UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. _____

In re Application of:

The REPUBLIC OF ECUADOR and DR. DIEGO GARCÍA CARRIÓN, the Attorney General Of The Republic of Ecuador,

Applicants,

For the Issuance of a Subpoena Under 28 U.S.C. § 1782(a) for the Taking of a Deposition of and the Production of Documents by BJORN BJORKMAN for Use in a Foreign Proceeding,

Respondent.

APPLICANTS' MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR THE ISSUANCE OF A SUBPOENA UNDER 28 U.S.C. § 1782(A) TO BJORN BJORKMAN FOR THE TAKING OF A DEPOSITION AND THE PRODUCTION OF DOCUMENTS FOR USE IN A FOREIGN PROCEEDING

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INTRODUCTION

Under 28 U.S.C. § 1782, "[t]he 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 . . . ." Accordingly, the Republic of Ecuador and Dr. Diego García Carrión, the Procurador (Civil Attorney General) of the Republic of Ecuador (collectively, the "Republic") hereby request that this Court issue a Rule 45 subpoena *duces tecum* under Section 1782 addressed to Bjorn Bjorkman. Upon information and belief, Mr. Bjorkman is a resident of Fort Collins, Colorado, and therefore may be found in this judicial district. The Republic requests that Mr. Bjorkman provide a deposition and documents directly relevant to an international arbitration (the "Treaty Arbitration") brought pursuant to the rules of the United Nations Commission on International Trade Law ("UNCITRAL") by Chevron Corporation ("Chevron Corp.") and Texaco Petroleum Corporation ("TexPet," and collectively "Chevron"[1]) against the Republic under the Ecuador-U.S. Bilateral Investment Treaty (the "BIT").

In the Treaty Arbitration, Chevron alleges that a lawsuit filed against it in Lago Agrio, Ecuador (the "*Lago Agrio*" action) — wherein the trial court (the "*Lago Agrio* Court") recently ordered Chevron to pay in excess of $8 billion in damages for remediation of environmental contamination, health impairment, and other related damages — is a "sham" because the *Lago Agrio* Court is neither independent nor impartial. Chevron claims that, in hearing and deciding the case, the *Lago Agrio* Court deprived it of "due process" by unjustifiably ruling against certain

[1] Chevron acquired Texaco and all of its subsidiaries in 2001.

of Chevron's defenses. Chevron contends that a fair and impartial court would have found it not liable for the claimed environmental damage.

During the course of the *Lago Agrio* litigation, Chevron introduced two expert reports authored by Mr. Bjorkman[2] — an environmental expert who specializes in "risk assessment and ecology, with a focus on the oil industry"[3] — in an effort to rebut certain of the *Lago Agrio* Plaintiffs' claims. Chevron has submitted these reports in the Treaty Arbitration in support of its argument that the *Lago Agrio* Court lacks any basis to find Chevron liable or to award Plaintiffs damages. Specifically, Chevron relies on Mr. Bjorkman to argue in the Treaty Arbitration that the evidence in the trial record so strongly supports its defenses to liability that any decision against it could only have been based on fraud or the result of judicial corruption. Relying on reports from Mr. Bjorkman and others, Chevron has asked the tribunal in the Treaty Arbitration to review and rule upon the underlying merits of the *Lago Agrio* action, seeking, *inter alia*, to compel the Republic to order the *Lago Agrio* Court to reverse itself and issue a determination of "no liability." Chevron's injection of Mr. Bjorkman and his reports into the Treaty Arbitration proceedings clearly renders him "relevant" for purposes of this proceeding and justifies the grant of the Republic's Application for discovery.

Pursuant to the express statutory authority of 28 U.S.C. § 1782, the Republic seeks an order allowing it to issue a subpoena to obtain discovery from and to depose Mr. Bjorkman. Consistent with the liberal discovery provided under the Federal Rules, the threshold showing

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[2] *See* Ex. 48, Bjorn Bjorkman, et al., *Response to Mr. Cabrera's Declarations about Alleged Harm to Indigenous Communities in the Petroecuador-Texaco Concession Area* (Sept. 9, 2008); Ex. 49, Bjorn Bjorkman and Claudia Sanchez de Lozada, *Response To Mr. Cabrera's Affirmations Regarding Alleged Ecosystem Impacts* (Sept. 9, 2008). "Ex. __" refers to exhibits to the Declaration of Lauren M. Butcher filed concurrently herewith.

[3] *See* Ex. 49, Bjorn Bjorkman and Claudia Sanchez de Lozada, *Response to Mr. Cabrera's Affirmations Regarding Alleged Ecosystem Impacts* (Sept. 9, 2008) at § 1.1.

required to justify the issuance of a subpoena under Section 1782 is low, *i.e.*: (i) the target of the subpoena must "reside" or be "found in" this Court's district; (ii) the discovery sought must be for "use in" a foreign or international proceeding; and (iii) the applicant must be an "interested person" in that proceeding. *See* 28 U.S.C. § 1782 (2010); *In re Application of Pérez Pallares*, No. 10-cv-02528-PAB-MEH, 2010 WL 4193072, at *1 (D. Colo. Oct. 20, 2010). As detailed below, this Application readily meets those requirements. In addition, the four discretionary factors analyzed by courts when considering applications under Section 1782, discussed in detail below, all support an order authorizing the issuance of a subpoena *duces tecum* to Mr. Bjorkman. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004) (describing the four discretionary factors); *In re Application of Michael Wilson & Partners, Ltd.*, No. 06-cv-02575-MSK-PAC (MEH), 2007 WL 2221438, at *3 (D. Colo. July 27, 2007) (applying *Intel* discretionary factors). Thus, the Republic respectfully requests that this Application be granted and that a subpoena *duces tecum* be authorized and issued at the earliest possible juncture.

For its part, Chevron has applied for and taken approximately twenty similar Section 1782 depositions — for use in the very same international proceeding — in fifteen different judicial districts, including in this judicial district. In its Section 1782 application to this Court, Chevron sought discovery from certain experts for the *Lago Agrio* Plaintiffs — Stratus Consulting, Inc. and seven of its principles and employees. *See* Ex. 50, Ex Parte Petition And Application For Order Under 28 U.S.C. § 1782 Permitting Chevron Corporation To Issue Subpoenas For The Taking Of Depositions And The Production Of Documents From Stratus Consulting And Related Individuals, *Chevron Corp. v. Stratus Consulting*, No. 10-cv-00047-MSK-MEH (Dkt. 1). Despite objections from the Respondents, the *Lago Agrio* Plaintiffs, and

the Republic, this Court granted Chevron's application, requiring the document productions and depositions Chevron sought. In so ruling, this Court noted the scope of permitted discovery is "broad" and that the application for discovery from experts who submitted reports to the *Lago Agrio* court "goes to central issues in both foreign proceedings [*i.e.*, the *Lago Agrio* action and the Treaty arbitration] and would be permitted under the Federal Rules of Civil Procedure." *Chevron Corp. v. Stratus Consulting*, No. 10-cv-00047-MSK-MEH, 2010 WL 1488010, at *2 (D. Colo. Apr. 13, 2010) (internal quotation omitted). Having never been denied an opportunity to obtain discovery from any witness under Section 1782, Chevron cannot plausibly contend that the Republic should be denied the same broad discovery rights it has amply enjoyed over the last nineteen months in courts throughout the country.[4]

