September 12, 2018

Honorable Sr. Lenin Moreno Garcés
Presidente de la República del Ecuador
Palacio Carondelet
Calle Garcia Moreno
Quito, Ecuador

Hon. Íñigo Salvador Crespo
Procurador General del Estado
Procuraduría General del Estado
Robles 731 Y Av. Amazónas
Quito, Ecuador

Hon. Miguel Valencia Espinosa
Canciller de la República del Ecuador
Ave. 10 de Agosto y Carrión
Quito, Ecuador

Dear President Moreno, Procurador Crespo, and Foreign Minister Valencia:

We represent the Frente de Defensa de la Amazonía (FDA),[1] which for over 25 years has advocated for the Indigenous and farmer communities (the Afectados) affected by catastrophic levels of pollution in and around Chevron's abandoned operational sites in Sucumbíos and Orellana provinces. The purpose of this letter is to explain the position of Los Afectados in light of what we believe is an illegitimate decision of the bilateral investment treaty (BIT) arbitral panel against the Republic of Ecuador (ROE) issued on August 30, 2018 ("Award"). We believe this decision is based on false evidence manufactured by Chevron, violates core international law and human rights norms for multiple reasons, and violates Ecuador's Constitution which guarantees the independence of the judiciary. We hope through this letter to convey what we believe is a non-controversial position: the arbitral decision is simply unenforceable as a matter of law and the ROE, for the reasons stated herein, is legally obligated to seek its nullification.

[1] Please note that the FDA is the only beneficiary of the judgment against Chevron and will be responsible for the administration of clean-up funds once collected. A separate organization, UDAPT, advocates for some of the affected communities but is not a beneficiary of the judgment and is not associated with the FDA. The lawyer for the UDAPT, Pablo Fajardo, was fired by the FDA in 2015 for violating his fiduciary duties to his clients after he acted, without consultation with his clients, to lift an embargo order against Chevron at the request of the prior President of Ecuador. Mr. Fajardo is not affiliated with, and has no connection to, the case that is being enforced in Canada and potentially in other jurisdictions.

Background

As you might be aware, the tireless efforts of the FDA leaders and their lawyers led to a historic environmental judgment against Chevron in 2011 ("the *Aguinda* judgment"), later affirmed by unanimous decisions of Ecuador's National Court of Justice and the Constitutional Court in the venue where Chevron insisted the trial be held and where Chevron voluntarily accepted jurisdiction. Chevron's subsequent allegations of unfairness and lack of due process made as the evidence mounted against the company have been wholly rejected by every layer of Ecuador's judiciary, including the country's two highest courts. The FDA is currently overseeing litigation to enforce the judgment against Chevron's substantial assets in Canada and is considering initiating other such actions in different jurisdictions around the world. The goal is to guarantee the affected communities the remedy issued by Ecuador's courts such that an adequate clean-up can take place of what most technical observers believe is the world's worst oil-related contamination. The legal case is over and the Afectados are the undisputed winners. They have the right to collect $12 billion from Chevron to spend in the country on various remedial activities to restore the damaged lands and ecosystem and to compensate Chevron's victims for the grievous harms caused.

The procedures just described represent the *only legitimate scope* of the *Aguinda* case given that it is a private citizen-group lawsuit against a private company. Nonetheless, in flagrant bad faith, Chevron has subjected this process to numerous illegitimate collateral attacks by employing courts and tribunals that are pro-business in their orientation and that Chevron has reason to believe will decide in its favor. Among these many attacks is the U.S.-Ecuador BIT arbitration demand against the ROE, which most recently resulted in the aforementioned Award. This Award purports to order the ROE to "take immediate steps" to "remove the status of enforceability" of the *Aguinda* judgment and to "wipe out all the consequences" of it. The judgment that the arbitral award purports to "wipe out" is the culmination of a 50-year struggle by thousands of Ecuadorian citizens for justice and accountability, the tribunal is effectively ordering the ROE to attempt to "wipe out" the entire history and future of this historic social movement. As said, such an order is illegal and would violate both international law and the independence of Ecuador's judiciary.

This order, issued by a trio of wealthy male lawyers from the conference rooms of elite Washington, D.C. law firms, is offensive to the rule of law.

