Comisión Andina
de Juristas

February 10, 2012

The Secretary-General of the United Nations
Mr. Ban Ki-mon
The United Nations
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Dear Secretary- General Ban Ki-Moon:

We respectfully write to you to express alarm regarding the misuse of the above-referenced UNCITRAL arbitration proceedings ("BIT Arbitration" or "Proceedings") by Chevron Corporation v. Republic of Ecuador, to influence the outcome of the private litigation between the indigenous Ecuadorian and the company.

These communities recently obtained a favorable and valid judgment in the court system of Ecuador that was chosen by Chevron as the venue for the litigation[1]. However, despite its previous stipulations to United States federal courts that it would respect any judgment from Ecuador[2], Chevron continues to use questionable litigation tactics to deny those injured any forum to seek justice and compensation for their injuries[3]. The latest such tactic is the misuse by Chevron of a BIT arbitration under the UNCITRAL rules to force Ecuador's government to violate international law and quash the human rights of its own citizens by essentially nullifying the result of their case after almost two decades of litigation.

This letter is intended to explain how Chevron's efforts to distort the BIT system to interfere with the rights of dozens of indigenous and farmer communities of the Amazonian rainforest (known as "Los Afectados") and how the actions of the BIT panel stand in direct violation of international

[1] In 2002, citing *forum non conveniens* principles, a United States federal court affirmed a lower court's granting of Chevron's motion to dismiss the original claims brought in the United States on the grounds that Ecuador was a more suitable forum to resolve the litigation. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

[2] The *forum non conveniens* dismissal was expressly conditioned on Chevron's promise to submit to the jurisdiction of Ecuador's courts and to satisfy and be bound by any judgment that would issue from an Ecuadorian court. Seeid., Opinion of the United States Court of Appeals for the Second Circuit in *Republic of Ecuador v.*
Chevron Corporation, Docked Nos. 10-1020-cv (L) 10-1026 (Con), (2d Cir. March 17, 2011), at pages 6-7, note 4 and Opinion of United States Court of Appeals for the Second Circuit in *Chevron Corporation v. Naranjo*, Docked Nos.
11-1150-cv (L) 11-1264 (Con), (2d Cir. January 26, 2011), at page 6.

[3] Indeed, Chevron has focused on the BIT Arbitration precisely because its recent attempts to prevent enforcement of the judgment in U.S. courts were summarily rejected. Chevron Corp. v. Steven Donziger, et al, No. 11-cv-691 (S.D.N.Y. Jan. 6, 2012) (mem. Opinion denying motion for attachment). Chevron Corp. v. Hugo Gerardo Camacho Naranjo, et al, No. 11-1150-cv (L) 11-1264 (Con), (2d Cir. Jan. 19, 2012) (order denying motion to lift stay and to vacate reversal of preliminary injunction). Opinion of United States Court of Appeals for the Second Circuit in *Chevron Corporation v. Naranjo*, Docked Nos. 11-1150-cv (L) 11-1264 (Con), (2d Cir. January 26, 2011) (stating that "the [Afectados] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where Chevron has assets") at 27 and ("the Ecuadorian judgment is now, in light of the intermediate court's January 2012 ruling, potentially "final, conclusive and enforceable where rendered" (...))" at 19.

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law. Ultimately, with all due respect, I ask that you act within your authority to ensure that the BIT arbitration system is not used by Chevron to undo international law protections guaranteeing access to justice[4]. With that in mind, I respectfully request that you direct your staff to evaluate the matter and ensure that these UNCITRAL proceedings are not used as a means to affect a country's sovereignty and to deny private parties their fundamental rights[5].

Chevron's plan to use the BIT Arbitration to influence the outcome of the private litigation between the indigenous Ecuadorian plaintiffs and the company has always been clear. Indeed, Chevron's case and public statements are directed as much at the underlying issues of the private litigation as they are at any *bona fide* commercial dispute under the Treaty between the United States and Ecuador despite the fact that (I) Ecuador is not a party to the *Lago Agrio* Case, and (ii) the Ecuadorian plaintiffs are not allowed under the BIT system to participate in the State-investor private arbitration[6]. Over the course of the Proceedings, Chevron has repeatedly asked the arbitral panel, *inder alia*, to order the Ecuadorian executive branch to affirmatively intervene in the domestic judicial proceedings and to withdraw from the Ecuadorian courts their constitutional powers to enforce their own judgments – a power that simply is not authorized by the BIT, and which in any event would force Ecuador to violate its national international law obligations.

