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FACSIMILE +1 (202) 282-5100

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January 22, 2013

Mr. V.V. Veeder, QC
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Prof. Vaughan Lowe, QC
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Dr. Horacio Grigera Naón
5224 Elliott Road
Bethesda, Maryland 20816
USA

Mr. Martin Doe
Permanent Court of Arbitration
Peace Palace, Carnegieplein 2
2517 KJ The Hague
The Netherlands

Re: *Chevron Corporation and Texaco Petroleum Company v. the Republic of Ecuador,* PCA Case No. 2009-23

Dear Members of the Tribunal:

On November 28, 2012, counsel for the Republic represented during the Track 1 Hearing on the Merits that the Respondent and counsel were re-engaged in serious discussions aimed at resolving the Tribunal's concerns about the enforcement actions commenced by the Lago Agrio Plaintiffs in courts outside Ecuador. The results of the extensive deliberations are outlined below.

At the outset, however, the Republic reiterates its concern that the Claimants have introduced the core elements of their "fraud" case on the merits through a series of applications for interim measures that have repeatedly required the Republic to respond to the Claimants' evolving set of allegations either spontaneously or over a period of weeks. As a result, the Tribunal has been forced to consider unprecedented requests for relief with far-reaching effects absent a full and complete record, and without affording the Republic the time it needed to critically examine the Claimants' and other available evidence. The Respondent has yet to file a substantive pleading in response to these allegations and respectfully requests that the Tribunal give careful consideration to the Respondent's Counter Memorial in Track II before taking any further action.

The interim measures — now interim awards — impose obvious and substantial legal conundrums for any public official trying to faithfully carry out his legal responsibilities. Whatever this Tribunal may currently and preliminarily conclude regarding the Lago Agrio

judicial proceedings based on substantially less than a full record, the Tribunal presumably also understands that from a State official's perspective, the State's own courts have determined – albeit subject to further review at the cassation appellate level — that the Plaintiffs' lands, water, and air have been polluted, that Chevron is liable for that pollution, that over the course of many years the existing pollution has caused (and is continuing to cause) the Plaintiffs harm, and that the judgment in the underlying Ecuadorian action is intended, in part, to remedy that harm. Officials of the State, therefore, are caught between this Tribunal's Interim Awards, on the one hand, and the officials' legal duties and obligations under both domestic law and international obligations relating to equal treatment under the law that arise from international human rights conventions to which Ecuador is a party, on the other. Under the domestic legal regime, there is no conceivable basis for the Republic to interfere in private party litigation either within Ecuador or in foreign jurisdictions.

Claimants have construed the Interim Awards as imposing on the Republic an obligation to violate its Constitution and domestic laws. The Republic has not interpreted the Interim Awards as requiring State officials to violate their own laws and considers Claimants' position utterly untenable under any conceivable principle of law or equity.

Claimants assert that they are confronting imminent irreparable harm by the Lago Agrio Plaintiffs' successive enforcement actions. In fact, Plaintiffs' enforcement actions in Canada and Brazil pose no imminent threat at all to Chevron. The Republic has previously offered declarations of Canadian and Brazilian legal experts affirming that these enforcement actions will take years to resolve.[1] These declarations remain uncontested. Additionally, though perhaps anecdotally, news coverage of the Canadian enforcement action suggests that Plaintiffs' effort to enforce against Chevron subsidiaries will be rejected.[2]

Plaintiffs' actions for recognition and enforcement in Argentina are no different. Those proceedings will take years to resolve and may well share the fate of the Canadian proceedings insofar as they are also targeted against Chevron subsidiaries. Argentina does, however, raise other issues.

In Argentina, special rules deriving from a Latin American convention on the enforcement of interim measures[3] allowed the Plaintiffs to secure the temporary attachment of certain Chevron assets — and those of Chevron's subsidiaries in Argentina — pending a final determination on the merits of the recognition and enforcement action there. The purpose of the attachment proceedings is merely to ensure that Chevron does not dissipate its assets in the jurisdiction. Even here, however, Claimants' decision to characterize the Argentine developments as threatening "irreparable" harm to the company is plainly strategic. To date, Chevron's 10-K and 10-Q filings fail to advise either its shareholders or the capital markets that

[1] *See* R-443, Affidavit of George J. Pollack (August 15, 2012); *see also*, R-444, Affidavit of Massami Uyeda Junior and Ruy Janoni Dourado (August 15, 1012).

