January 24, 2012

Hon. Dr. Diego García Carrión
Procurador General del Estado
Procuraduría General del Estado
República del Ecuador
Robles 731 Y Av. Amazónas
Quito
ECUADOR

Dear Honorable Procurador,

I write on behalf of my clients, the indigenous and farmer communities of Ecuador's Amazon region who continue to suffer the consequences of the environmental harm caused by the operations of Chevron and its predecessor company Texaco in the area of the Napo concession in the provinces of Sucumbíos and Orellana. As you know, on February 14, 2011, the presiding judge of the Provincial Court of Justice of Sucumbíos delivered a judgment for clients and against Chevron (in a case titled *Aguinda v. Chevron Texaco,* or the "Lago Agrio case"). The judgment was affirmed on appeal by the Sole Chamber of the Provincial Court on January 3, 2012. Both decisions are strictly grounded in the law and the voluminous scientific proof presented by both parties, including the evidence presented by Chevron's own experts.

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The purpose of this letter is to inform the Republic of Ecuador of the position of the affected Amazonian communities with respect to the illegal efforts by Chevron and possibly an arbitral panel to abuse the U.S.-Ecuador Bilateral Investment Treaty ("BIT") to attempt to deny the fundamental human rights of over 30,000 Ecuadorians that are protected by Ecuador's Constitution and international law. The most critical point is that the Republic of Ecuador (ROE), pursuant to its legal obligations under the Constitution and numerous international treaties that protect human rights, may not implement any order (be it "interim" or final) by an arbitral panel to the extent that it violates core international human rights norms. It is abundantly clear that the "interim" order that Chevron is now demanding would violate Ecuador's Constitution, as well as international law, and therefore would be null and void were an arbitral panel to issue it. Moreover, such an "order" would violate the BIT, which reflects the clean intent of the two parties to

protect the sovereignty of their respective judicial systems—something completely contrary to what Chevron is now demanding at international arbitration.

As background, our clients for 18 years have waged a courageous struggle to hold Chevron accountable for the environmental and human rights crimes committed in the national territory. This struggle has attracted significant media attention worldwide that has verified via firsthand accounts the fundamental allegations of the affected communities.[1] As confirmed by the trial court, over a period of almost three decades Chevron used recklessly sub-standard production methods in Ecuador that at the time were outlawed in the United States and were considered wholly inadequate by the petroleum industry. The trial court confirmed statements by Chevron legal representative Rodrigo Perez Pallares that the company discharged more than 16 billion gallons of toxic "water of formation" into streams and rivers relied on by our clients for their drinking water. The court also found that Chevron abandoned more than 800 unlined waste pits which today continue to discharge their toxins into soils, groundwater, and surface waters. The court determined that Chevron's misconduct violated Ecuador's laws, industry standards, and its own operating contract.[2] One expert for the plaintiffs, Dr. Daniel Rourke, concluded that more than 9,000 Ecuadorians in the affected area likely will contract cancer due to exposure to oil contamination even assuming a comprehensive remediation is conducted by the year 2020.[3] (Of course, the harm and the number of human victims would be even greater absent a remediation.) Given this grave and

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1 *See, e.g.*, "The Amazon's Toxic Mess," Sunday Night program, Australia Channel 7, Oct. 9, 2011, *at* http://au.news.yahoo.com/sunday-night/video/watch/26872380/; "Amazon Crude," 60 Minutes, CBS News, May 8, 2009, at http://www.cbsnews.com/stories/2009/05/01/60minutes/main4983549_page3.shtml.

2 A summary of the evidence undergirding the court's 188-page decision can be found at http://chevrontoxico.com/assets/docs/2012-01-evidence-summary.pdf. A summary of the decision itself can be found at http://chevrontoxico.com/news-and-multimedia/2011/0406-key-documents-and-court-filings-from-aguinda-legal-team.html.