FACTUAL BACKGROUND

I. TexPet Operates An Oil Concession In Ecuador for Twenty-five Years

From 1964 through June 1992, TexPet and its predecessors, all wholly-owned subsidiaries of Texaco, Inc. ("Texaco"), were partial equity participants (50 percent and later 37.5 percent) in an oil exploration and development concession (the "Concession") in the *Oriente* (Eastern) section of Ecuador's Amazonian rain forest. Indeed, TexPet served as the Concession's sole Operator (manager) for twenty-five years, from 1965 to 1990. As Operator, TexPet "conducted the physical exploration and production activities" in the Concession,

[4] *See, e.g.*, Ex. 1, Order, *In re Application of Chevron Corp.*, No. 1:10-mi-0076-TWT-GGB (N.D. Ga. Mar. 2, 2010) (Dkt. 5); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283 *1 (S.D.N.Y. 2010), aff'd No. 10-1918 (2d Cir. July 15, 2010); Ex. 2, Order, *In re Application of Chevron Corp. v. 3TM Consulting, LLC*, No. 4:10-mc-00134 (S.D. Tex. Apr. 5, 2010) (Dkt. 12); Ex. 3, Order, *In re Application of Chevron Corp.*, No. 10-cv-1146-IEG (WMc) (S.D. Cal. Sept. 10, 2010) (Dkt. 81); Ex. 4, Order, *In re Application of Chevron Corp.* (UBR), No. 2:10-cv-02675-SRC-MAS (D. N.J. Jun. 15, 2010) (Dkt. 21); Ex. 5, Order, *In re Application of Chevron Corp.*, No. 10-mc-00371-CKK (D.D.C. Oct. 20, 2010) (Dkt. 69).

including building out all of the infrastructure to extract the crude.[5] The Republic, which at that time did not have sufficient scientific and technical know-how to manage the Concession's operations, relied on TexPet's expertise to determine and use the appropriate exploration and production methods.[6] After twenty years under Chevron's tutelage, in July 1990, a subsidiary of the Republic's state-owned oil company, PetroEcuador, took over the role of Concession Operator. In June 1992, TexPet's ownership interest in the Concession expired. *Republic of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334, 338-41 (S.D.N.Y. 2005) ("*ROE I*.").[7]

II. The Plaintiffs File Their Environmental And Health Litigation In District Court In New York And, After Dismissal There, Re-file In Lago Agrio, Ecuador

One year after TexPet's interest in the Concession expired, a group of indigenous residents of the *Oriente* region filed a class action complaint against Texaco in the U.S. District Court for the Southern District of New York (the "*Aguinda"* action). The *Aguinda* plaintiffs alleged that TexPet had polluted private and public lands and streams in Ecuador and demanded

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[5] Ex. 6, Defs.' Am. Mot. to Dismiss Compl. or, in the Alternative, to Stay, 2006 WL 2805513, at * 3 (May 25, 2006), filed in *Doe v. Texaco Inc.*, C 06-02820, 2006 WL 2805513 (N.D. Cal. Oct. 5, 2006).

[6] Ex. 7, Sworn Statement of Luis Arturo Araujo (Jan. 26, 1996) ¶ 5 ("Texaco's duties included the complete control of the seismic exploration, exploitation, production, design, the excavation of the wells, the extraction of the petroleum, and all the other tasks necessary to exploit the petroleum which this company found in the Ecuadorian Amazon"); *id.* ¶¶ 11-12 (since no one in the Ecuadorian Government "had sufficient knowledge to oppose or to judge the Texaco Company in reference to any issues pertaining to the petroleum industry," TexPet was "permitted . . . to introduce whatever technology it deemed adequate as environmental policy"); *id.* ¶ 14 (TexPet "never suggested to anybody in the government that the practices which they employed, and which resulted in the dumping of petroleum and other contaminants into the Amazon were practices that were not carried out in any other country"); *see also* Ex. 8, Excerpts from Deposition of Edmundo Brown (Dec. 19, 2006) at 50:1-5, 50:17-51:7 (the state-owned oil company, CEPE (later PetroEcuador), had limited input into the Concession's work program and budget and "[t]he management of the operations was basically in the hands of Texaco"); *id.* at 53:8-13 ("Texaco as operator was responsible and had the technology, had the staff, had the entire control in its hands . . . . We in CEPE were spectators outside the operation.").

[7] Authoritative summaries of the long history of this dispute are established in numerous judicial decisions and are cited throughout for facts already judicially established. *ROE I* is a decision related to the Republic's petition to permanently stay an earlier arbitration initiated by Chevron under the American Arbitration Association ("AAA") rules, discussed further below.

both monetary damages and extensive equitable relief to reimburse them for oil-related health problems and "to compel the cleanup of their community's environmental resources." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473-74 (2d Cir. 2002) ("*Aguinda II*"); *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d, 452, 456 (S.D.N.Y. 2007) ("*ROE II*").

In 1993, Texaco filed a motion to dismiss the *Aguinda* action on, *inter alia*, *forum non conveniens* grounds, arguing that the case should be tried in the Ecuadorian courts. *Jota v. Texaco, Inc.*, 157 F.3d 153, 156 (2d Cir. 1998). In support of its motion, Texaco submitted several affidavits from Ecuadorian law experts describing and promoting the Ecuadorian court system and process.[8] *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 544-46 (S.D.N.Y. 2001) ("*Aguinda I*"). In 1996, the District Court granted Texaco's motion and dismissed the case on *forum non conveniens* grounds.[9] However, two years later the Second Circuit vacated the dismissal, holding, in part, that a *forum non conveniens* dismissal was inappropriate absent a requirement that Texaco consent to Ecuadorian jurisdiction and agree to certain other stated conditions. *Jota*, 157 F.3d at 155.

Following the Second Circuit's remand, Texaco consented to jurisdiction in Ecuador and further expressly committed to satisfy any final judgment against it, subject "only" to its right to defend against enforcement under CPLR Section 5304, New York's version of the Uniform

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8 *See, e.g.*, Ex. 9, Aff. of Dr. Alejandro Ponce Martinez (Dec. 13, 1995), ¶¶ 3-5 ("In my opinion, based upon my knowledge and expertise, the Ecuadorian courts provide a totally adequate forum in which these plaintiffs fairly could pursue their claims. I believe that the Ecuadorian judicial system would resolve the plaintiffs' claims in a proper, efficient and unbiased manner. . . . The civil procedures utilized in Ecuadorian courts are essentially those used in other civil jurisdictions, such as Spain, France, Germany and Japan. While different from procedures used in common law jurisdictions like the United States, they permit the effective resolution of civil claims"); Ex. 10, Aff. of Dr. Rodrigo Pérez (Dec. 1, 1995) ("[I]t is my strong belief that any attempt by Texaco Inc., TexPet or any other person or entity, to exert influence over the Ecuadorian judiciary would be unsuccessful.").

9 *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996).

Foreign Country Money Judgments Recognition Act.[10] Texaco submitted *ten* supplemental affidavits from its Ecuadorian legal experts uniformly attesting to the fairness and adequacy of Ecuador's courts and disputing statements in U.S. Department of State Human Rights reports that characterized the Ecuadorian judiciary as being "politicized, inefficient, and sometimes corrupt."[11] Texaco's experts affirmed to the District Court, under penalty of perjury, that: "Ecuador's judicial system is neither corrupt nor unfair"; "the courts of Ecuador . . . treat all persons who present themselves before them with equality and in a just manner"; and the Ecuadorian judiciary was fully independent.[12]

The *Aguinda* plaintiffs opposed Texaco's newest dismissal motions. Finally, in 2001, the District Court again dismissed the case on *forum non conveniens* grounds. *Aguinda I*, 142 F. Supp. 2d at 537. On appeal, Chevron, having recently acquired Texaco and its subsidiaries through merger, joined Texaco in supporting *Aguinda*'s dismissal and re-filing in Ecuador. The Second Circuit this time affirmed the dismissal. *Aguinda II*, 303 F.3d at 473.

