
From: Steven Donziger [sdonziger@gmail.com]
Sent: Tuesday, May 25, 2010 3:32 AM
To: Andrew Woods
Subject: print for trip
Attachments: Ecuador-Ecuador. AW Notes re Ecuadorian submission (00051591-2).DOC

----- Forwarded message -----

From: **Ilann M. Maazel** <imaazel@ecbalaw.com>
Date: Mon, May 24, 2010 at 10:40 PM
Subject: RE: Draft Outline of Possible Ecuadorian Court Filing
To: "Westenberger, Eric" <ewestenberger@pattonboggs.com>, "Jonathan S. Abady" <jabady@ecbalaw.com>, bnarwold@motleyrice.com, imoll@motleyrice.com, sdonziger@gmail.com, Andrew Wilson <awilson@ecbalaw.com>, jbrickell@h5.com
Cc: neconomou@h5.com, "Tyrrell, James" <JTyrrell@pattonboggs.com>, "Yennock, Edward" <EYennock@pattonboggs.com>, "Daleo, Eric" <EDaleo@pattonboggs.com>

This is a great start. Andrew's thoughts are in red, mine in blue. I'd love to file something like this this week. Can you all start drafting tomorrow?

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From: Westenberger, Eric [mailto:ewestenberger@pattonboggs.com]
Sent: Thursday, May 20, 2010 3:33 PM
To: Jonathan S. Abady; bnarwold@motleyrice.com; imoll@motleyrice.com; sdonziger@gmail.com; Ilann M. Maazel; Andrew Wilson; jbrickell@h5.com
Cc: neconomou@h5.com; Tyrrell, James; Yennock, Edward; Daleo, Eric
Subject: Draft Outline of Possible Ecuadorian Court Filing

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All:

Per our discussion during yesterday's conference call, we have attached a draft outline of the Petition that we are contemplating filing before the Ecuadorian Court in an effort to "cleanse" any perceived impropriety related to the Cabrera Report.

In the process of drafting the attached outline, we identified two critical decision points that we will need to come to agreement on:

(1) The level of detail we should include in our disclosure of the contacts between Cabrera and Plaintiffs' team. Some on the call yesterday suggested we provide in this filing a "full accounting" of each and every contact between Cabrera and Plaintiffs. Others expressed the view that this filing should more generally refer to the contacts between Cabrera and Plaintiffs' team.

(2) The form(s) of relief we are seeking from the Ecuadorian Court. As detailed in the attached outline, we have identified five possible forms of relief (as indicated, if it makes sense, the resulting Petition will likely propose as relief a hybrid of the options listed below):

- (a) a declaration that the Cabrera Report (and the process involved in drafting the Report) fully complies with Ecuadorian law and Court Orders;
- (b) a request that Cabrera provide a "full and detailed bibliography" to supplement his Report;
- (c) a request that Cabrera produce to the parties all materials he read and reviewed in drafting his Report;
- (d) an Order allowing each of the parties to submit additional global damages reports, to supplement Cabrera's Report; and/or
- (e) an Order striking the Cabrera Report and allowing the parties to submit new reports.

Part of the decision-making process will be driven by the form in which the Ecuadorian Court may respond to our filing. Steven -- would we expect to receive a detailed opinion? Or would we merely receive a "yes" or "no"? Also, how soon after filing would we receive a response?

Your comments and feedback on this draft outline -- and on these decision points, in particular -- are invited. Given the timing involved, we would appreciate consolidated comments from each firm, Steven, and Julie, as soon as possible.

Eric

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Petición to be Filed in Ecuadorian Court
Draft Outline

I. Chevron has raised concerns regarding the Report prepared by Ing. Richard Stalin Cabrera Vega in an attempt to discredit the Report, and these proceedings, and to prevent the enforcement of any judgment this Court ultimately renders against Chevron.

A. Concerns Raised by Chevron

1. Ing. Cabrera improperly relied on and/or adopted the work of Plaintiffs' consultants in his report without disclosing his use of this work to this Court or to Chevron.
2. The Plaintiffs' litigation team improperly met or communicated with Ing. Cabrera.