Last year, the BIT Arbitration tribunal issued an Interim Measures Order (the "Order") against the Republic of Ecuador at the request of Chevron that expressly directed Ecuador to "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the *Lago Agrio* Case"[7]. The international legal community was shocked by the Order, which Chevron interpreted to force the Ecuadorian executive branch affirmatively to interfere in a judicial process and limit Ecuador's sovereignty vis-a-vis a case that that has been in court for 18 years. The concern over the improper use of the BIT Proceedings is equally shared by United States courts. The United States Court of Appeals for the Second Circuit, while finding that the Proceedings could properly co-exist with the Lago Agrio plaintiffs' claims Chevron, very clearly sought to prevent Chevron form the misusing the BIT system to interfere in the Lago Agrio litigation. On March 17, 2011, the Second Circuit ruled, "Plaintiffs are not parties to the [Bilateral Investment Treaty], and that treaty has no application to their claims, *their dispute with Chevron therefore cannot be settled through [Bilateral Investment Treaty] arbitration"*[8].

Yet, when the Ecuador Court of Appeals affirmed the first instance judgment against Chevron in favor of the Ecuadorian Plaintiffs on January 3, 2012, Chevron went back to the BIT Arbitration panel on the very next day claiming that the Ecuadorian government had violated the Order by failing to interfere in the case, and Chevron requested that the arbitration panel convert the Order into an Interim Award with the obvious intention of rendering the Lago Agrio judgment indefinitely unenforceable. The request ignored the fact that the Order forced the Ecuadorian government to

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[4] See, e.g., Universal Declaration on Human Rights; International Covenanton Civil and Political Rights; American Declaration on Rights and Duties of Men; Inter-American Convetion on Human Rights.

[5] As the Under-Secretary-General for Legal Affairs of the United Nations has stated: *"UNCITRAL plays a key role in the promotion of the rule of law by providing internationally acceptable rules in the field of commercial law and supporting the enactment of those rules"*; Statement of the Deputy Secreatry-Genral Asha-Rose Migiro's remarksto the panel discussion on the role of the United Nations Commission on International Trade Law (UNCITRAL) at the national and international levels, 7 July 20120, in New York.; Enhancing International Trade and Development in the Asia-Pacific Region: UNCITRAL Regional Centre for Asia and the Pacific, Openning speech by Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel Tuesday, 10 January 2011.

[6] This matter falls within the UN's priority agenda: See, "Preparation of a legal standard on transparency in treaty-based investor-State arbitration" in the agenda of Working Group II of UNCITRAL (A/CN.9/WG.II/WP.168)

[7] PCA Case No. 2009-23, Order for Interim Measures dated February 9, 2011at 3.

[8] Opinion of the United States Court of Appeals for the Second Circuit in *Republic of Ecuador v. Chevron Corporation*, Docket Nos. 10-1020-cv (L) 10-1026 (Con), (2d Cir. March 17, 2011), at 21. (emphasis added).

breach its own laws and interfere in an ongoing judicial process between private parties. At the same time, Chevron has attempted to extend the scope of the Order even further under its own peculiar reading, explicitly telling the competent Ecuadorian courts that the Order (i) renders it immune form Ecuadorian law, allowing Chevron not to post a bond as required of any other party under Ecuadorian law, and (ii) requires the Ecuadorian appellate court to block enforcement of a valid and final judgment. Chevron maintains in effect that the BIT Arbitration panel has the power to act as an immediate appellate court of domestic disputes and issue binding orders as to what a sovereign's domestic courts can and cannot do[9].