In 2003, following the *forum non conveniens* dismissal of the *Aguinda* action in New York, a subset of most, but not all, of the *Aguinda* plaintiffs re-filed their claims in the *Lago*

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10 *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 389, 390 n.4 (2d Cir. 2011) ("Texaco's promise to satisfy any judgment issued by Ecuadorian courts, subject to rights under New York's Recognition of Foreign Country Money Judgments Act . . . along with Texaco's more general promise to submit to Ecuadorian jurisdiction, is ***enforceable against Chevron*** in this action and any future proceedings between the parties, including enforcement actions, contempt proceedings, and attempts to confirm arbitral awards."); *see also* Ex. 11, Texaco Inc.'s Objections and Resps. to Pls.' Interrogs. Regarding Proposed Alternative Fora (Dec. 28, 1998) at 3, filed in *Aguinda v. Texaco Inc.*, No 93-CIV-7527 (JSR) (S.D.N.Y.); Ex. 12, Excerpt from Texaco Inc's Reply Memorandum of Law in Support of its Renewed Mot. to Dismiss (Jan. 25, 1999), filed in *Aguinda v. Texaco Inc.*, No 93 CIV. 7527 (JSR) (S.D.N.Y.).

11 *See Aguinda I*, 142 F. Supp. 2d at 544-45.

12 *See, e.g.*, Ex. 13, Aff. of Dr. Enrique Ponce y Carbo (Feb. 4, 2000) ¶¶ 15, 17; Ex. 14, Aff. of Dr. Alejandro Ponce Martinez (Feb. 9, 2000) ¶¶ 5, 7; Ex. 15, Aff. of Dr. Sebastian Perez-Arteta (Feb. 7, 2000) ¶¶ 4, 7; Ex. 16, Aff. of Rodrigo Pérez Pallares (Feb. 4, 2000) ¶¶ 3-4, 6; Ex. 17, Supplemental Aff. of Dr. Alejandro Ponce Martinez (Apr. 4, 2000) ¶¶ 5-7; Ex. 18, Aff. of Jaime Espinoza Ramírez (Feb. 28, 2000) ¶¶ 2-6; Ex. 19, Sworn Statement of Doctor Ricardo Vaca Andrade (Mar. 30, 2000), ¶¶ 4-7.

Agrio Court against Chevron. *ROE I*, 376 F. Supp. 2d at 341-42.[13] As was the case in *Aguinda*, the Plaintiffs alleged that (a) the oil exploration and exploitation activities that TexPet carried out, as Operator, caused contamination and harmed the people residing in the region, and that (b) the methods and technology that TexPet had employed as Operator had already been prohibited in other countries "due to their lethal effects on the environment and human health."[14] The Plaintiffs further alleged that TexPet's "willful misconduct" and "negligence" caused severe contamination of the land and waters in the region, affecting not only the drinking water and crops, but also the livelihood, culture, and general health of the population, which saw a rise in cancer, birth defects, and other illnesses.[15] As in *Aguinda*, the Plaintiffs demanded that: (i) medical monitoring and care be established for the affected residents; (ii) the polluting elements still in the region be removed; and (iii) remediation be performed on both private and public lands to repair the environmental damage caused by the oil operations conducted while TexPet operated the Concession.[16]

The *Lago Agrio* action proceeded in Ecuador with numerous judicial site inspections, thousands of test samples, and voluminous reports by both party-appointed and party-nominated,

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13 Chevron has argued in other forums that the new lawsuit was not a continuation of the *Aguinda* case. The Second Circuit has flatly rejected Chevron's argument: "Chevron's contention that the Lago Agrio litigation is not the refiled Aguinda action is without merit. The Lago Agrio plaintiffs are substantially the same as those who brought suit in the Southern District of New York, and the claims now being asserted in Lago Agrio are the Ecuadorian equivalent of those dismissed on forum non conveniens grounds." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 390 n.5 (2d Cir. 2011).

14 Ex. 20, Complaint in *Maria Aguinda y Otros v. ChevronTexaco Corp.*, No. 002-2003-P-CSJNL, Superior Court of Nueva Loja (May 7, 2003) §§ I (5), I (7), IV (5)-(6).

15 *Id.*, §§ I (7), III (1)-(5), IV (9).

16 *Id.*, § VI.

court-appointed experts investigating and analyzing the extent and causes of pollution, health risks, and other damages to the land and inhabitants of the Concession area.[17]

III. The Republic Signs A Settlement And Release Agreement Releasing TexPet And Affiliated Companies From Claims Held By The Republic

While the *Aguinda* action was pending, the Republic, PetroEcuador, and TexPet entered into a 1994 Memorandum of Understanding, a 1995 Settlement Agreement, and a 1998 Final Release (collectively, the "Settlement and Release Agreements") wrapping up TexPet's oilfield remediation obligations *vis-à-vis* the Government of Ecuador. Under these agreements, TexPet agreed to perform specified remedial work in exchange for a release by the Government and PetroEcuador (the "Releasors") of all of the Releasors' claims against TexPet, Texaco, and certain other related entities (the "Releasees") "arising from the Operations of the Consortium," except for those contractual obligations agreed to under the 1995 Settlement Agreement itself. *ROE I*, 376 F. Supp. 2d at 341-42. Because the *Aguinda* case was pending in New York, these agreements "applied *without prejudice to the rights possibly held by third parties* for the impact caused as a consequence of the operations of the former PetroEcuador-Texaco Consortium."[18] While these agreements contained a release from the Republic and PetroEcuador as the two Releasors, they did not contain any affirmative "hold harmless" or indemnification covenant protecting Chevron from pending or future third-party claims. Indeed, under the Ecuadorian Constitution, the Republic did not have the authority to waive the rights of its citizens to pursue

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[17] Ex. 21, Aff. of Andrew Woods (Mar. 3, 2010), ¶ 8, filed in *Chevron Corp. v. Stratus Consulting, Inc*., No. 10-cv-00047-JLK (D. Colo.).

[18] Ex. 22, Memorandum of Understanding between the Government of Ecuador, PetroEcuador, and Texaco Petroleum Company (Dec. 14, 1994), art. VIII (emphasis added).

their own third-party claims for damages or for remediation of the environmental damage caused by Chevron.[19]

Subsequent to the execution of the 1998 Final Release, questions arose about the adequacy of the remediation work performed by TexPet, leading to several criminal investigations in Ecuador. The last investigation was just this week dismissed by the Ecuadorian courts.

IV. Chevron Initiates AAA Arbitration Which The Republic Successfully Stays In Federal Court

As had been true with respect to the *Aguinda* action, the complaint in the *Lago Agrio* action did not name as a party the Republic or any of its agencies or instrumentalities. And although it could have done so, and indeed it advised the Second Circuit that it would do so upon a *forum non conveniens* dismissal,[20] Chevron made no effort to implead the Republic into the *Lago Agrio* action or otherwise file an action against the Republic in the Ecuadorian courts Chevron had praised. Instead, in June 2004, Chevron commenced a separate AAA arbitration proceeding in New York against PetroEcuador (the "AAA Arbitration") seeking a declaration that PetroEcuador was contractually obligated to indemnify Chevron for all defense costs and liability that Chevron had incurred and would incur in defending the *Lago Agrio* action.[21] PetroEcuador and the Republic filed a petition to stay the AAA arbitration (the "AAA Stay Action").

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19 Ex. 23, Excerpt from Foreign Law Declaration of Genaro Eguiguren and Ernesto Albán (Dec. 20, 2006) ¶ 113.