B. Related Actions Taken By Chevron to Discredit this Court and the Cabrera Report

1. Before the courts of the United States, in addition to alleging that this "Court itself is part of a corrupt system," Chevron has alleged that, Plaintiffs violated Orders of this Court in the process of submitting materials to Ing. Cabrera which he considered in drafting his Report. Chevron has also asserted that it is entitled, under Ecuadorian law, to copies of any materials given to Ing. Cabrera by Plaintiffs. It has sought "discovery" from members of the Plaintiffs' litigation team, demanding persons turn over copies of private documents and sit for depositions under oath regarding their contacts with Ing. Cabrera.
2. Before an International Arbitral Tribunal currently convened in The Hague, Chevron alleges that it is being "deni[ed] justice" by the Courts of Ecuador, in part, because Ing. Cabrera "collaborated with the plaintiffs' representatives in preparing his report."

II. A. Discussion of the contact between Ing. Cabrera and Plaintiffs, including discussion of the submission of any and all materials to Cabrera. [[This section would discuss and disclose all of the contacts Plaintiffs had with Cabrera. We will need to discuss how much relevant detail we should disclose to the Court.]] [IS THIS SECTION BETTER PLACED AFTER THE NEXT SO THAT IT IS MADE IN CONTEXT??][I AGREE: III SHOULD GO BEFORE II] [AS FAR AS DETAIL IS CONCERNED, I THINK WE PROVIDE DATES, AND DETAILS ENOUGH TO BE CLEAR – E.G. X PAGES WERE SENT BY MAIL

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ON [DATE] – WE SHOULD INCLUDE/ATTACH THE DOCUMENTS, IF POSSIBLE, RATHER THAN CHARACTERIZE THEM. AS FAR AS THE MEETINGS ARE CONCERNED, I THINK WE NEED TO GIVE ATTENDEES [OR NUMBERS/CATEGORIES OF PEOPLE/CONTEXT AND TOPICS DISCUSSED.] I.B. NONE OF THIS MATTERS. THE SCIENCE IS SOUND. THE RECORD IS OVERWHELMING. THE CONTACTS WERE PROPER. CHEVRON IS LIABLE FOR 27 BILLION IN DAMAGES.

III. The means and method used to prepare the Cabrera Report were proper and did not violate Orders of this Court or Ecuadorian law. [[This Section will detail, with citations, relevant orders of and filings before the Lago Agrio Court in an effort to show Plaintiffs’ understanding that all communications and submissions of material were proper and in accord with Ecuadorian law.]]

- A. Ing. Cabrera was available to both parties.
- B. Ing. Cabrera asked both parties to provide information to him, and this Court memorialized his requests in the form of Orders.
- C. This Court provided that “the parties may submit to the expert whatever documentation they believe may be useful in preparing his report.”
- D. Only Plaintiffs provided Ing. Cabrera documents and this Court specifically denied Chevron’s request that Ing. Cabrera be directed not to consider material supplied to him by Plaintiffs.
- E. Plaintiffs were not required to provide Chevron the materials they gave to Ing. Cabrera.

IV. Requested Relief from the Ecuadorian Court [[Listed below are potential relief options. We will need to determine which options to include in the Petición. More than likely, the relief sought will need to be a hybrid of two or more of the below options.]][I THOUGHT ALBERTO RECOMMENDED WE “SUGGEST” THAT THE COURT APPOINT SOMEONE TO REVIEW CABRERA’S FINDINGS. THAT SEEMS DIFFERENT FROM ALL THE BELOW.]

- A. AFFIRM THAT? [MAYBE GIVE A YES OF NO QUESTION TO DEAL WITH THE BREVITY ISSUE HIGHLITED BELOW?][THIS SEEMS TOO SELF-SERVING TO ME. WILL THIS REALLY HELP ENFORCEMENT? IT DEFINITELY WON’T HELP IN THE BIT.] Find and declare that, based upon the facts contained in this Petición and the other facts known to this Court, there occurred no violation of any Orders of this Court, the Ecuadorian Civil Code of Procedures, the Organic Code of Judiciary, or the Constitution of Ecuador. Further find and declare that any contact between Ing. Cabrera and Plaintiffs and the submission of

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materials by Plaintiffs to Ing. Cabrera is proper and not violative of any Order of this Court or the laws of Ecuador. Cabrera was free to rely on materials prepared and submitted by the parties in drafting his report.¹