3 See Dr. Daniel Rourke, *Estimate of the Number and Costs of Excess Cancer Deaths Associated with Residence in the Oil-Producing Areas of the Sucumbíos and Orellana Provinces in Ecuador*, Sept. 12, 2010, in the Lago Agrio trial record at 1967:206,576-206,597; Dr. Daniel Rourke, Addendum Report, Sept. 15, 2010. Dr. Rourke, a statistician former with the RAND Corporation, used data taken from independent studies published in leading peer-reviewed publications that found statistically significant elevated risks of cancer, leukemia, birth defects, and other problems among people impacted by the contamination. *See, e.g.*, *Incidence of Childhood Leukemia and Oil Exploitation in the Amazon Basin of Ecuador*, Int'l J. of Occupational and Env'l Health (July/Sept 2004); M. San Sebastián, B. Armstrong, J.A. Córdoba and C. Stephens, *Exposures and cancer incidence near oil fields in the Amazon basin of Ecuador*, Occup. Environ. Med 58:517-522 (2001); A.K. Hurtig and M. San Sebastian, *Geographical differences in cancer incidence in the Amazon basin of Ecuador in relation to residence near oil fields*, Int'l J. of Epidemiology (2002); M. San Sebastián, B. Armstrong, J.A. Córdoba and C. Stephens, *Outcomes of Pregnancy among Women Living in the Proximity of Oil Fields in the Amazon Basin of Ecuador*, Int'l J. of Occupational & Environmental Health (Oct-Dec. 2002); A.K. Hurtig and M. San Sebastian, *Gynecological and breast malignancies in the Amazon basin of Ecuador*, 1985-1998, Int'l J. of Gynecology & Obstetrics (2002); M. San Sebastian and A.K. Hurtig, *Oil exploitation in the Amazon basin of Ecuador: a public health emergency*, Pan Am. J. of Public Health (2004); E. Quizhpe, M. San Sebastián, A.K. Hurtig, A. Llamas, *Prevalencia de anemia en escolares de la zona amazonica de Ecuador* [Prevalence of anemia among students in the Amazon region of Ecuador], Pan Am. J. of Public Health (2003).

ongoing threat to human life, the environment, and indigenous cultures, and the profound difficulties facing the affected communities due to Chevron's abusive litigation tactics,[4] we believe that Chevron's efforts are part of a cynical plan to avoid paying its legal obligations in order to obtain impunity for its crimes.

As we understand it, a panel of three private arbitrators convened by Chevron under the BIT is considering Chevron's demands for "relief" whereby the panel would order the executive branch of the Ecuadorian government to interfere in and undermine the judicial process, notwithstanding that this would put the executive in flagrant violation of Ecuadorian law. Specifically, Chevron has asked the panel (a) to order the ROE to decree that the judgment is not enforceable until the private arbitral panel has completed its process or there is a judgment of the National Court of Justice; (b) to order the sovereign courts of Ecuador to affirm that Chevron does not have to request or post a cassation appeal bond per the usual requirements of Ecuadorian law; (c) to order the ROE to pay the cassation appeal bond in Chevron's place; or (d) to order the ROE to mandate the affected communities and their representatives not take steps to enforce the judgment. All of these requests are highly illegal and unconstitutional and would seriously violate the law and undermine the international human rights system. In accordance with Ecuador's Law of Cassation Appeal, when a party wants to suspend the enforceability of a final judgment—that is, a judgment by a provincial-level appeals court—it has the right to file a cassation appeal in parallel with a request for the fixing of an appeal bond.[5] On January 20, 2012, Chevron filed a cassation appeal but instead of requesting the fixing of a bond it simply asked the Provincial Court to take into consideration the "order" issued by the arbitral panel on February 9, 2011. In other words, Chevron is asking the organs

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4 Chevron's abusive litigation tactics were highlighted most recently by the judgment of the Ecuador Court of Appeals. This court cited Chevron for its repeated acts of "blatant bad faith," "notorious and obvious bad faith," and "obvious abuse of rights and clear intent to obstruct the administration of justice." Appeals Judgment of Jan. 3, 2012, at 2. They were also recounted by the trial court. *See* Trial Judgment of Feb. 14, 2011, at 185 (describing Chevron's "sever[e] . . . misconduct," "bad faith," and "abuse of process"); *id*. at 55 (describing how Chevron attorneys "misled" and "manipulated" the court), id. at 184-85 (describing how Chevron filed repetitive, frivolous motions, up to thirty in one hour). One independent observer concluded that Chevron's Ecuador strategy is a "textbook example of abusive litigation." Santiago Cueto, *Ecuador Class Action Plaintiffs Strike Back at Chevron's Cynical Game of Musical Jurisdictions*, International Business Law Advisor, Jan. 18, 2010, *at* http://www.internationalbusinesslawadvisor.com/2010/01/articles/international-litigation/ecuador-class-action-plaintiffs-strike-back-at-chevrons-cynical-game-of-musical-jurisdictions/. Chevron's lead law firm in the matter, the U.S.-based Gibson Dunn & Crutcher, has repeatedly been sanctioned by courts for harassing witnesses and engaging in unethical practices. Last November, for example, a U.S. federal judge fined and sanctioned Chevron after a Gibson Dunn lawyer harassed an environmental group that had filed an *amicus* brief in in Ecuador supporting the plaintiffs. The Gibson Dunn firm was fined by another U.S. judge for suing a lawyer for the Ecuadorian plaintiffs with the intent of intimidating and silencing him. Gibson Dunn has used similar tactics on behalf of other multinational clients who face serious charges of human rights abuses. *See* Paul Paz y Miño, *How Lawyer Arrogance Imperils Chevron Shareholders in Ecuador*, The Huffington Post, Jan. 4., 2012, at http://www.huffingtonpost.com/paul-paz-y-mino/chevron-ecuador-oil_b_1180208.html.