20 Ex. 24, Excerpts from Br. for Def.-Appellee (Dec. 20, 2001) at 51, filed in *Aguinda v. Texaco, Inc.*, No. 01-7756(L).

21 Ex. 25, ChevronTexaco Corp. and Texaco Petroleum Co.'s Demand for Arbitration (June 11, 2004).

The principal issue in the AAA Stay Action was whether the Republic was contractually bound to indemnify Chevron for its costs and potential liability in defending the *Lago Agrio* litigation. In counterclaims in the AAA Stay Action, Chevron also asserted that TexPet had been released from liability for the claims asserted by the *Lago Agrio* Plaintiffs by virtue of the Settlement and Release Agreements, and that the Republic was in breach of those agreements by "allowing the *Lago Agrio* lawsuit to proceed" and by refusing to inform the *Lago Agrio* Court that Chevron had been released and would be indemnified — even though the Settlement and Release Agreements did not purport to compromise third-party claims and certainly imposed no obligation on the Republic to intervene in private party litigation. *ROE I*, 376 F. Supp. 2d at 344. In addition to seeking an award of costs, legal defense fees, and the amount of any adverse judgment which might be rendered against it in *Lago Agrio*, Chevron sought a declaratory judgment that "the Republic and PetroEcuador are in breach of their obligations under the 1995 Settlement and 1998 Final Release of Claims" and were "obligated to intervene in the Lago Agrio litigation and inform the Ecuadorian court that they owned and released all rights to environmental remediation or restoration by TexPet in the concession area." *Id.* at 345. Following extensive discovery, cross-motions for summary judgment, and an evidentiary hearing on the applicable Ecuadorian law, the District Court granted the Republic's motion for summary judgment and thereupon permanently stayed the AAA Arbitration.[22] *ROE II*, 499 F. Supp. 2d 469, *aff'd* 296 F. App'x 124 (2d Cir. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 2862 (2009).

[22] Chevron's counterclaims relating to the Settlement and Release Agreements were not resolved by the June 2007 decision and order. During the pendency of the AAA Stay Action appeals, Chevron initially insisted that its counterclaims remained ripe for adjudication and opposed the Republic's efforts to have the counterclaims dismissed for lack of subject matter jurisdiction. Ex. 26, Letter from Thomas F. Cullen, counsel for Chevron, to Hon. Leonard B. Sand (Oct. 30, 2008) at 7. Following the Supreme Court's denial of certiorari in June 2009, however, Chevron reversed its position, advising the District Court that "Chevron no longer wishes to press its

V. Chevron Requests Arbitration Under The UNCITRAL Arbitration Rules

With the environmental plaintiffs in fact re-filing their claims in the *Lago Agrio* Court, with Chevron having lost its AAA Arbitration effort to compel the Republic to adjudicate its alleged obligations to Chevron in the AAA Arbitration, and having elected to allow its Settlement and Release Agreements claims pending before the AAA Stay Action court to be dismissed before adjudication on the merits, on September 23, 2009 Chevron filed a Notice of Arbitration under the UNCITRAL arbitration rules.[23] Chevron therefore injected into a third forum and a third proceeding identical issues that had been before two other forums (the U.S. District Court for the Southern District of New York and the *Lago Agrio* Court).

In the present Treaty Arbitration, Chevron resuscitates its claims that the Republic is violating its contractual release by "allowing" the *Lago Agrio* Court to hear the environmental claims that Chevron asked the U.S. Federal Courts to dismiss in favor of an Ecuadorian forum. Chevron also claims that the Republic has violated Chevron's rights under the U.S.-Ecuador BIT by failing to afford it due process in the environmental litigation. As part of its due process claims, Chevron points to a former contractor's clandestine taping of meetings with purported

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opposition to The Republic's motion to dismiss all remaining counterclaims for lack of subject matter jurisdiction . . . . Dismissal for lack of subject matter jurisdiction would appear to moot the parties' cross-motions for summary judgment and . . . would conclude all proceedings before this Court." Ex. 27, Letter from Thomas F. Cullen, counsel for Chevron, to Hon. Leonard B. Sand (Jul. 13, 2009) at 1-2. In accordance with Chevron's decision to withdraw its opposition, on July 20, 2009, the District Court dismissed all remaining counterclaims in the AAA Stay Action. Ex. 28, Order, *Republic of Ecuador v. ChevronTexaco, Inc.*, No. 04 CV 8378 (S.D.N.Y. July 20, 2009) (Dkt. 241).

[23] Ex. 29, Chevron Corp. and Texaco Petroleum Co.'s Notice of Arbitration (Sept. 23, 2009). Interestingly, Chevron filed its Notice of Arbitration challenging its liability in Ecuador before the *Lago Agrio* Court even issued its decision.

representatives of the Ecuadorian government and the then-presiding *Lago Agrio* Court judge, which Chevron claims "reveal a $3 million bribery scheme."[24]

Independent journalists, following review of the videotapes, have questioned Chevron's statements regarding what the tapes actually show, noting, *inter alia*, that "[i]t was not clear ... whether Judge Nuñez was even aware of the plans to bribe him."[25] As one news account observed:

> On the tapes, the men – a former Chevron contractor and an American businessman – press Nuñez to say how he will rule, without success. Then, as Nuñez prepares to leave, one of the men maintains that Chevron is guilty, and Nuñez replies, "Yes, sir." To Chevron, this cinches the argument. *But on the video, it's unclear to whom the judge is speaking and whether he is responding to the question or just trying to end the meeting.*[26]

In fact, at no time in either recorded meeting does Judge Nuñez ever solicit or accept a bribe, nor is he ever offered or provided with money or promised any benefit of any kind for anything. Instead, Judge Nuñez *repeatedly* declined to advise Mr. Borja how he intended to rule, a pattern throughout the recorded meeting that is patently inconsistent with Chevron's allegations.[27]

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[24] Ex. 30, Chevron press release, *Videos Reveal Serious Judicial Misconduct and Political Influence in Ecuador Lawsuit* (Aug. 31, 2009) at 1.

[25] Ex. 31, *Ecuador Oil Pollution Case Only Grows Murkier*, NEW YORK TIMES (Oct. 9, 2009) at 2; *see also* Ex. 32, *Chevron Judge Says Tapes Don't Reveal Verdict*, SFGATE.COM (Sept. 2, 2009) ("[T]he taped conversations with the judge himself do not ever explicitly discuss bribes. Núñez repeatedly tells the businessmen that he can't discuss the verdict in advance."). Chevron which had initially claimed that it had no advance knowledge of any of the taping, was also forced to admit that its counsel had met with the former contractor, Diego Borja, as well as another individual appearing on the tapes, purported American businessman Wayne Hansen, in advance of the fourth taped meeting (the only meeting where, at Mr. Borja's urging, the "bribery plot" was specifically discussed). Ex. 33, Thomas F. Cullen, Jr. to Dr. Diego Garcia Carrión (Oct. 26, 2009) at 8.

[26] Ex. 34, *Chevron's Legal Fireworks*, LOS ANGELES TIMES (Sept. 5, 2009) (emphasis added); *see also* Ex. 35, *Chevron Steps Up Ecuador Legal Fight*, FINANCIAL TIMES (Sept. 1, 2009) ("The judge refuses several times on the tape to reveal the verdict, before saying "Yes, sir," when asked if he will find Chevron guilty. However, the video raises the question as to whether Judge Nuñez understood what he was being asked.").

[27] *See* Ex. 32, *Chevron Judge Says Tapes Don't Reveal Verdict*, SFGATE.COM (Sept. 2, 2009); Ex. 35, *Chevron Steps Up Ecuador Legal Fight*, FINANCIAL TIMES (Sept. 1, 2009).

