of the  
15 Treaty Arbitration tribunal.

16 Another factor is receptivity of the foreign tribunal  
17 and that is neutral as to the Treaty Arbitration tribunal  
18 since the Court has not heard from them; however, even if  
19 the Ecuadorian court were opposed to receiving the aid of  
20 this Court with the production of documents and  
21 information, this alone would not be dispositive. Intel,  
22 542 U.S. at 265, (holding that Section 1782 application  
23 could be granted even though a foreign tribunal, the  
24 European Commission, stated in amicus curiae briefs to the  
25 Supreme Court that it did not need or want the United

1 States District Court's assistance.)

2 In short, the Court does not view this as an effort  
3 by Chevron to make an end-run around the Ecuadorian court's  
4 proof-gathering restrictions. The evidence sought is  
5 probative of issues in the Lago Agrio litigation, as  
6 Chevron needs the sought evidence to impeach the Cabrera  
7 report if its suspicions of an improper relationship are  
8 borne out. Moreover, the evidence sought goes to the heart  
9 of the Treaty Arbitration's concern with the conduct of the  
10 Lago Agrio litigation.

11 And finally, there is no indication that the  
12 application regarding UBR is unduly intrusive or  
13 burdensome.

14 Based upon those findings, the Court concludes that,  
15 indeed, the application by Chevron Corporation for an order  
16 to conduct discovery proceedings is indeed authorized.

17 As the Court indicated, the Court is concerned, as  
18 was the court in, I believe it's 3TM, that it is possible  
19 that nevertheless some material sought by what can only be  
20 described as a voluminous document request may be violative  
21 to a limited extent of the attorney-client privilege.

22 In short, the Court concludes that communications  
23 between Mr. Villao and plaintiffs' counsel are not covered  
24 by the attorney-client privilege and that is, indeed,  
25 because of the Court's determination with regard to the

1 crime-fraud exception.

2 To the extent that communications between plaintiff  
3 and UBR are not covered by that and to the extent that they  
4 have not been provided to Cabrera, there is the possibility  
5 that some of those documents nevertheless preserve either  
6 an attorney-client privilege protection or a work-product  
7 protection. The Court will therefore direct that, as the  
8 court in 3TM directed -- and I'm trying to find the opinion  
9 again so excuse me for just one moment.

10 MR. WILSON: Your Honor, I think it's OO.

11 THE COURT: Therefore, the court will, as the Court  
12 in 3TM ordered, direct the plaintiffs to submit a list of  
13 the documents which were turned over directly or indirectly  
14 to Cabrera by this coming Wednesday. What day is that?

15 MR. WILSON: Your Honor, this Wednesday is the 16th,  
16 but my client is out of the country until the 16th, so,  
17 it's not practical for us to be able to communicate with  
18 him with respect to his documents if he's not within the  
19 district until that day.

20 THE COURT: When can a list be turned over by?

21 MR. WILSON: Your Honor, I can communicate with him  
22 and be back in touch with the Court to give you a date on  
23 Monday, after I speak with him today, but I'm not in a  
24 position to make a representation as to a particular date  
25 without speaking to him.



1 THE COURT: Mr. Stern?

2 MR. STERN: From what I could see of the list of  
3 employees, this is not a one-person operation and it may  
4 well be, and I'm sure, I don't doubt Mr. Wilson's word that  
5 one person is out of the district or even out of the  
6 country, but I don't believe this is a one-person shop.

7 Now, Mr. Wilson is in a better position to know than  
8 I am, but I call upon him through the Court to make a  
9 representation as to whether there are other people there  
10 who would be in a position to respond.

11 MR. WILSON: Your Honor, I don't know whether or not  
12 anybody else at UBR is in a position to respond. I have  
13 been in touch with one principal there who I spoke to this  
14 morning, who I can speak to immediately after the hearing,  
15 but as I stand here today, I don't want to make a  
16 representation to the Court that I can't meet and, so, I'm  
17 happy to, first thing on Monday, provide a letter to the  
18 Court indicating the date upon which we can provide that  
19 list, and I represent that we'll provide it promptly.

20 I'd also -- I mean, there's also the possibility,  
21 your Honor, after we review your Honor's opinion, that we  
22 seek review of that opinion, so, I just want to say that in  
23 other districts where we have discovery disputes with  
24 Chevron, we view these privilege issues with some gravity  
25 and we have sought reviews, so, that's a possibility here.

1 I don't know. I've heard your opinion five minutes ago,  
2 so, I don't know whether or not we'll be seeking --

3 THE COURT: It's not totally dissimilar from other  
4 opinions which have been issued, Mr. Wilson.

5 MR. WILSON: Yes. No, I appreciate that, your Honor.  
6 So, in that regard, then, we may be in a position where  
7 we're seeking a stay of discovery so that we can get the  
8 input of the appellate court.

9 MR. STERN: Your Honor, respectfully, may I be heard  
10 for a moment?

11 THE COURT: Yes.

12 MR. STERN: That should not impact the role of the  
13 schedule. As you said, it just means that they have to  
14 move along to the next level.

15 I would respectfully direct your attention to Exhibit  
16 Y, I don't know if it's before you but I have a copy, if I  
17 could hand it up.

18 THE COURT: Please. Thank you, Mr. Stern.

19 MR. STERN: This is the exhibit which had Mr.  
20 Villao's CV on it, but that's near the end. You can see  
21 all the personnel that are associated with UBR and, so, I  
22 really believe that they could get started collecting the  
23 documents that you've called for, and I haven't even heard  
24 a representation that they can't, just that one man is out  
25 of the country.

