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VIA EMAIL AND FAX

The Honorable Diego García Carrión
Procurador General del Estado
Procuraduría General del Estado
Av. Amazonas N39-123 y José Arízaga
Quito, ECUADOR

RE: Racich expert report contradicting Chevron's allegations

Estimado Dr. Garcia Carrion:

I write to you in your capacity as the legal representative of the Republic of Ecuador (“the Republic”) to urge the public release of an expert report referenced in the Republic’s most recent Counter-Memorial (dated November 7, 2014) in the BIT arbitration that apparently was authored by the American forensic expert J. Christopher Racich (“Racich Report”). I make this request on behalf of myself, the communities in Ecuador who have held Chevron accountable for its pollution, and other Ecuadorian citizens cited herein who have been targeted by Chevron’s retaliation strategy.

We believe there is a reasonable basis to believe that the Racich Report contains further proof that Chevron’s allegation that a “bribe” occurred to obtain the judgment in the *Aguinda* case is false. The affected Ecuadorian communities and those of us in the United States who have been targeted by Chevron’s retaliation campaign have long asserted Chevron’s claim is the product of flagrantly corrupt and untruthful witness testimony arranged and paid for by the oil company. Any probative and/or exculpatory evidence related to the Chevron bribe allegation – as the Racich Report appears to be -- should be made public immediately in the interests of justice for all involved.¹ This request is time-sensitive given the ongoing health impacts in Ecuador’s

¹ In the interests of fairness, we again urge the Republic to release not just the Racich Report but *all* documents submitted by the parties to the BIT arbitration since its inception in 2009 as well as the transcripts of any proceedings. As pointed out herein, there is evidence before the BIT panel that appears to be highly probative as regards contested allegations Chevron has made in other proceedings where the company is carrying out its avowed “lifetime of litigation” strategy to prevent the villagers from collecting their judgment. Keeping that probative evidence under wraps might protect Chevron, but it does not serve the public interest nor the interests of the thousands of Ecuadorian citizens who continue to suffer grave harm due to Chevron’s contamination. Generally, disclosures of the BIT documents by the Republic have been selective, untimely, and redacted while Chevron’s limited disclosures have been completely self-serving.

More to the point, we believe it is patently unfair for an arbitral process that purports to deal with issues affecting the fundamental rights of vulnerable citizens to conduct its business behind closed doors, as is clearly

rainforest caused by Chevron's contamination and the pendency of an appeal of a U.S. judge's decision in New York filed by myself and two Ecuadorian citizens, Javier Piajguaje and Hugo Camacho.

As background, the legal team representing the Ecuadorian victims analyzed the contents of the latest Counter-Memorial in the *Chevron Corp. v. Republic of Ecuador* arbitration ("BIT Arbitration") after it was posted on a government website in redacted form. Apart from the strong international law arguments presented, the Counter-Memorial incisively deconstructs the many layers of misleading statements, factual distortions, and outright fabrications driving Chevron's deeply abusive attacks on the Republic through the BIT Arbitration and via other means. As you surely know, myself and various Ecuadorian citizens -- including the 47 villagers who are named plaintiffs in the *Aguinda* matter and the renowned environmental advocates Luis Yanza and Pablo Fajardo -- also have been targets of a parallel prong of the same abusive Chevron attack strategy.

This prong involves a so-called "racketeering" or RICO lawsuit Chevron filed in 2011 in front of the aforementioned U.S. judge, the Honorable Lewis A. Kaplan. The record of that proceeding is replete with examples of Judge Kaplan's hostility toward me, the Republic's judicial system, and the Ecuadorian villagers who sued the company. As you no doubt know, after denying the defendants a jury of impartial fact finders, Judge Kaplan issued a decision in 2014 that sought to undermine the earlier-issued legitimate judgment in the *Aguinda* case that has been unanimously affirmed by two appellate courts in Ecuador, including by the National Court of Justice. These decisions found Chevron liable for extensive environmental and other damages arising from its sub-standard operational practices in Sucumbíos and Orellana provinces. As the appellate and amicus briefs in the U.S. case make clear, Judge Kaplan's decision appears to be a direct attack on the sovereignty of Ecuador, the independence of its judiciary, and fundamental principles of international comity. Among others, thirty-five international law scholars from nine countries and 17 U.S. civil society organizations have signed briefs urging that Judge Kaplan's decision be