The U.S. District Court for the Northern District of California, having reviewed the transcripts, observed in a related Section 1782 action that:

> In your brief, in your statement of facts, you quote from the Borja declaration in which he claims that Novoa asked for him for $3 million to be divided: A million dollars for the judge, which is an assertion of the payoff, the bare knuckle kind of payoff to the judge -- a very serious allegation. And I read the transcript, at least of the two transcripts you provided me, and while I could see why the judicial authorities in Ecuador found Judge Nuñez in violation of his ethical duty by exposing and discussing his opinion, there was no hint in there about him taking a bribe or payoff, and I didn't see anything in the two transcripts provided to me on that.[28]

Chevron's tactics and allegations against the Republic have now come full circle. After Mr. Borja turned the videos of his meetings over to Chevron, Mr. Borja was himself secretly recorded by his friend, Santiago Escobar. In those recordings, Mr. Borja claimed that Chevron's chemical analysis was not done by independent labs, as Chevron has asserted, but instead by labs owned and controlled by Chevron.[29] And he further claimed to possess substantial evidence, including photographs, of Chevron's extensive misconduct.[30] Mr. Escobar also has testified that

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[28] Ex. 36, Transcript of Proceedings (Nov. 10, 2010), *In re The Republic of Ecuador*, No. No. C-10-00112(EMC) (N.D. Cal.), at 38-39.

[29] Ex. 37, Transcript of Skype Conversation between Diego Borja and Santiago Escobar (Oct. 1, 2009) (13:03:33) at 6-7 ("BORJA: . . . [T]he plaintiffs have a laboratory where they analyzed their samples, right? . . . And Chevron always stayed, supposedly, independent, and sent the analysis to have them analyzed here, supposedly, isn't that right? ESCOBAR: Okay. BORJA: But I know that's not true. ESCOBAR: [Laughs] And where did they have them analyzed? BORJA: That's as much as I can tell you, my man! but you understand me? ESCOBAR: But I don't understand you… I mean, how is that true? I mean . . . they didn't do an analysis; they just got an analysis that was in their favor. BORJA: How shall I say it? They did an analysis . . . . [I]t's like you . . . like I had done an analysis in my own house, something like that. ESCOBAR: Oh yeah, yeah! In other words, <u>they sent them to laboratories that had… that had a connection with them. BORJA: I have proof that they were more than connected, they belonged to them</u>.") (emphasis added).

[30] Ex. 38, Transcript of Skype Conversation between Diego Borja and Santiago Escobar (Oct. 1, 2009) (12:36:08) at 7-10:

- BORJA: [W]hat I have are two documents, but those documents are . . . they are ready to be delivered to each side in case something happens to me. . . . The one confirms everything and the other one helps the Amazons. *Id.* at 7-8.

Mr. Borja admitted to him in unrecorded conversations that Mr. Borja swapped out dirty soil samples for clean soil samples prior to the samples being sent to the laboratory.[31]

Of course, even if the *Lago Agrio* action were tarnished in some way by the irregularities claimed by Chevron — as opposed to the irregularities allegedly *caused* by Chevron — that would not end the Treaty Arbitration. To obtain a declaration of "no liability," as Chevron requests, Chevron would, at a minimum, also have to establish that an impartial court would have evaluated the evidence differently and, applying Ecuadorian law, would have concluded that Chevron is *not* liable. In such a scenario, the arbitral tribunal would have to re-evaluate all of the evidence and analysis presented by both parties in the *Lago Agrio* case.

The tribunal that is hearing the Treaty Arbitration agreed to bifurcate the proceedings and first determine whether it has jurisdiction to hear the claims before turning to the merits of the case. The parties have completed briefing on the Republic's jurisdictional objections and a

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- BORJA: I have the mails . . . . Did you think I was going to jump into the water without that? I brought everything, I have everything in my I-phone, dude. . . . And I also have copies in Ecuador . . . I have one copy here . . . I have correspondence that talks about things you can't even imagine, dude . . . I can't talk about them here, dude, because I'm afraid, but they're things that can make the Amazons win this just like that. *Id.* at 8 (emphasis added).
- BORJA: I mean, what I have is conclusive photos of how they managed things internally. . . . *Id.* at 9.
- BORJA: . . . I can change my story from the videos, and in the second place, because of everything else I have. I mean, it would be too conclusive. And since the world . . . everyone wants the Amazons to win, they would pay a lot more attention to that than what they paid to what I gave to the company. . . . *Id.*
- BORJA: I've made companies . . . I've made companies for them, dude. I mean, shit! [Unintelligible], I just can't any more. I feel like telling you everything, but if you were here in person I'd tell you everything because I'm tripped out here, dude. ESCOBAR: Now, now I get you. In . . . other words, you created companies for them to . . . but why did you create companies for those guys? BORJA: So that things could be managed in an independent way. . . . ESCOBAR: So things could be managed in an independent way. BORJA: Correct. In other words, I have evidence of all that, you get it? Everything, everything. In other words, even the invoices. *Id.* at 10.

[31] Ex. 39, Statement of Santiago Ernesto Escobar, submitted in Preliminary Investigation No. 107-2009-DRR, Office of the General Prosecutor of Ecuador (June 8, 2010) at 2-3.

hearing was held in November 2010. A decision on jurisdiction is expected soon. At its request, Chevron submitted its opening brief on the merits on September 6, 2010, but the tribunal has declined to issue a briefing schedule requiring the Republic's response on the merits prior to the tribunal's ruling on jurisdictional objections. Chevron has repeatedly requested an expedited briefing schedule on the merits in the event the tribunal were to find that it has jurisdiction over part or all of the matters raised by Chevron's Notice of Arbitration.

VI. The *Lago Agrio* Court Issues Multi-Billion Dollar Judgment Against Chevron

Almost eighteen years after the Ecuadorian Plaintiffs first brought their action in New York, the *Lago Agrio* Court issued an $8.6 billion judgment against Chevron on February 14, 2011. As summarized by Chevron, the court ordered damages for reparation in the following amounts:

- $600 million for groundwater remediation;
- $5.396 billion for soil remediation;
- $200 million to restore native flora, fauna, and aquatic life;
- $150 million to implement a potable water system in the allegedly affected areas;
- $1.4 billion to establish a healthcare system to serve the general population of the allegedly affected communities;
- $800 million for "a plan of health," including potential cancer treatment; and
- $100 million to rebuild ethnic communities and indigenous culture.[32]

Pursuant to Ecuadorian law, the court also ordered Chevron to pay an additional 10 percent to the Amazon Defense Front — the organization representing the Plaintiffs.[33] In addition, the court ordered Chevron to pay a "punitive penalty" of 100 percent of the reparations

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[32] Ex. 40, Letter from Randy M. Mastro to Judge Lewis A. Kaplan (Feb. 24, 2011), transmitting certified copy of Judgment in *Maria Aguinda y Otros v. Chevron Corp.* No. 002-2003, Provincial Court of Sucumbrio (Feb. 14, 2011), submitted in *Chevron Corp. v. Donziger, et al.*, No. 11-CV-0691 (LAK) ("*Lago Agrio* Judgment").

[33] *Id.*

damages if it did not issue a public apology within fifteen days of the judgment.[34] Both parties have appealed the court's judgment.