In response to Chevron's recent submissions in the BIT Arbitration, the 3-member panel schedule two days of hearings on February 11-12 to evaluate Chevron's request. Just days ago, however, the BIT Arbitration panel gave in to Chevron's request and converted the Interim Measures Order into an Interim Award. Both the panel's Order and Interim Award make a travesty of the bilateral commercial treaty system and stand in direction of violation of international law. Specifically, the panel's actions represent a distorted interpretation of bilateral investment treaties and their purpose, establish an improper and illegal expansion of arbitral powers, and have wide ranging implications for well-settled principles of international law, including State sovereignty and fundamental rights.

It is widely recognized that the International investment treaty system promotes cross-border investment and, as such, protects the rights of foreign investors form discriminatory and, in general, wrongful acts by states. In covering the Order into an Interim Award, the panel's application of the treaty fundamentally departs from the international investment treaty system by allowing an even encouraging losing parties in any domestic dispute to use such treaties to attempt to invalidate domestic court rulings or significantly delay their impact (which literally has life and death implications in the case of Los Afectados). This clearly was not intended by the treaty's signatories, and taken to its logical conclusion, suggests that a country potentially forfeits the jurisdiction of its courts whenever it receives foreign investment under an investment treaty[10]. Such an interpretation calls into question the entire investment treaty regime and may even affect the willingness of nations to enter into investment agreements.

Moreover, the panel's actions represent an improper an illegal expansion of arbitral powers. By its terms, the Interim Award purports to force the Ecuadorian government to violate its own constitution and national law. Chevron is effectively distorting the BIT Arbitration to undermine the established separation of powers of the Republic of Ecuador and attempting to limit the country's sovereignty. Such a result is simply untenable under international law - BIT arbitral panels cannot be called on by investors to set aside countries' constitutional system and sovereignty, which are essential components of modern democracies. No panel of commercial arbitrators is imbued under international law with the right to alter justice rendered by domestic courts, no matter how many times or ways that Chevron tries imbue them with such authority.

Finally, the arbitrators' Interim Award diminishes basic international law principles of comity and the presumption of validity of a sovereign's judicial processes. The panel's Interim Award in this

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[9] Not being a part of the BIT Arbitration, the *Asamblea de Afectados* recently sent a letter to the Ecuador's Attorney General Requesting that Ecuador "acknowledge that it is obligated under international law to forego carrying out nay order form 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". Letter to Dr. Diego García Carrión, Procurador General del Estado, República del Ecuador, dated January 24, 2012.

[10] To illustrate this point, the panel seems to understand *mutatis mutandis* that, under the UNCITRAL Rules, it is permissible to require the United States Department of Justice to order the United States Supreme Court not to issue an opinion in a case before it.

instance is all the more exceptional in that it is based exclusively on mere allegations of Chevron and nothing more. Chevron now wants the forum (Ecuador) it once explicitly elected for the *Lago Agrio* as the "more convenient" to be rendered absolutely meaningless through a proceeding in which the Ecuadorian plaintiffs are not even a party and have little or no access to information. If UNCITRAL Rules allow Chevron to distort the BIT system in this way, the Ecuadorian plaintiffs will have no forum left anywhere in the world to assert their claims rendering them for all intents and purposes stateless under international law[11].

As human rights non-governmental organization working in the Andean Region, we need to alert the United Nations of this distortion of the BIT arbitration system in the context of the UNCITRAL Arbitration and a clear violation of international law. We therefore respectfully request that, in view of the United Nations' role to promote the rule of law around the world[12], this letter be referred to all relevant entities within the UN structure and action taken to avoid the usurpation of sovereignty and human rights by decisions of BIT investment arbitration panels.

Respectfully submitted,

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[11] The United States Court of Appeals for the Second Circuit expressed similar concern about the district court asserting similar powers, excoriating it against setting "itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems". Opinion of United States Court of Appeals for the Second Circuit in *Chevron Corporation v. Naranjo*, Docked Nos. 11-1150-cv (L) 11-1264 (Con), (2d Cir. January 26, 2011) at 24.

[12] In the Outcome Document of the 2005 World Summit the Heads of State and Government resolved to encourage greater direct investment, including foreign investment, in developing countries to support their development activities and to enhance the benefits they can derive from such investments. They also recommitted to actively protect and promote all human rights, the rule of law, and democracy and to recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations. See, General Assembly, 2005 World Summit Outcome Resolution, A/RES/60/1.