1           MR. WILSON: Your Honor, what I am proposing to the  
2 Court is that I have the opportunity to speak to my client  
3 and ask him for how long it will take him to prepare the  
4 records. I'm not suggesting that he's the only one who  
5 could gather them. All I'm saying is that given that I  
6 haven't spoken to him about the timeliness of this and  
7 given that he -- to the extent that he personally needs to  
8 be involved in it, he's unable to be involved in it.

9           I can't make a representation to the Court as to how  
10 his associates can contribute to his efforts or not. I  
11 just don't know.

12          THE COURT: Okay. Well, I will want a list of  
13 documents which UBR provided to Mr. Cabrera, documents  
14 which Mr. Villao or communications from Mr. Villao to Mr.  
15 Cabrera, communications by Mr. Villao to plaintiffs'  
16 counsel or any representative of plaintiffs' counsel, and a  
17 listing of them, and I'll want a list of any documents  
18 which are covered by the applicant's subpoena which the  
19 Respondents contend nevertheless will survive as privileged  
20 or could survive as privileged; in short, a privilege log.

21          MR. WILSON: Your Honor, in Colorado the courts have  
22 directed that the parties prepare a privilege log and the  
23 end date for that privilege, it's a rolling production, the  
24 end date for that privilege is August 6.

25          Now, I don't know in this case whether we have the

1 same volume of documents because, as I said before, I  
2 haven't had the opportunity to speak to my client, but I  
3 will say that depending on the scope of the documents,  
4 that's going to make a radical difference in terms of if  
5 we're talking about five documents, then we can make those  
6 available very quickly. If we're talking about the level  
7 of documents that were involved in the Colorado action, it  
8 could take a lot more time.

9 I will also just say one more thing about the list  
10 that you suggested. The documents from Villao to Cabrera,  
11 my understanding is that Villao is not a subject of this  
12 1782 proceeding and, so, we're not in a position to  
13 provide --

14 THE COURT: Those documents from Mr. Villao to  
15 Cabrera which are in the possession of UBR.

16 MR. WILSON: Okay. Certainly.

17 THE COURT: Okay?

18 MR. WILSON: Certainly.

19 MR. STERN: If your Honor please, as counsel properly  
20 stands before you saying he doesn't know about the volume,  
21 so, my suggestion would be that you set the dates that you  
22 had intended to. They should immediately comply as best  
23 they can and should then provide you with sworn  
24 certifications as to what the volume in fact is and what,  
25 therefore, they can do as a practicable matter.

1           I suspect that the next step after the entry of the  
2           order, in any event, is going to be before either a one  
3           judge or a panel of the circuit, and we can get started on  
4           that while they are collecting the documents. So, that's  
5           my respectful suggestion and I think what you had suggested  
6           by time is appropriate.

7           THE COURT: I'll tell you what, Mr. Wilson. Get  
8           together what you can and make your best efforts to get  
9           that information to opposing counsel by the close of  
10          business on Wednesday. I am going to set this down for  
11          counsel to be in front of me the next day on Thursday at  
12          12:00, and to the extent --

13          MR. WILSON: Your Honor, I have a 2:30 -- I'm afraid  
14          I have a 9:30 and a 2:30 conference in New York Supreme  
15          Court on that day. Getting here --

16          MR. STERN: If your Honor please, as reluctant as I  
17          am to lose a day, I'm in an arbitration on Tuesday,  
18          Wednesday, Thursday, but I could be here Friday if your  
19          Honor please. There's nothing I can do about that. My  
20          colleagues kind of want me to be here, but we have other  
21          people who could do it on Thursday if you can't do it, I  
22          don't want it to go beyond Friday, so, if that's not  
23          convenient to your Honor --

24          THE COURT: Let me consult with my staff for a few  
25          moments here.

1           (Discussion off the record.)

2           THE COURT: Mr. Wilson, when are you due in New York?

3           MR. WILSON: 2:30, so, I mean, and I have the 9:30,  
4 but perhaps I can -- maybe noon will work. I can come over  
5 and then try to get back.

6           THE COURT: Let's do noon. Unfortunately, I have a  
7 very busy Thursday and Friday also has its own issues.  
8 Okay. Mr. Stern, can you get somebody else to stand in for  
9 you?

10          MR. STERN: They'll be very happy to have me out of  
11 the way.

12          THE COURT: All right. And I think, quite frankly,  
13 counsel and I appreciate, Mr. Wilson, that indeed, you  
14 know, there's a substantial possibility that you're going  
15 to seek a stay and an appeal -- all right -- but totally  
16 apart from that, to the extent that counsel can, in fact,  
17 agree upon a form of order which you can live with in this,  
18 including the scope of the subpoena which meets my  
19 concerns, that will make all of you have a much happier  
20 district judge, so, you can use that interim also to  
21 discuss, indeed, whether or not perhaps the scope of the  
22 subpoena in fact can voluntarily be narrowed down.

23          I note, you know, we all know everyone's history  
24 here. Mr. Stern, of course, was a U.S. attorney here and  
25 U.S. attorneys are well-known for issuing subpoenas which

1       are a starting point for further negotiations.

2               Now, you would never admit that, Mr. Stern, but --

3               MR. STERN:   How can I deny it in your Honor's  
4       presence.

5               THE COURT:   So, in fact --

6               MR. STERN:   We'll sit down.

7               THE COURT:   -- perhaps you can get this down.

8               MR. STERN:   We'll sit down in good faith with him and  
9       try to do that.  We would present an order to you early  
10      next week so that our adversaries can seek review.  They'll  
11      need an order to do that and we'd like that -- look,  
12      they're going to seek review, your Honor, there's no doubt  
13      in my mind about that, so we might as well get that on its  
14      way.

15              THE COURT:   Well, the sooner you get an order in, the  
16      better.  All right.  Thank you.

17              MR. STERN:   Thank you very much, your Honor.

18              (Whereupon the proceedings are adjourned.)  
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