5 Law of Cassation, art. 11. Save for certain specific exceptions articulated in the article itself, the provision states that a request for suspension of enforcement of the judgment underlying a cassation appeal must involve paying a bond sufficient to cover any damages the opposing party might suffer on account of the delay.

of justice in Ecuador to violate the law, the Constitution, and to undermine the affected communities' fundamental human rights to a fair judicial process on the same terms as everyone else; it is demanding special treatment of a sort never seen in Ecuador's history.

It is obvious that Chevron's strategy is to pressure the Republic to bargain away the fundamental human rights of our clients in the name of protecting Chevron's extreme interpretation of "investor rights" to which it believes it is entitled under the BIT.[6] We also reiterate that the persons who by far have the largest stake in this matter are the thousands of Ecuadorian rainforest residents who continue to suffer the life-threatening impacts of Chevron's contamination. Under the applicable arbitration rules, the affected residents are not allowed to be part of the process, which in itself is a clear violation of due process as guaranteed by international law. Moreover, the sovereign government of the Republic of Ecuador does not and cannot fully represent the interests of our clients, nor does it have the obligation to do so, given that our litigation is strictly between private parties and does not include the government of Ecuador.

However, the relief Chevron seeks also would have much more serious legal implications for my clients. Chevron has asked the arbitral panel to require the Republic to violate its clear legal obligations under a host of international treaties that protect fundamental human rights, including the right to life and the right to seek legal redress.[7] It is our position that ordering or complying with any such relief would be a *per se* violation of international law and Ecuador's Constitution. If the arbitral panel were to

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6 We do not dispute the validity of the BIT itself nor Chevron's right to have recourse to international arbitration when permissible. But Chevron's invocation of the BIT to avoid legal obligations from a court that it expressly selected merely because it dislikes the outcome of a trial is unprecedented and illegitimate. It is also rife with other fundamental problems, in part because it is not based on any "dispute" arising out of an "investment" cognizable under Article VI(1)(c) or "investment agreement" under Article VI(1)(a) of the BIT. In addition, Chevron already and irrevocably had selected another remedial path for its underlying claims ("fork in the road"). Finally, Chevron's overreaching threatens to steal credibility from the BIT arbitral process in a way that harms all investors with legitimate claims, just so Chevron can try to obtain an unfair and wholly unjustified advantage in one case. From the perspective of our clients, the fact the arbitral panel has yet to conclude on these facts that Chevron has acted in bad faith is just astounding. It also raises questions about the very objectivity of the panel members and whether they understand how international law governing investor disputes exists inside a larger international law context.

7 The American Convention on Human Rights, entered into force and ratified by Ecuador on Dec. 8, 1997, guarantees all persons the "right to a fair trial," expressly including "the determination of [one's] rights and obligations of a civil, labor, fiscal, or any other nature." Am. Conv. on Hum. Rts., 1144 U.N.T.S. 123, O.A.S.Treaty Ser. No. 36 (1969), art. 8. The Convention further guarantees the right to "simple and prompt recourse, or any other effective recourse . . . for protection against acts that violate [one's] fundamental rights recognized by" the Convention and requires that Ecuador ensure that claims for such recourse "shall [be] determined" and that "the competent authorities shall enforce such remedies when granted." *Id.*, art. 25. *See also* International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, U.N. Doc. A/6316, *entered into force* Mar. 23, 1976, *ratified by Ecuador* Mar. 6, 1969, at art. 2(3) (requiring Ecuador to "ensure . . . an effective remedy [and] ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities"); Universal Declaration of Human Rights, U.N. Doc. A/810 (1948), art. 8 (setting forth "the right to an effective remedy by the competent national tribunals for the violation of fundamental rights").

grant *any* of the relief requested by Chevron—even seemingly technical relief—then it is our position that the arbitral panel itself would stand in violation of international law. Chevron, in effect, is asking the arbitral panel to violate various provisions of international law so that the company can evade paying the Ecuador court judgment. This request is clearly beyond the scope of any conceivable remedy authorized by the BIT and it is certainly beyond the arbitral panel's authority. If the panel were to act on Chevron's requests for an interim award, our clients would consider the resulting order to be an illegitimate exercise of its authority. We also believe such an order would trigger a legal obligation for Ecuador's government to forego its implementation given Ecuador's unambiguous duty to protect the rights of its citizens as guaranteed by domestic and international law.[8]

We agree with the basic thrust of the facts and arguments laid out in your January 9 letter to the panel. However, we do not believe the correspondence adequately presents the underlying facts that so forcefully rebut Chevron's false accusations and the grave consequences that would flow from any realization of its illegitimate requests. Granting or complying with Chevron's requests would in effect condemn thousands of people to years of additional suffering and even death, in clear violation of their fundamental rights to life, health, and a clean enviroment, among others.