In its decision, the *Lago Agrio* Court explicitly acknowledged and addressed allegations of fraud made by Chevron based on evidence Chevron gathered through its own Section 1782 discovery applications. For example, the court acknowledged deposition testimony by Plaintiffs' expert, Dr. Charles Calmbacher, in which Dr. Calmbacher alleged that he had not authorized the judicial site inspection reports submitted by Plaintiffs' counsel under his signature.[35] The court noted that Dr. Calmbacher had "a sense of resentment on a personal level against the plaintiffs' team due to labor and money issues" and cited statements Dr. Calmbacher made to the press condemning Chevron.[36] The *Lago Agrio* Court nonetheless elected to disregard all reports submitted under Dr. Calmbacher's name.[37] Similarly, the court granted Chevron's request that it disregard the Global Damages Assessment Report prepared by court-appointed expert Richard Cabrera, on the grounds that the Plaintiffs may have improperly contributed to that report.[38] Instead, the *Lago Agrio* Court focused on the voluminous remaining testing data and scientific evidence before it. Applying Ecuadorian law to its assessment of the facts in the record, the *Lago Agrio* Court determined that Chevron is liable for health and environmental damages attributed to its acts as Operator of the Concession.

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34 *Id.*

35 *Id.* at 48.

36 *Id.* at 49.

37 *Id.*

38 *Id.* at 51.

VII. Chevron's Attempt To Avoid Liability Has Spawned Numerous Corollary Proceedings

As Chevron seeks to avoid potential liability for environmental damage, it has spawned numerous corollary proceedings in the United States. Chevron has now brought approximately twenty discovery actions under 28 U.S.C. § 1782. The excessive reliance on U.S.-styled discovery is at odds with the fundamental concept that Treaty Arbitration is intended to be free of the costly discovery Chevron has imposed on the Republic here. But it has also forced the Republic to respond in kind. Of the discovery actions brought by Chevron, the Republic has partially opposed just four in an effort to protect its evidentiary privileges. The Republic has also brought four of its own Section 1782 discovery actions — two of which have been granted and two of which are pending.[39]

As a general matter, courts have permitted discovery under the statute, albeit with occasional limitations, often related to privilege.[40] Most of the deciding courts have deliberately left the merits of the case to the side, noting instead that the issue before a district court in a Section 1782 action is a narrow one, that is, to determine whether discovery is appropriate for use in a foreign proceeding.[41] As one District Court observed:

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[39] *In re Application of Republic of Ecuador* (Diego Borja), No. C-10-80225 MISC CRB (EMC), 2010 WL 4973492 (N.D. Cal. Dec. 1, 2010); Ex. 41, Order, *In re Application of Republic of Ecuador* (Wayne Hansen), No. 1:10-mc-00040 GSA (E.D. Cal. Oct. 14, 2010) (Dkt. 41); *In re Application of Diego García Carrión* (Mason), No. 11-mc-80110-CRB (N.D. Cal.) (currently pending); *In re Application of the Republic of Ecuador* (Mackay), No. 11-00816 (E.D. Cal.) (currently pending).

[40] *See, e.g.*, *In re Application of Chevron Corp.*, No. 10-4699, 2011 WL 2023257 (3d Cir. May 25, 2011); *see also* Ex. 42, Order, *Chevron Corp. v. 3TM Consulting LLC*, Misc. H-10-134 (S.D. Tex. Oct. 26, 2010) (Dkt. 88) (denying Chevron's motion to expand the scope of discovery ordered from the 3TM respondents beyond limited foundational deposition); *In re Application of Republic of Ecuador* (Diego Borja), No. C-10-80225 MISC CRB (EMC), 2010 WL 4973492 (N.D. Cal. Dec. 1, 2010) at 13 (refusing to enforce discovery request regarding passport information).

[41] *See, e.g.*, *In re Application Ricardo Reis Veiga*, 746 F. Supp. 8, 13 (D.D.C. 2010) ("Notwithstanding the parties' all-too-frequent detours, these proceedings are limited to the narrow question of whether the Applicants

> [T]his proceeding, initiated pursuant to 28 U.S.C. § 1782, is not an opportunity to put on a full trial. Chevron has raised accusations that would indeed be subject to intense scrutiny had they occurred in this Court or in any court of the United States. The simple fact remains, however, that this proceeding is limited to the statutory relief provided in § 1782—namely, discovery for use in a foreign proceeding. Chevron had an opportunity to litigate this matter in the United States and strongly opposed jurisdiction in favor of litigating in the Ecuadorian courts. While fraud on any court is a serious accusation that must be investigated, it is not within the power of this court to do so, any more than a court in Ecuador should be used to investigate fraud on this court. The Magistrate Judge has found that § 1782 relief is appropriate in this matter, and Chevron is entitled to discovery from Respondent. Neither party is entitled, however, to use this court to try a dispute that is already pending in a foreign jurisdiction. This limited proceeding is quickly spiraling out of control.

Ex. 43, Order, *In re Application of Chevron Corp.* (Mark Quarles), No. 3:10-cv-00686 (D. Tenn. Sept. 21, 2010) at 2-3. Nor should courts of the United States considering applications under Section 1782 cast aspersions on a system of justice adopted by a foreign sovereign, or otherwise assume that it is inferior to our own. As the Third Circuit recently observed: "Though it is obvious that the Ecuadorian judicial system is different from that in the United States, those differences provide no basis for disregarding or disparaging that system. American courts, though justifiably proud of our system, should understand that other countries may organize their judicial systems as they see fit." *In re Application of Chevron Corp.*, No. 10-4699, 2011 WL 2023257 at *44 (3d Cir. May 25, 2011).

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have properly invoked the statutory relief contemplated by § 1782(a) — *i.e.* whether discovery should be allowed in this District for potential use in proceedings abroad."); *Chevron Corp. v. Stratus Consulting, Inc.*, No. 1:10-cv-00047-MSK-MEH, 2010 WL 3923092, at *5 (D. Colo.) ("the Court intends to avoid any analysis of the merits of the underlying litigation, including whether Petitioner contaminated the Ecuadorian Amazon as argued by Plaintiffs or whether Mr. Cabrera defrauded the Ecuadorian court as averred by Petitioner . . . . The Court, in this order, restricts its adjudication to the legal issues of privilege in this discovery proceeding, without intruding into the merits that are committed to the jurisdiction of the Ecuadorian trial court.").

In contrast to the generally measured responses to Chevron's Section 1782 applications, some courts have strayed from that approach and have offered dicta going to the merits of the underlying dispute. In *In re Application of Chevron Corp. (Steven Donziger)*, No. 10-mc-0002 LAK (S.D.N.Y.), Judge Lewis Kaplan, largely adopting Chevron's Statement of Facts, made findings regarding the Republic of Ecuador[42] — even though the Republic had not even made an appearance in that case at that time, notwithstanding the court's subsequent decision denying the Republic's motion to intervene, and notwithstanding that such issues are pending before the Ecuadorian courts or the international arbitral tribunal and not necessary for its discovery rulings.

Other courts have granted the requested discovery, but all the while noting that Chevron's contentions (or the contentions of those acting in concert with it) do not appear supported by the very evidence it has submitted. *See, e.g.*, Ex. 44, Hr'g Tr. (Aug. 30, 2010), *Chevron Corp. v. 3TM Int'l, Inc. (3TM)*, No. 10-20389 (5th Cir.) at 34-35 (JUDGE BENAVIDES: "It's not the system – oral system that we have in the United States. I mean, the fact that things were turned over to [Cabrera] doesn't bother me at all . . . .") & 36 (JUDGE BENAVIDES: "Hey, you're making a mountain out of a molehill. This is a very simple case."); *In re Application of Republic of Ecuador* (Diego Borja), No. C-10-80225 MISC CRB (EMC), 2010 WL 4973492 (N.D. Cal. Dec. 1, 2010) at 11 (finding that contrary to Mr. Borja's "contention," "the nature and meaning of the discussions recorded by the video and transcripts thereof (which this Court has reviewed) are not entirely self-evident, especially with regard to Chevron's bribery allegation. An

[42] *See, e.g., In re Application of Chevron Corp.* (Steven Donziger), 749 F. Supp. 2d 141, 143-44 (S.D.N.Y. 2010) at 1 (stating, without citation or attribution, that the Ecuadorian government "has both financial and political interests in the success of the [environmental] lawsuit").

evaluation of the merits of Chevron's claims requires additional interpretive inferences and context. It is not all clear that the recordings tell 100% of the story.").[43]

At this point in time, the underlying environmental case and the corollary litigations have been pending in one form or other since 1993, when the *Aguinda* case was first commenced. The litigations have now touched three continents, as the environmental case has been before both the U.S. and Ecuadorian courts; the Treaty Arbitration has given rise to successive hearings in Europe; and the Section 1782 proceedings have been before more than fifteen judicial districts of the United States.