happening now with the BIT arbitration. We have sympathy for the Republic because it did not create these rules when it was dragged into the arbitration process by a disgruntled litigant that lost in the court of its choosing. That said, the fact that the parties appear to have the discretion to release some BIT documents as they wish while they withhold or redact others is troubling. It is further troubling that the Republic as a sovereign seems to have fallen victim too easily to the inertia of the secrecy rules that govern the arbitral process. These rules clearly have been designed to limit public accountability of not only bad corporate actors like Chevron but of the arbitral process itself, including the personal conduct of the arbitrators. The three arbitrators (as we have pointed out in detail elsewhere) appear to suffer from acute conflicts traceable in part to the secrecy embedded in the process and to an incentive structure that guarantees them exorbitant fees if they rule in a way that stretches out the proceedings -- a dynamic which always favors the party (in this case Chevron) seeking to delay a resolution. After 22 years of litigation across countries and continents distinguished by Chevron's strategy of designed delay, the inability of the BIT arbitration panel to stand up to Chevron's abusive tactics could be Exhibit A in why the larger dispute is fast becoming an absurdity in the eyes of much of the world. While we will continue to seek the release of the entirety of the BIT record, and while we will continue to call attention to the structural and procedural unfairness of a process that we consider to be fundamentally flawed and of highly questionable legitimacy, this letter is limited to our discrete request for the Racich Report.

reversed.

As the Republic has pointed out in its briefing before the BIT, the source of Chevron's bribe allegation -- former Ecuadorian judge Alberto Guerra -- is an admitted crook who has confessed under oath to a lifetime of taking bribes. During the Kaplan proceeding, Mr. Guerra's testimony changed multiple times as prior versions were rendered implausible by the emergence of new facts. Contrary to the rules of ethics that govern the legal profession in the U.S. and around the world, Chevron has paid Mr. Guerra exorbitant sums (approximately \$2 million in cash and benefits) in exchange for his testimony. While we believe Chevron bribed Mr. Guerra to fabricate his story, Judge Kaplan credited the testimony of such a manifestly corrupt witness by referencing certain "forensic analyses" put forward by paid Chevron experts. These experts claim to have examined (a) Guerra's computer, USB drives, and certain files thereon; and (b) the preliminary results of a forensic analysis by the Republic of the computer on which Judge Zambrano wrote the *Aguinda* judgment. Judge Kaplan claimed that these analyses raised doubts as to whether Judge Zambrano had in fact written the *Aguinda* judgment.

The Republic's exculpatory evidence that contradicts Judge Kaplan's finding appears to consist of Dr. Racich's forensic analysis of Judge Zambrano's computer and computer files. Given the ample data that can be extrapolated from the "metadata" of computers, it seems clear that the Racich Report likely contains significant details pointing to Guerra's lack of truthfulness. Indeed, the Republic's submission redacts what appears for Chevron to be a devastatingly harmful piece of evidence contradicting Judge Kaplan's finding on this critical issue. The Counter-Memorial describes the Racich findings as "compelling" and "hard" evidence that Chevron "cannot... will away" and that "directly contradicts Chevron's allegation of impropriety in respect to the [Aguinda] judgment." Clearly, this report has the potential to vindicate the legal claims of the indigenous and farmer communities harmed by Chevron's toxic dumping and the lawyers who have helped the communities hold the company accountable.

It is our understanding that the Racich Report has not been disclosed pursuant to a private party confidentiality agreement between the Republic and Chevron. Such an agreement no doubt reflects the Republic's legitimate concerns as a sovereign about the implications of allowing a litigation adversary to access the files of a sitting judge in its independent judiciary. Nonetheless, the Republic seems to recognize that this case presents a unique challenge in light of the global debate that Chevron instigated over the adequacy of the Ecuadorian judiciary. We now request that the Republic recognize the compelling interest shared by all Ecuadorians as well as the global environmental community in the public dissemination of this highly probative evidence. We have no doubt that, if disclosed, the Racich Report will be of critical importance in pending judicial proceedings in the United States and in other jurisdictions where the villagers are seeking to enforce their judgment or where Chevron has initiated retaliatory actions against their financial supporters. The Racich Report will be of limited use, however, if it remains secret and therefore cannot be considered in these other proceedings.

On behalf of my clients and colleagues in Ecuador, we call upon the Republic either to disclose the full contents of the Racich Report or to issue a public explanation as to why it believes it is

unable to do so. We also ask that the Republic disclose any relevant documents (such as any confidentiality agreement with Chevron) that might explain the reasons the Republic believes it might be barred from granting our request. If the Republic claims that the only reason for non-disclosure is a confidentiality agreement with Chevron, we request that the Republic waive its rights under that agreement such that it can only be Chevron's assertion of its rights that stands in the way of the release of the Racich Report. If the reason for the non-disclosure is an order of the BIT panel, we call upon the Republic to promptly move said panel to amend any such order to allow for disclosure of the Racich Report and to make any such filing public.

Given the time-sensitive nature of the relevant judicial proceedings, we respectfully request a prompt response to our request. Thank you kindly for the consideration.

Sincerely,

Steven R. Donziger

cc

Representatives of the affected communities:

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