It is the legal obligation of the ROE like any other sovereign nation to strongly defend these fundamental human rights. If the private arbitral panel were to grant any of Chevron's requests, it would in effect be deciding that international commercial law created to help facilitate the resolution of private business disputes overrides international human rights law created to protect the fundamental right to life and right to seek legal redress, especially as regards historically disadvantaged indigenous groups.[9] This would

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8 International law obligates States to provide civil remedies against corporations for human rights abuses. Thus the U.N. General Assembly, in a 2005 "restatement of existing State obligations," noted that States must provide "access to justice" for victims of serious abuses, specifically contemplating liability for "reparation" from "a legal person, or other entity." Basic Principles & Guidelines on the Right to a Remedy & Reparations for Victims of Gross Violations of Int'l Human Rights Law & Serious Violations of Int'l Humanitarian Law, A/RES/60/147 Annex, Principles 3(c) & 15. This reflects the general rules of human rights law, including remedies required under the ICCPR. *See* UN Human Rights Comm., Gen. Cmt. No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 ¶ 8 (Mar. 29, 2004) (stating that States must "provide effective remedies" and "redress the harm caused . . . by private persons or entities").

9 With respect to indigenous persons and communities, such as those among the Ecuadorian plaintiffs, international law goes even further in emphasizing the importance of a meaningful remedy and the State's obligation to protect the same. The 1989 Indigenous and Tribal Peoples Convention, ILO Conv. No. 169, entered into force and ratified by Ecuador on May 15, 1998, requires Ecuador to ensure that indigenous peoples are "safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through representative bodies, for the effective protection of these rights." ILO Conv. No. 169, 72 ILO Official Bull. 59, art. 12. It adds that States should adopt, as appropriate, "[s]pecial measures for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned." *Id.*, art 4(1). More recently, the landmark 2007 UN General Assembly Declaration on the Rights of Indigenous Peoples declares that "indigenous peoples have the right of access to and to prompt decision through just and fair procedures for the resolution of conflicts and disputes . . . as well as to effective remedies for all infringements of their individual and collective rights" and obligates States to "provide effective mechanisms for prevention of, and redress for . . .

dramatically undermine the advances in international human rights protections fought for by millions of people around the globe over the last century. Given the rapid and controversial explosion in international arbitral jurisdiction that has transpired in recent years—an expansion driven in large part by multinational corporations like Chevron—it might not be long before this type of dangerous precedent would be used by other large companies to abrogate the fundamental right to seek legal redress in national courts held by other aggrieved individuals and indigenous communities.

We recognize that Ecuador's government over a period of many years has defended itself honorably from Chevron's vicious and unfounded attacks on our nation's judiciary, political institutions, and elected leaders. Chevron repeatedly has said that it will never pay any judgment issued from an Ecuador court in the *Aguinda* case, even though it was Chevron that previously had praised Ecuador's judiciary as a way to shift the litigation from the United States to Ecuador. Now that the Provincial Court of Sucumbíos has found Chevron liable and the ruling has been confirmed on appeal, we expect these Chevron attacks to increase in intensity and frequency. Chevron has demonstrated it will use any means available—even if unethical and illegal—to evade being held accountable for the horrific contamination it caused to the indigenous and farmer communities of the Oriente. As such, it is critical that the ROE go further than its January 9 letter and acknowledge that it is obligated under international law to forego carrying out any order from the BIT arbitral panel that would purport to order the ROE to violate the Ecuadorian Constitution or the international instruments that protect the fundamental human rights of the affected Amazon communities.

The affected communities are not and will not be party to the arbitration, which itself cannot and should not affect the process of the Lago Agrio case in the slightest. Nonetheless we consider it important to speak out against Chevron's illegal and illegitimate strategy to abuse the BIT. We ask that you share this correspondence with the panel members and opposing counsel. We reserve entirely the prerogative to exercise our rights as necessary should it become apparent that Chevron, alone or through the efforts of the arbitral panel, the ROE, or the United States, intends to violate the rights of the people of the Ecuadorian Amazon.

Sincerely,

Pablo Fajardo M.
PLAINIFFS' LEGAL REPRESENTATIVE
AGUINDA V. CHEVRON CORP.

cc: Dra. Nathaly Cely Suárez
Ambassador, Embassy of Ecuador in the United States

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[a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources." G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), arts. 40, 8.

Hon. Timothy Zúñiga-Brown
Chargé d'Affaires, Embassy of the United States in Ecuador.

Hon. Hillary Rodham Clinton
Secretary, U.S. Department of State

Sr. Ricardo Patiño
Chancellor of the Republica del Ecuador