As reflected in the growing outrage by civil society in both the U.S. and Ecuador, the Award illustrates the excesses and arrogance of the international arbitration system generally and the bad faith of Chevron (and the private lawyer arbitrators) in particular. The acts that the Award demands of the ROE would profoundly violate Ecuadorian constitutional and procedural law, the rights of the FDA's constituent communities, and Ecuador's commitments under numerous human rights treaties. The Award is an affront to the sovereignty and dignity of the ROE and the Ecuadorian people, as well as to core principles of human rights and the rule of law.

With this letter, we convey the position of the FDA: **the ROE must refuse to comply with the illegal and illegitimate injunctive orders in the Award and publicly declare that, to the contrary, it will fully respect Ecuadorian law and the rights of the FDA and its constituent communities**. To ensure a shared understanding of the present context, we outline below the FDA's specific views on the illegality of the acts ordered by the Award and the illegitimacy of the Award generally.

ROE Action Against the* Aguinda *Judgment Would Be Unconstitutional and Is Not Required or Authorized by International Law

The Award's order to "remove the status of enforceability" from the *Aguinda* judgment effectively requires that the ROE take action that would violate Ecuadorian law and contravene fundamental separation-of-powers limitations of the Ecuadorian Constitution. Investment law tribunals are purportedly established to enhance compliance with the rule of law; they cannot purport to require states to engage in flagrantly illegal and unconstitutional conduct, as the three arbitrators purport to do in the instant matter.

The *Aguinda* lawsuit is and has always been a private lawsuit by citizens acting in a representative capacity against a private company. The plaintiffs, through the FDA, have always exercised complete control over their side of the litigation (including complete control over the undersigned U.S. and Ecuadorian lawyers). The basic separation of powers doctrine in the Ecuador Constitution and the principle of judicial independence prevent the executive, and the State as a whole acting through the executive, from using government power to influence the civil justice process in favor of one party or another. In 2012, the same BIT tribunal tried to use an "interim" award to pressure the appellate court of Sucumbíos to act in Chevron's favor. The court appropriately rejected the tribunal's demands.[2]

The ROE has no more authority to act (domestically or internationally) in purported compliance with a BIT tribunal ruling than it would otherwise have under Ecuadorian law. As Ecuador's ambassador to the United States noted years ago (also responding to the BIT tribunal's "interim" award), the government of the United States faced exactly this situation when President George W. Bush sought to effectuate an order of the International Court of Justice by acting beyond the federal government's constitutionally delimited power over the individual U.S. states.[3] The U.S. Supreme Court held categorically that the order from the International Court of Justice was unconstitutional

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[2] *See* Order of the Sole Chamber of the Provincial Court of Sucumbíos, Case No.: 21101-2011-0106, Mar. 1, 2012 ("March 2012 Order") ("no [] legal mechanisms [are] available (nor has Chevron Corp. suggested any legally valid mechanism) to suspend or cause to be suspended the recognition and enforcement of the judgment" as requested by the tribunal).

[3] *See* Letter from Nathalie Cely, Ambassador of the Republic of Ecuador to the United States, to Douglas Bell, Office of the U.S. Trade Representative, dated Sept. 17, 2012, at 3 (citing *Medellín v. Texas*, 522 U.S. 491 (2008)).

under U.S. law and that the fact that the executive sought to act pursuant to international obligations provided no justification.[4] The ROE is now in the same position as the U.S. government was in that case.

Action To Comply With The Award Would Violate ROE's Binding Human Rights Obligations

Any action by the ROE to affect the enforceability of the *Aguinda* judgment would also severely violate the rights of the Afectados and the ROE's legal obligations under binding international human rights treaties including the American Convention on Human Rights ("American Convention"),[5] the International Covenant on Civil and Political Rights (ICCPR),[6] and ILO Convention No. 169 Concerning Indigenous and Tribal Peoples ("ILO Conv. 169").[7] The obligations contained in these treaties are fully applicable and considered an essential part of Ecuadorian law.