ARGUMENT

I. Section 1782 Entitles The Republic To The Requested Discovery

The highly-relevant and narrowly-tailored discovery sought by the Republic is precisely the sort of discovery contemplated by 28 U.S.C. § 1782. Section 1782 authorizes federal district courts, "upon the application of any interested person," to order discovery of a "person [who] resides or is found" in the district "for use in a proceedings in a foreign or international tribunal." 28 U.S.C. § 1782(a) (2010); *see also Phillips v. Beierwaltes*, 466 F.3d 1217, 1220 (10th Cir. 2006); *In re Application of Pérez Pallares*, No. 10-cv-02528-PAB-MEH, 2010 WL 4193072, at *1 (D. Colo. Oct. 20, 2010); Ex. 53, Tr. of Hr'g on Pet. for Subpoenas, *Chevron Corp.*, 10-cv-00047-MSK-MEH (D. Colo. Mar. 4, 2010) (Dkt. 22) at 5:13-18; *In re Application of Michael*

[43] In addition to proceedings under Section 1782, Chevron launched a RICO and declaratory judgment action against the Plaintiffs and nine other parties related to the *Lago Agrio* action, arguing that the defendants in that action have conspired to commit a fraud against Chevron. Not surprisingly, out of the many courts that have addressed Chevron's many applications under section 1782, Chevron chose to bring this action before the same court that not only granted two of its Section 1782 applications, but which also openly expressed hostility to the Plaintiffs while adopting virtually *in toto* Chevron's merits-driven statement of facts. Chevron has obtained preliminary injunctive relief, *Chevron Corp. v. Donziger*, No. 11-cv-0691, 2011 WL 778052 (S.D.N.Y. Mar. 7, 2011), with a trial date set in November 2011 for one part of the case.

Wilson & Partners, Ltd., No. 06-cv-02575-MSK-PAC (MEH), 2007 WL 2221438, at *2 (D. Colo. July 27, 2007). Those statutory requirements are met here. First, upon information and belief, Mr. Bjorkman resides and works in Fort Collins, Colorado, which is located in this district.[44] Second, the discovery the Republic seeks is for use in a proceeding before an international tribunal, specifically in the Treaty Arbitration. *See, e.g.*, *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 258 (2004) (citing legislative history confirming that Section 1782 includes "arbitral tribunals"); *Ukrnafta v. Carpatsky Petroleum Corp*., No. 3:09 MC 265(JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009) (arbitration under UNCITRAL rules "falls within the purview of Section 1782"); *In re Application of the Republic of Ecuador*, No. 10-mc-80225, 2010 WL 3702427, at *5 (N.D. Cal. Sept. 15, 2010) (issuing subpoena for discovery in aid of Treaty Arbitration).[45] Indeed, Chevron has already made extensive use of Section 1782 itself to obtain discovery in the United States — including of Plaintiffs' expert witnesses — for use in the Treaty Arbitration. Third, as the respondent in the Treaty Arbitration and the host country to the *Lago Agrio* proceeding, which Chevron attacks as being unfair, biased, and under the control of the Ecuadorian government, the Republic is an "interested

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[44] *See, e.g.*, Ex. 55, Bjorn Bjorkman, LinkedIn profile, available at http://www.linkedin.com/in/bbjorkman (last accessed June 3, 2011).

[45] Indeed, Chevron has repeatedly argued before the various district and appellate courts hearing its Section 1782 applications that the statute's reference to "foreign proceedings" necessarily includes the type of arbitration here, and, in granting Chevron's applications, the courts have indicated their agreement. *See, e.g.*, Ex. 45, Br. for Appellee Chevron Corp. (Feb. 2, 2011) at 50-53, filed in *In re Application of Chevron Corp.*, Nos. 10-4699 & 11-1099 (3d Cir.); *In re Veiga*, No. 10-371(CKK)(DAR), 2010 WL 4225564, at *8 (D.D.C. Oct. 20, 2010); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283 (S.D.N.Y. 2010); *In re Application of Chevron Corp.*, 749 F.Supp.2d 141 34 (S.D.N.Y. 2010); *Chevron Corp. v. Camp*, Nos. 1:10mc27, 1:10mc28, 2010 WL 3418394, at *4 (W.D.N.C. Aug. 30, 2010); Ex. 46, *Chevron Corp. v. Barnthouse*, No. 10-mc-00053 (S.D. Ohio Nov. 26, 2010) (Dkt. 36) at 5-7.

person."[46] Similarly, Dr. Diego García Carrión is the legal representative of the Republic of Ecuador in the Treaty Arbitration and therefore is also an "interested person" under Section 1782.[47]

Moreover, where the information sought is relevant, it is "presumptively discoverable" under Section 1782. *In re Bayer AG*, 146 F.3d 188, 195-96 (3d Cir. 1998); *see also Chevron Corp. v. Stratus Consulting*, No. 10-cv-00047-MSK-MEH, 2010 WL 1488010, at *4 (D. Colo. Apr. 13, 2010) (applying Fed. R. Civ. P. 26 to analysis of relevancy of discovery requested under Section 1782). Courts have ascribed two goals to Section 1782. First, it provides an efficient means for federal courts to assist foreign tribunals and litigants before such tribunals. *In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007). Second, it encourages foreign countries to provide similar assistance by setting an example. *In re Application of Dr. Braga*, No. 10-mc-23973, 2011 WL 900577, at *13 (S.D. Fla. Mar. 15, 2011). District courts have broad discretion to apply Section 1782 to achieve these goals. *See Intel*, 542 U.S. at 261.

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[46] *See Intel*, 542 U.S. at 256 ("No doubt litigants are included among, and may be the most common example of, the 'interested person[s]' who may invoke § 1782."); *In re Application of the Republic of Ecuador*, No. 10-MC-80225 CRB (EMC), 2010 WL 4973492 at *6 (N.D. Cal. Dec. 1, 2010) ("[T]he ROE does qualify, in the instant case, as an 'interested person' for purposes of § 1782").

[47] *In re Application of the Republic of Ecuador*, No. 10-MC-80225 CRB (EMC), 2010 WL 4973492 at *2-5. Ecuadorian law designates Attorney General Garcia to defend the Republic in the international arbitration. Ex. 47, Codification of the Organic Law of the State Attorney General, art. 2 (providing that the Attorney General "is charged with the judicial defense of the State"). A government official empowered to represent the state in the relevant foreign proceeding is an "interested person" under Section 1782. *In re Application of the Republic of Ecuador*, No. 10-MC-80225 CRB (EMC), 2010 WL 4973492, at *5; *In re Letter of Request From Crown Prosecution Serv.*, 870 F.2d 686, 690 (D.C. Cir. 1989) ("A foreign legal affairs ministry, attorney general, or other prosecutor, courts have repeatedly held, fits squarely within the section 1782 'interested person' category."); *Young v. United States Dep't of Justice*, No. 87 Civ. 8307 (JFK), 1988 WL 131302, at *6-7 (S.D.N.Y. Nov. 28, 1988) (finding the Attorney General of Bermuda was an interested person because he had a reasonable interest in obtaining the discovery and was empowered by Bermuda's law to represent the state in the foreign proceeding at issue); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 648 F. Supp. 464, 466 (S.D.Fla. 1986) (finding that the Attorney General and Minister of Legal Affairs of the Republic of Trinidad and Tobago qualified as an interested person).