[2] R-469, Michael Bastasch, *$19 Billion anti-Chevron lawsuit heard by Canadian Judge*, The Daily Caller (December 3, 2012).

[3] *See* R-468, Declaration of Marcelo Rufino (November 21, 2012).

any enforcement action anywhere is likely to cause it material harm. All of its representations have been to the contrary, instead affirming that the ongoing proceedings pose no material harm to the company.

Moreover, under the applicable law, if Chevron fails to have the attachment order reversed on the grounds that the Argentine courts cannot reach assets of Chevron's subsidiaries, it still is entitled to post *substitute collateral* that would have the effect of denying the plaintiffs the right to freeze, attach or garnish income or bank accounts or otherwise affect Chevron's (or its subsidiaries') presence in Argentina. By offering substitute collateral, therefore, Chevron can eliminate any further alleged disruption to its Argentine operations for the foreseeable future. Indeed, Respondent is concerned that Chevron may eschew such a remedy based on its considered analysis that it is better to leverage any alleged disruption in Argentina to obtain even more dramatic relief here than it is to prevent the disruption in the first instance. In either event, it is clear that Chevron has the ability and wherewithal, should it choose to do so, to eliminate any disruption to its Argentine operations and thus eliminate any risk of imminent harm (irreparable or otherwise).

Interim Measures and Interim Awards are intended to ensure that this Tribunal's jurisdiction and its ability to grant meaningful relief are not impeded by developments on the ground. But no enforcement action brought by the Lago Agrio Plaintiffs — who are *not* coordinating with the Republic and who do not take orders from the Republic — will lead to collections of any portion of the Lago Agrio Judgment or the seizure of assets for a number of years. Accordingly, neither of the pending actions in Canada, Brazil or Argentina will affect this Tribunal's jurisdiction or its ability of rendering a monetary award.[4]

The Republic, as promised, has nonetheless considered (and re-considered) options in an effort to address the Tribunal's concerns regarding Plaintiffs' ongoing efforts to enforce the judgment.[5] The Republic considers that a combination of the following three actions should adequately address those concerns.

- *First*, while the Respondent has no competence under domestic law to intervene in and move the Argentine court to lift the order of attachment currently in place, it might be possible to work with the Tribunal to remove any alleged immediate threat of harm to the Argentine subsidiaries. Chevron is currently under

[4] Not only is there no realistic threat of an Argentine court ordering Chevron to satisfy any part of the Judgment for a period of *years*, but even if it were otherwise, Chevron's monetary pay-out could, if Claimants were to prevail in the arbitration, be remedied through a monetary award in this proceeding. To date the Republic has satisfied each of three pecuniary arbitral awards against it, and the Republic has committed in writing to satisfy any award in the *Commercial Cases Arbitration* should the Republic's set-aside actions in the Hague be rejected. Claimants' presumption that Respondent will fail to honor some hypothetical obligation at the conclusion of these proceedings (and any appeals therefrom) cannot and should not be adopted by this Tribunal. Such would reverse the ordinary presumption afforded to sovereigns, especially a sovereign that has complied with and satisfied each monetary award entered against it.

[5] Merits Track 1 Hrg. Tr. (November 28, 2012) 629:11-25.

an obligation to mitigate damages. As such, as noted above, it could post substitute collateral, which could take the form of (i) a surety insurance ("Seguro de Caución"), (ii) a deposit in escrow in an international financial institution with operations in Argentina, (iii) a surety bond issued by an accredited financial institution with operations in Argentina, or (iv) any other form that Chevron might consider appropriate. The premise of this proposal is to find a way in which the Republic is not intervening in the private-party litigation while affording the Tribunal comfort that there is no possible imminent threat to Chevron's global operations. Should the Tribunal ultimately find against the Republic on the issue of denial of justice or breach of the BIT, the financial cost involved in structuring and implementing any of the foregoing alternatives may be computed within the *quantum* of any monetary award.