Again, when the BIT tribunal sought to force the ROE to undermine the *Aguinda* judgment in 2012, the appellate court of Sucumbíos quite appropriately assessed and rejected the tribunal's demands in the context of a broader human rights analysis:

> [An] arbitration award, although it may bind Ecuador, cannot obligate Ecuador's judges to violate the human rights of [Ecuador's] citizens. That would not only run counter to the rights guaranteed by our Constitution, but would also violate the most important international obligations assumed by Ecuador in matters of human rights.[8]

When Chevron's lawyers tried to argue that there was no actual conflict between the arbitral orders and Ecuador's human rights obligations, the appellate court in Sucumbíos articulated the numerous conflicts in detail. The most obvious problem was (and is today with the recent aforementioned order) that compliance with the tribunal's demands would violate the *Aguinda* plaintiffs' right to equal protection of the laws.[9] This is a norm that is not only enshrined in Article 24 of the binding American Convention but also considered a non-derogable or *jus cogens* norm at customary international law. The fact that the Award seeks to impose a *jus cogens* violation is an independent reason (in addition to those set forth below) that the Award itself is illegitimate and properly considered invalid under international law.

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4 *Id.*

5 1144 U.N.T.S. 123, O.A.S.Treaty Ser. No. 36 (1969), *ratified by Ecuador* Dec. 8, 1997.

6 999 U.N.T.S. 171, U.N. Doc. A/6316, *ratified by Ecuador* Mar. 6, 1969, *entered into force* Mar. 23, 1976.

7 ILO Conv. No. 169, entered into force and ratified by Ecuador on May 15, 1998.

8 *See* Order of the Sole Chamber of the Provincial Court of Sucumbíos, Case No.: 21101-2011-0106, Feb. 17, 2012. *See also id.*, Order dated Mar. 1, 2012.

9 March 2012 Order.

The Award's injunctive orders would also require violations of the right to determination and enforcement of remedies under Article 25 of the American Convention which is binding on the ROE as a matter of international law. This provision guarantees "prompt" and "effective" recourse and remedy, including the "enforce[ment] [of] such remedies when granted."[10] The obligation applies with respect to the ROE's conduct generally, not just within the national court system. As such—and especially in light of parallel international legal authority[11]—action aimed at undermining the effectiveness of the *Aguinda* action even in proceedings outside of Ecuador (such as the BIT proceeding) would still violate the ROE's human rights obligations.

To the extent it would halt or even just frustrate or delay the progress of enforcement of the *Aguinda* judgment, compliance with the Award would cause or exacerbate violations of the fundamental rights to life, health, and a clean environment held by Los Afectados.[12] Any action to disadvantage the Indigenous peoples who have driven the private *Aguinda* lawsuit since its inception would also put the ROE in flagrant violation of its broad legal duty under Article 12 of ILO Conv. 169 to "safeguard [Indigenous peoples] against the abuse of their rights" and to ensure such peoples access to justice "either individually or through representative bodies, for the effective protection of [their] rights."[13]

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[10] *See also* ICCPR Article 2(3) requires 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." *See also* 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").

[11] 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").

[12] The right to life, physical integrity, and health are protected by Articles 4 and 5 of the American Convention and Articles I and XI of the American Declaration. The health, integrity, and lives of the Afectados have been under continuous threat and actual violation for almost 50 years. To occasion further delay in any process that would begin to remedy these violations would be a complete violation of Ecuador's human rights commitments, including its commitment under the Protocol of San Salvador, ratified by Ecuador in 1993, which in addition to the right to health specifically guarantees "the right to live in a healthy environment" and commits Ecuador to the protection, preservation, and improvement of the environment. *See* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S. Treaty Series No. 69 (1988), *entered into force* Nov. 16, 1999.

[13] Indeed, Ecuador has obligations under Conv. 169 to take affirmative steps to adopt "[s]pecial measures for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples

It is important for the ROE to publicly repudiate the latest BIT tribunal award not only to assure the FDA and its constituent communities that it will comply with its international human rights obligations, but also to address the profound attack on international human rights law that the Award, in its essence, represents. The Award necessarily implies a proposition that international investment law, created to further multinational business interests, is *superior to and overrides international human rights law whenever it wishes*. This proposition must be called out and rejected. Such a precedent would dramatically undermine the advances in international human rights protections fought for by millions of people around the globe over the last century, and if not rejected will certainly be used again by multinational companies to trample internationally-protected rights.

