

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CHEVRON CORPORATION,

Plaintiff,

v.

STEVEN DONZIGER, et al.,

Defendants.

Case No. 11 Civ. 0691 (LAK)

**MEMORANDUM OF LAW IN SUPPORT OF
PETITIONER'S MOTION TO INTERVENE**

WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
Phone: (212) 294-6700
Fax: (212) 294-4700

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. The Republic Is Entitled To Intervene As Of Right In This Action	2
A. Intervention Is Timely	2
B. The Republic Has An Interest In The Action	4
C. The Republic's Interests Will Be Prejudiced Without Intervention	4
D. The Republic's Interest Is Not Adequately Protected By Current Parties	5
II. Alternatively, The Republic Should Be Permitted To Intervene	6
CONCLUSION	7

PRELIMINARY STATEMENT

This Court is well-familiar with the underlying environmental dispute, and subsequent litigations and arbitrations, that together serve as the common point of intersect between the Plaintiffs in this RICO action, Chevron Corporation (“Chevron”), the Defendants in this action, Steven Donziger, et al., (“Defendants”), and the Republic of Ecuador (“the Republic”). In the interests of judicial economy, therefore, the Republic will not rehash those facts here.

The Republic has not previously moved to intervene in this case because up until October 7, 2013, the Republic had no certain interest requiring its intervention in this dispute between Chevron and the Defendants. On October 7, 2013, however, Chevron filed a Motion By Order To Show Cause Why Certain Documents Should Not Be Disclosed To Chevron (“Motion”). Dkt. 1503. In its Motion, Chevron claims that it was recently approached by an “unaffiliated” individual, Margaret Petito, with certain documents that, on their face, involve the confidential and privileged interests of the Republic. That is because, according to Patton Lochridge (an attorney hired by Chevron), “many” of Ms. Petito’s email documents, reportedly given to her by an anonymous source, allegedly include Alexis Mera as either the sender or recipient. Dkt. 1505-1. Mr. Mera is a senior advisor and chief counsel to the President of Ecuador. Given Mr. Mera’s highly-sensitive position within the Government of Ecuador, any of his documents would necessarily involve the confidential and privileged interests of the Republic. Indeed, Chevron acknowledged as much in its Motion, offering to provide the Republic, as an interested party, with an index of the documents upon order of this Court. Dkt 1503 at 1-2.

Given the obvious and important interests of the Republic now at play in this case, the Republic hereby respectfully moves to intervene in the matter and protect its interests—interests that no other party can adequately defend. The Republic has consulted with counsel for both the

Defendants and Chevron regarding this motion. The Defendants have given their consent to the Republic's motion. The Republic has not heard back from Chevron's counsel.

ARGUMENT

The Federal Rules allow a party to intervene, either as of right under Federal Rule of Civil Procedure 24(a) or permissively under Federal Rule 24(b). The Republic satisfies all of the criteria to intervene as of right, or, in the alternative, it should be permitted to intervene because its claims share common questions of law and fact with those at issue here.

I. THE REPUBLIC IS ENTITLED TO INTERVENE AS OF RIGHT IN THIS ACTION

Federal Rule of Civil Procedure 24(a) applies when the movant makes the timely claim of “an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest.” Fed R. Civ. P. 24(a)(2). To intervene as of right, “an applicant must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.” *In re Bank of N.Y. Derivative Litig.*, 320 F.3d 291, 300 (2d Cir. 2003) (internal quotations omitted).

A. Intervention Is Timely

The Republic's motion to intervene is timely because it is filed within days of Chevron's Motion. Upon Chevron's injection of the Republic's interests into the matter, counsel for the Republic has consulted with its client, which has now authorized counsel to move in this Court to protect the sovereign interests of Ecuador, including its confidential communications and all evidentiary privileges. *See Convertino v. U.S. Dept. of Justice*, 674 F. Supp. 2d 97, 108 (D.D.C. 2009) (finding intervention timely when discovery ongoing).

In the Second Circuit, “[f]actors to consider in determining timeliness include: ‘(a) the length of time the application knew or should have known of [its] interest before making the motion; (b) prejudice to existing parties resulting from the applicant’s delay; (c) prejudice to [the] application if the motion is denied; and (d) [the] presence of unusual circumstances militating for or against a finding of timeliness.’” *MasterCard Int’l Inc. v. Visa Int’l Serv. Ass’n, Inc.*, 471 F.3d 377, 390 (2d Cir. 2006) (quoting *United States v. New York*, 820 F.2d 554, 557 (2d Cir. 1987)). All of these factors cut in favor of the Republic intervening in a timely manner. **First**, the Republic was unaware that it had an interest in protecting privilege claims over these recently discovered documents until Chevron filed its Motion on October 7, 2013. Until then, the Republic’s privileged interests were not at stake in the dispute. **Second**, permitting the Republic to intervene at this date will cause neither Chevron nor the Defendants any harm. Chevron has all but invited the Republic to intervene via its Motion. Indeed, intervention by the Republic may likely be of benefit to Chevron as it will run less risk of potential disqualification in related cases for reliance on ultimately privileged materials if the Republic is allowed to intervene and adequately protect the Republic’s interests of privilege and confidentiality. **Third**, there is high risk of prejudice to the Republic should the motion be denied as no party will be able to adequately protect against the public dissemination of confidential and privileged documents relating to a high-ranking government official and privilege may be lost pertaining to the documents. **Fourth**, and finally, “unusual circumstances” assuredly exist in this case. The “anonymous” production of government documents suggests the potential of theft and unlawful activity. All circumstances here militate in favor of a finding of timeliness, especially given the Republic’s prompt reaction and response to these unexpected events.