- *Second*, in the interim, the Republic would not object to the Tribunal releasing the fifty million dollar bond currently held in escrow back to the Claimants if Chevron requested those funds to apply them against any cost in which it might incur while structuring and posting substitute collateral with the courts in Argentina.

- *Third*, the Attorney General intends to file a letter with the National Court — specifically with the Chamber that has been recently appointed to hear Chevron's cassation appeal — to keep the National Court apprised of the existence of these arbitral proceedings and of the issues currently under consideration of the Tribunal.

We reiterate our affirmation that much time, thought and resources have been and are still being devoted to these issues. The Republic believes that the process might be advanced if the Tribunal should convene a short hearing to discuss, informally, these proposals and perhaps others that the Tribunal might consider on its own. Should the Tribunal consider it necessary to hold such hearing prior to Respondent's filing of the Track 2 Merits Counter-memorial, the Republic would respectfully request a one week extension of the February 18, 2013, deadline for such filing.

Respectfully submitted,

Christel Gaibor
Procuraduría General del Estado

Zachary Douglas
Matrix Chambers

Ricardo E. Ugarte
Winston and Strawn LLP

cc: Mr. R. Doak Bishop
Mr. Wade M. Coriell
Ms. Isabel Fernández de la Cuesta
Mr. Edward G. Kehoe
Ms. Caline Mouawad
Mr. James Crawford SC
Dr. Diego García Carrión
Mr. Luis González
Mr. Eric W. Bloom
Mr. Tomás Leonard
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Last week, a Canadian Superior Court judge heard arguments in a $19 billion legal battle between Chevron and a group of trial lawyers representing Ecuadorian villagers and expressed doubts over whether or not he could issue a ruling on the case.

Ontario Superior Court Justice David Brown questioned whether or not he could rule on the case while an appeal is pending in Ecuador's constitutional court, the Associated Press reports.

"Chevron Corporation appreciated the opportunity to present its initial challenge to the statement of claim in this matter," Chevron said in a statement. "Focusing only on the limited issue of whether the Ontario courts had jurisdiction to hear this case in the first instance, Justice Brown took that legal question under reserve until early next year."

Brown also asked why the case was being heard in Canada and not the United States — where Chevron has sufficient assets. He was reported saying "You should all be in New York" several times during the hearings.

"Justice Brown also noted on more than one occasion that Chevron Corporation has sufficient assets in United States and questioned why the Ecuadorian plaintiffs were not proceeding there — something we have asked as well," the statement continued.

Chevron has been locked in an $19 billion legal battle with environmental groups over environmental damage allegedly caused by Texaco Petroleum Company from 1964 to 1992 while it operated in partnership with the state-owned oil company PetroEcuador — though Chevron did not acquire Texaco until 2001.

Last year, Ecuadorian courts awarded the plaintiffs $19 billion for black sludge contamination of a rainforest, but Chevron refuses to pay and argues that Texaco dealt with the problem before it was acquired by Chevron.

However, the case has been plagued by allegations of corruption and, last year, Chevron filed a racketeering suit in the U.S. against the Ecuadorians and their lawyers for conducting a "fraudulent litigation and PR campaign against the company," Bloomberg reports.

The suit against Chevron was brought to Canada in May and subsequently to Argentina and Brazil in an effort to go after Chevron assets on multiple fronts because Chevron currently has no assets within Ecuador. Earlier this month, an Argentine judge froze Chevron's in the country until the $19 billion award is found.

The AP reports that foreign judgments can be enforced in Canada as long as there exists a "real and substantive connection" between the foreign jurisdiction and the subject of the claim.

However, Chevron lawyers argued that the Ecuador case had no cause against Chevron's Canadian subsidiary since the judgment was against the parent company and the company's subsidiaries largely operate independently from the parent company.

"There is no other connection to Ontario but for the claim that the assets of Chevron Canada Ltd. are the assets of Chevron Corp," said Chevron lawyer Alan Mark.

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