The Award is Illegitimate and a Product of Bad Faith by the Tribunal

The bad faith of both Chevron and the three members of the arbitral tribunal itself is unfortunately indisputable. Shortly after Chevron filed the arbitration demand, the ROE (along with the FDA) petitioned U.S. courts to enjoin Chevron from pursuing the arbitration because it amounted to an illegitimate collateral attack on Ecuador's civil justice system. To obtain permission to proceed, Chevron's lawyers misled the U.S. court by expressly promising as follows:

> I do want to be super clear about this. We have not attempted, and we will not attempt, to ask the BIT tribunal to stop entry of a judgment. We do intend to fight enforcement, but we—and we do intend to fight in Lago Agrio against entry of a judgment, but we have not and we will not, if I left any doubt about it, ask the BIT tribunal to stop entry of a judgment in Lago Agrio.[14]

Of course, Chevron quickly broke its promise and the recent Award is a furtherance of this broken promise. Chevron has suffered no consequence for this unethical act of promising one thing to one court to gain a tactical advantage and then going back on its word in a different forum. Also, early in the BIT arbitration that resulted in the recent award, civil society groups petitioned the tribunal to accept an amicus brief that highlighted the problematic underlying nature of Chevron's arbitral demand. That amicus brief made the following critically important argument:

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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 . . . [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.

[14] Tr. of Aug. 5, 2010 Hearing, *Republic of Ecuador v. Chevron*, Nos. 10-1020-cv (L), 10-1026-cv (Con) (2d Cir.), at at 94:18-25.

> While the central role of international investment law has historically been to remove political interference from disputes related to the conduct and operations of foreign investments, [Chevron] here seeks the opposite: for a Tribunal to issue an order for specific performance for a State to make just such an interference for the benefit of one side of a civil case in which no State agency or entity is a litigant.[15]

The members of the tribunal took the highly unusual step of refusing even to accept the offered amicus brief. They also barred any of the affected Ecuadorian citizens from offering evidence or testifying in the proceedings. The arbitrators even barred the Ecuadorian citizens from even attending as observers. A more unfair and one-sided "court" rigged in favor of a multinational corporation could scarcely be imagined.

The members of the BIT tribunal also committed another egregious violation of international law. They openly contravened a core principle of international law named after the *Monetary Gold* case. This case held that an international tribunal *may not* exercise jurisdiction over a controversy that aims to affect the rights of a third-party unless that party consents or is otherwise accorded due process.[16] Obviously, the third party in this matter – the affected communities harmed by Chevron's toxic dumping – neither consented to the proceeding nor were afforded due process. The members of the tribunal acknowledge this authority but cynically seek to circumvent it by asserting that the Award will not affect the FDA and its constituent communities because "[none] of [the] decisions made in this arbitration can be legally binding upon any of the [environmental lawsuit] Plaintiffs."[17] While it is true that the Award is not legally binding on the affected communities, the Award expressly aims to nullify and destroy the single greatest resource that the communities have fought for and obtained in their decades of advocacy and litigation: the *Aguinda* judgment itself. The notion by members of the tribunal that the Award does not affect the rights of the communities is implausible and disingenuous.

Because the entire arbitration is a calculated violation of the *Monetary Gold* principle—a calculated attack on the rights of third-parties with no rights to appear or defend in the proceeding—the Award also is void on jurisdictional and substantive law grounds. Furthermore, because the Award is an *ad hoc* judicial finding within the non-hierarchical regime of international law, each state -- including the ROE -- retains discretion to independently consider and determine its legality and validity under international law.

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[15] Amicus Submission of Fundación Pachamama and the International Institute for Sustainable Development (IISD), *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Nov. 5, 2010, *available at* http://italaw.com/documents/Chevron_v_Ecuador_SubmissionOfAmici_5Nov2010.pdf.

[16] *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), ICJ, Judgment (Preliminary Question), 15 June 1954, 1954 ICJ Reports 19.

[17] Award at ¶ 7.36.

The Tribunal Relied on Chevron's False and Manufactured Evidence

A final basis revealing the core illegitimacy and invalidity of the Award is its reliance on notoriously corrupt and manufactured "evidence" from Chevron—even as it pretends to disclaim such reliance. We refer here to the testimony of Alberto Guerra, a notoriously corrupt former Ecuadorian judge who was recruited by Chevron, paid millions of dollars, and coached full-time for months in order to claim that there was a "bribe" arrangement in the underlying environmental trial. As the ROE's own legal submissions prepared by the Winston & Strawn law firm document in great detail, this claim is utterly false. Guerra's testimony shifted constantly as new facts emerged over time, and he was forced to recant key details of it on cross-examination. The forensic analysis of the trial judge's hard drives by international expert J. Christopher Racich flatly disproved Guerra's core claim that lawyers for Los Afectados wrote the trial-level *Aguinda* judgment and gave it to the trial judge just weeks before it was issued. This claim is false and has been proven false, regardless of what the three arbitrators concluded. In any event, this claim is currently being considered by Canadian courts who will make a final and legitimate determination on a far fuller evidentiary record and in a proceeding where lawyers for Los Afectados will be able to fully participate.