- B. [IN THE INTERESTS OF TRANSPARANCY AND TO SUPPORT THE COURT PROCESS, PLAINTIFFS WAIVE THEIR CONFIDENTIALITY AND REQUEST THAT THE COURT [[MIGHT THIS GIVE CABRERA COVER TO SUGGEST HE WAS OPERATING TO PROTECT OUR CONFIDENTIALTY?]] Order the preparation, by Ing. Cabrera, of a full and detailed bibliography to supplement his report. This bibliography should detail the author, title, and source of any materials he “considered” in the drafting process, including any documents he read and reviewed that were submitted directly by the parties. This bibliography should also include a full accounting of any meetings or other communications Cabrera had with either or both of the parties.² [I LIKE THIS. ALSO THINK WE SHOULD GIVE TO THE COURT/CHEVRON WHATEVER WE KNOW WE GAVE CABRERA]
- C. Order the production, by Ing. Cabrera, to this Court and the parties, of all materials Ing. Cabrera read and reviewed in the process of drafting his expert report.³

¹ Potential challenges/attendant risks with this relief: For judgment enforcement, the resulting Court Order ideally would be a clear and unambiguous statement specifically addressing (and not disapproving of) Plaintiffs’ communications with Cabrera and Cabrera’s adoption of Plaintiffs’ work. The risk is that, similar to other Orders from the Court of Nueva Loja that we have seen, the Court Order resulting from this Petición would not contain detailed findings and would be vague and formalistic.

² Potential challenges/attendant risks with this relief: It is possible that Cabrera could respond with an indication that he already supplied a detailed bibliography in his Report and refuse to supply an expanded bibliography. A second possibility is that Cabrera could supplement his bibliography but leave off Plaintiff-provided documents, or indicate that he was given documents from Plaintiffs without any attribution. [WE SHOULD GET A COPY OF THE DOCS THAT STRATUS PREPARED AS SOON AS POSSIBLE TO DETERMINE WHETHER STRATUS’S NAME WAS ON THE FINAL – IE WHETHER CABRERA COULD HAVE KNOWN IT WAS STRATUS.]

³ Potential challenges/attendant risks with this relief: It is possible that Cabrera could respond with an indication that he already supplied a detailed bibliography in his Report and refuse to supply an expanded bibliography. Alternatively, Cabrera could supplement his bibliography but leave off Plaintiff-provided documents. A third “worst case” option is that Cabrera could indicate that he was given documents from Plaintiffs without any indication of authorship and is therefore unable to attribute these sources in his bibliography. [IDEALLY WE COULD SUBMIT ALL DOCUMENTS THAT WE GAVE HIM – TO CONTEXTUALIZE THE FILING. IN ANY EVENT, IF WE SUBMIT ALL DOCS WE HAVE COPIES OF – THAT WILL INCENTIVIZE CABRERA TO BULK UP THE BIBLIOGRAPHY TO SHOW ALL HE REVIEWED IN ADDITION TO THOSE DOCS FROM STRATUS]

- D. Allow each of the parties to submit a supplemental global damages report, if desired, that this Court will consider in rendering judgment.⁴ [I DEFER TO LOCAL EXPERTS ON WHETHER THIS MAKES SENSE BUT I THINK OUR STORY SHOULD BE THERE IS NOTHING TO HIDE HERE – TRANSPARENCY, BUT NO PROBLEM TO “FIX”][PREFER ALBERTO’S IDEA TO THIS. CHEVRON WILL DELAY FOR YEARS UNDER THIS APPROACH.]
- E. Strike the Expert Report of Ing. Cabrera from the record, and allow each of the parties to submit new global damages reports, if desired.⁵ [SEE ANSWER TO PART C][WOULD NOT DO THIS]

⁴ Potential challenges/attendant risks with this relief: Allowing the opportunity for the submission of additional expert reports would delay the judgment. It is likely that Chevron would seek to delay the submission of these reports beyond what would be tolerable to the Plaintiffs. In addition, the Court would need additional time to review such reports.

⁵ Potential challenges/attendant risks with this relief: In addition to delaying the judgment to allow for the submission of new reports, striking the Cabrera Report would mean that Plaintiffs would lose the benefit of Cabrera’s favorable findings with the risk that a new expert would not reach a final damages comparable to Cabrera’s damages estimate.

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