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Chevron's Discovery of Crude Outtakes

Roger Alford (General Editor) (Notre Dame Law School) · Friday, May 7th, 2010

Yesterday a federal court in New York [granted Chevron's request for discovery](#) of outtakes from the 2009 documentary [Crude](#) about the multi-billion dollar litigation in Ecuador. Chevron's request was pursuant to [28 U.S.C. 1782](#), which authorizes a judge in the United States to order discovery of evidence to be used in proceedings before a foreign tribunal.

As reported [here](#), Chevron's lawyer, Randy Mastro, argued that over 600 hours of film that was left on the editing room floor will incriminate the plaintiffs' lawyers and show collusion between the Ecuadorian judge, the court-appointed expert, the Ecuadorian government and plaintiffs. "We're trying to show in Ecuador that the expert report is tainted," Mastro said. "We have the right to show how the process was manipulated by the plaintiffs' counsel working in concert with the government.... Outtakes are an extraordinary record in which the plaintiffs' counsel and their clients participated."

The Court held that an investment arbitration panel is a "foreign tribunal" within the meaning of the statute. "The arbitration here at issue is not pending in an arbitral tribunal established by private parties. It is pending in a tribunal established by an international treaty, the BIT between the United States and Ecuador." But the court seemed to suggest that even if it was a private arbitration, it could still order discovery under Section 1782. In the wake of the Supreme Court's 2004 decision of *Intel Corp. v. Advanced Micro Devices*, the court noted that several circuits have "held that international arbitral bodies under UNCITRAL rules constitute 'foreign tribunals' for purposes of Section 1782. This Court agrees."

Regarding whether a documentary film enjoys a journalistic privilege that precludes discovery, the court held that documentary films may invoke journalistic privilege, but that the test to satisfy the privilege was not met. The material sought is not confidential, will likely prove relevant in the case, and cannot reasonably be obtainable from other available sources.

Perhaps most interesting, the court seemed sympathetic to Chevron's arguments that Ecuador is no longer the fair and impartial forum it once was when it advocated dismissal of the case on the grounds of *forum non conveniens*. The court cited a disturbing 2009 State Department report of judicial corruption and influence, and stated that "one readily sees why Chevron ... now might be concerned about their fate in the Ecuadorian courts, regardless of whether events ultimately will prove those concerns to be justified."

So Chevron will now have access to hundreds of hours of unedited film outtakes that have the potential to be completely explosive. If Chevron is to be believed, it could show footage of

plaintiffs' lawyers using pressure tactics to influence the outcome. Reportedly among the outtakes is a scene in which the plaintiffs' lawyer pressures an Ecuadorian judge not to inspect a laboratory used to assess environmental contamination, saying "this is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it's dirty."


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