We note that Guerra's "bribe" testimony is so obviously false that ***even the tribunal rejects it***. Award at ¶ 5.160. But the tribunal nonetheless purports to "find" that there was a bribe by relying on ***circumstantial*** evidence showing that the trial-level judgment relied on documents that may not have been part of the formal record. This evidence is absurdly insufficient to support the "finding" of the existence of an elaborate bribery conspiracy as Chevron maintains and again shows the bias in favor of corporate interests of the three arbitrators. As the ROE's legal submissions have detailed, the reliance by the trial judge on extraneous pleading materials is not unusual or improper in any court in the world including those in the United States. This is especially true given that the substance of the material relied was repeatedly submitted elsewhere in the record as proven by the Winston & Strawn law fir. Chevron's substantive claims of error were raised, reviewed, and rejected on appeal in Ecuador by 17 different appellate judges on three different courts, including the National Court of Justice and the Constitutional Court. In short, without the purported ***direct*** evidence of corruption that was ***only*** provided by Mr. Guerra, the bribery claim cannot stand.[18] The fact that this patently insufficient evidence was relied on by the three arbitrators further underscores the completely rigged nature of the proceeding, in additional to all of its many legal defects outlined above.

[18] Chevron's other non-bribery claims as to procedural irregularities, unfair treatment, and lack of due process, were all reviewed by four layers of courts in Ecuador. While a BIT tribunal may purport to be the appropriate authority as to questions of international law, including a claim to "denial of justice," such a claim relies on underlying findings of improprieties and denial of due process that themselves rooted in the procedural requirements and legitimate party expectations in Ecuadorian law and procedure. Ecuadorian courts are the experts in the substance of this base-level law and procedure, and have unanimously found that there is no substantive merit to the procedures and outcomes that Chevron tries to paint as unjust. The Award's refusal to accord any weight to Ecuadorian courts' determinations on the substance of the underlying claims is another basis of the Award's invalidity.

The tribunal's attempt to prop up the bribery claim without Guerra only illustrates its bad faith determination to bolster Chevron's "bribery" claim regardless of the facts, likely because the claim is so central to the company's larger global efforts to resist paying the *Aguinda* judgment. It also further underscores the rigged nature of the evidentiary phase of the proceeding, in addition to its many legal defects as outlined in this letter.

Conclusion

As a business operator, Chevron inflicted incalculable damage on the people and territory of Ecuador. Its actions created a true humanitarian crisis that is ongoing and impacts tens of thousands of vulnerable Ecuadorian citizens. There likely have been thousands of cancer-related deaths and other harms as concluded by several independent scientific studies. As a recalcitrant judgment debtor refusing to abide by the determination of four levels of Ecuadorian courts (despite its promise to its home country courts that it would do so), Chevron has immeasurably deepened its original offense of deliberately discharging billions of gallons of cancer-causing oil waste into the delicate Amazon ecosystem. We recognize that the ROE has for many years defended itself vigorously and honorably from Chevron's vicious and unfounded political and legal attacks on the ROE, the Ecuadorian judicial system, and the Ecuadorian people. In the face of the recent unfortunate but illegitimate Award, the ROE must stand firm in defense of its citizens and honor its binding legal obligations to protect the human rights of its own citizens over an order from a secret trade court that engaged in illegitimate conduct that warrants nullification.

Once again, the FDA respectfully requests that the ROE, as it pursues legal avenues to recognize the invalidity of the Award, publicly declare its support for Ecuadorian law and its binding international obligations. These obligations prevent the ROE from complying with the tribunal's instructions that clearly are designed by Chevron to undermine the decades-long struggle for justice of the affected communities.

Sincerely,

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Steven R. Donziger	Dr./ Abg. Angel Cajo Arana
Aaron M. Page	