The documents and oral testimony requested in this Application further the above goals and are patently relevant to the disputed issues in the Treaty Arbitration. As noted above, Mr. Bjorkman was a party-appointed testifying expert in the *Lago Agrio* litigation. The *Lago Agrio* court explicitly relied on soil samples taken by Mr. Bjorkman,[48] Mr. Bjorkman's expert opinion on TexPet's waste treatment procedures and techniques,[49] and Mr. Bjorkman's expert opinion on worldwide industry practice.[50] Moreover, Chevron cites Mr. Bjorkman's reports in its Merits submission to the Treaty Tribunal for topics such as the scope of TexPet's operations in Ecuador[51] and the impact of TexPet's involvement in road building and settlement of the region.[52]

By this action, the Republic seeks the same types of documents and testimony that courts across the United States find are relevant in assessing an expert's reports — documents that are now required to be produced in the ordinary course under the Federal Rules of Civil Procedure.[53]

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48 *See* Ex. 40, *Lago Agrio* Judgment (Feb. 14, 2011) at 107-08 (referencing soil samples taken by Bjorkman at Sacha Norte 2 and Sacha 13 that showed presence of benzene in amounts of "an alarming 18 and 17 mg/kg."), 159 (citing Mr. Bjorkman the for proposition that: "In the decades of Texaco's operation, the common practice all over the world was the treatment of waters in decanting pits and the discharge of the water into the environment.").

49 *Id.* at 158.

50 *Id.* at 159.

51 Ex. 52, Claimants' Memorial on the Merits, *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador*, PCA Case No. 2009-23 (Sept. 6, 2010), ¶ 46.

52 *Id.* ¶¶ 47-50.

53 *See, e.g., Henderson v. Nat'l R.R. Passenger Corp*., No. 09-2173, 2011 WL 14458, at *4 (10th Cir. Jan. 5, 2011) (As stated in Fed. R. Civ. P., parties are entitled to discover "all opinions the [expert] witness will express and the basis and reasons for them."); *Doctor John's v. Wahlen*, 542 F.3d 787, 790 (10th Cir. 2008) ("Fed.R.Civ.P. 26(a) requires disclosure of the . . . information that the party may use to support its claims or defenses, including expert witnesses and their opinions."); *In re Williams Sec. Litig.–WCG Subclass*, 558 F.3d 1130, 1140-43 (10th Cir. 2009) (discussing probing of expert methodology as disclosed during deposition); *Student Mktg Group, Inc. v. College P'ship, Inc*., 247 F.App'x 90, 102 (10th Cir. 2007) (same); *Milne v. USA Cycling Inc*., 575 F.3d 1120, 1134 (10th Cir. 2009) (discussing use of deposition testimony to probe expert's qualifications to provide specific expert testimony).

For example, the Republic requests the documents on which Mr. Bjorkman relied in reaching his expert opinion and documents necessary to assess his expertise, bias, and credibility as a witness.[54] The Republic also seeks documents and information relating to Mr. Bjorkman's participation in Chevron's sampling and testing. Given that Diego Borja, one of Chevron's contractors tasked with transporting samples from the sampling sites to Chevron's selected labs, has allegedly admitted that he replaced dirty samples with clean samples to skew Chevron's results, discovery relating to Chevron's sampling and testing methodologies is, at a minimum, "relevant." Thus, this Application meets the statutory requirements for discovery under Section 1782.

II. The *Intel* Discretionary Factors Favor Granting The Republic's Application

Where, as here, the Application meets the statutory requirements, the Supreme Court has directed that a court consider four factors to determine whether to exercise its discretion to grant a Section 1782 application: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign proceeding and whether the foreign tribunal is receptive to U.S. judicial assistance; (3) whether the discovery request is an attempt to avoid foreign evidence-gathering restrictions; and (4) whether the discovery request is unduly intrusive or burdensome. *Intel*, 542 U.S. at 264-66 ; *In re Application of Pérez Pallares*, 2010 WL 4193072, at *1; Ex. 53, Tr. of Hr'g on Pet. for Subpoenas, *Chevron Corp.*, 10-cv-00047-MSK-MEH (D. Colo. Mar. 4, 2010) (Dkt. 22) at 6:10-15; *In re Application of Michael Wilson & Partners*, 2007 WL 2221438, at *3. Each *Intel* factor favors granting the Republic's application.

[54] *See* Subpoena, attachment A.

First, Mr. Bjorkman is not a party to the Treaty Arbitration between the Republic and Chevron, and the Treaty Tribunal has no jurisdiction to order him to produce evidence.

Second, Section 1782 applications have been routinely granted in aid of foreign proceedings authorized by treaty between sovereigns, as is the case here. *See, e.g.*, Ex. 1, Order, *In re Application of Chevron*, Case No. 10-mi-0076, at 7 (N.D. Ga. Mar. 2, 2010) (Dkt. 5) (granting Chevron's application for discovery in aid of Treaty Arbitration); *In re Application of the Republic of Ecuador*, Case No. 10-mc-80225, 2010 WL 3702427, at *5 (N.D. Cal. Sept. 15, 2010); *In re Oxus Gold PLC*, No. 06-82-GEB, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007) (Bilateral Investment Treaty arbitration constitutes a valid "foreign tribunal" for purposes of Section 1782); *Ukrnafta*, 2009 WL 2877156, at *4 (arbitration under UNCITRAL rules "falls within the purview of Section 1782"). And this Court has observed that "BIT tribunals historically have been receptive to federal court assistance under section 1782." Ex. 53, Tr. of Hr'g on Pet. for Subpoenas, *Chevron Corp.*, No. 10-cv-00047-MSK-MEH (D. Colo. Mar. 4, 2010) (Dkt. 22) at 6:19-21.

Third, this Application is not an attempt to avoid foreign evidence-gathering restrictions. There is no UNCITRAL rule that prohibits the gathering of evidence via Section 1782. As shown above, Section 1782 has previously been used in aid of UNCITRAL proceedings and Chevron has sought and obtained substantial Section 1782 discovery for use in the Treaty Arbitration at issue here. The Republic seeks from Chevron's expert no more and no less than what Chevron sought and obtained in its own Section 1782 actions.

Fourth, the Republic's Application is not unduly intrusive or burdensome. Mr. Bjorkman's knowledge is directly relevant to the Treaty Arbitration because he performed soil

testing in the *Lago Agrio* litigation, the *Lago Agrio* court relied on his expert reports, and Chevron relies on his expert reports in its merits submission to the Treaty Tribunal. The Republic's document requests and deposition topics are narrowly tailored to discover Mr. Bjorkman's knowledge of these topics and to inquire into the support for his conclusions.

CONCLUSION

The Republic of Ecuador therefore respectfully requests that this Court issue an order permitting the Republic to serve the attached subpoena pursuant to 28 U.S.C. § 1782.

Dated: June 6, 2011

Respectfully Submitted,

/s/ Eric W. Bloom
Eric W. Bloom
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006
Phone: (202) 282-5000
Fax: (202) 282-5100
E-mail: ebloom@winston.com