B. The Republic Has An Interest In The Action

The Republic plainly has an interest in protecting privileged and confidential documents and communications that purportedly involve a high-ranking official and that have arrived in the hands of Chevron under suspicious—at best—circumstances.¹ This is true for all documents to or authored by Mr. Mera or any other Ecuadorean official. Such interests are recognized as legally sufficient for intervention. *See, e.g., United States v. American Telephone & Telegraph Col, et al.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (finding privilege claims satisfy the definition of “legal interest” necessary to permit intervention and noting that “[w]ithout the right to intervene in discovery proceedings, a third party with a claim of privilege in otherwise discoverable materials could suffer ‘the obvious injustice of having his claim erased or impaired by the court’s adjudication without ever being heard.’”). It is therefore undeniable that the Republic has an interest that it must protect in this action. *See, e.g., Convertino v. U.S. Dept. of Justice*, 674 F. Supp. 2d 97, 109 (D.D.C. 2009) (allowing intervention to protect attorney-client privilege and attorney work product).

C. The Republic’s Interests Will Be Prejudiced Without Intervention

If the Republic is not allowed to intervene, review, and protect its privileged communications, there is a danger that this privilege might be forever lost. Once privileged communications have been divulged, there is a risk that the cat is out of the bag and privilege may no longer attach. *See, e.g., Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725, 732 (Cal. Nov. 30, 2009) (“the primary harm in the discovery of privileged material is the disruption of that [attorney-client] relationship, not the risk that the parties seeking discovery may obtain information to which they are not entitled.”); *see also In Re Papandreou*, 139 F.3d 247, 251

¹ Until the Republic is afforded the opportunity to review the documents, it cannot confirm that the emails currently being attributed to Mr. Mera by Chevron and Mr. Lochridge were in fact authored by or sent to him.

(D.C. Cir. 1998) (“Disclosure followed by appeal after final judgment is obviously not adequate in [privilege] cases—the cat is out of the bag.”) (*dictum*). Allowing a Sovereign’s privileged and high-level communications to be divulged to its adversaries and the public would strike at the very heart of the purpose underlying the attorney-client privilege. *See Mohawk Indus. Inc., v. Carpenter*, 130 S.Ct. 599, 606 (2009).

Furthermore, Chevron itself has called for “[a]ny party desiring to claim the documents or claim any privilege or protection” to demonstrate why the documents should not be released to Chevron. Dkt. 1503 at 2. The Republic desires to make such claims, but obviously the Republic cannot do so absent intervention. Given the speed at which Chevron seeks to have this issue resolved, waiting to permit the Republic to intervene until after the Court conducts an *in camera* review of the documents would only constitute an unnecessary and cumbersome delay—something neither party, nor the Republic, desires in this case.

D. The Republic’s Interest Is Not Adequately Protected By Current Parties

As the D.C. Circuit said in *In re Sealed Case*, “the confidentiality of communications covered by the privilege must be jealously guarded by *the holder of the privilege* lest it be waived.” *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir. 1989) (emphasis added). The Defendants as currently situated cannot adequately assert privilege over the documents implicating the Republic’s interests. Confidential communications purportedly from Mr. Mera do not implicate the Defendants’ interests—but such communications would, of course, implicate the Republic’s. Because it is the Republic that possesses the privilege that may be destroyed here, it is the Republic that must be present and heard in order to protect the privilege. *See In re von Bulow*, 828 F. 2d 94, 100 (2d Cir. 1987) (stating that privilege is solely the client’s, not the attorney’s). It is simply unacceptable that a sovereign nation’s confidential communications, anonymously provided to an arbitral adversary in a matter in which the State is

not a party, could have the confidentiality and privileged status of such communications waived because the sovereign was not permitted to intervene and protect its rights.

II. ALTERNATIVELY, THE REPUBLIC SHOULD BE PERMITTED TO INTERVENE

Permissive intervention is governed by Rule 24(b) and should be granted when a party “has a claim or defense that shares with the main action a common question of law or fact.” FED. R. CIV. P. 24(b)(2). Whether the claim for intervention is “of right” under Federal Rule of Civil Procedure 24(a)(2), or “permissive” under Federal Rule of Civil Procedure 24(b)(2), the court considers substantially the same factors. *R Best Produce v. Shulman-Rabin Marketing, Corp.*, 467 F.3d 238, 240-41 (2d Cir 2006). The determination of all issues regarding permissive intervention lies wholly within the discretion of the district court. *See, e.g., H.L. Hayden Co. of N.Y. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986). In exercising this discretion, courts are to liberally construe Rule 24(b)(2). *See, e.g., Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 407 (S.D.N.Y. 2006). Thus, this Court should exercise its discretion to permit the Republic to intervene to protect its sovereign, privileged communications.

CONCLUSION

For the foregoing reasons, the Republic respectfully requests that this Court allow the Republic to intervene in the above captioned case.

Dated: New York, New York
October 10, 2013

Respectfully submitted,

Of Counsel
Thomas M. Buchanan
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

/s/ C. MacNeil Mitchell
C. MacNeil Mitchell
WINSTON & STRAWN LLP
200 Park Avenue
New York, New York 10166
Phone: (212) 294-6700
Fax: (212) 294-4700
E-mail: cmitchel@winston.com

*Attorneys for Petitioner
The Republic of Ecuador*