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Centre de recherches et de publications sur les relations entre le Tiers Monde et l'Europe

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Mr. Michel Forst
Special Rapporteur on the Situation
of Human Rights Defenders
Office of the United Nations High
Commissioner for Human Rights
CH 1211 Geneva 10
Switzerland
hrd-ra@ohchr.org

11/25/15

RE: Update/supplement to submission regarding Chevron Corporation attacks on human rights defenders in Ecuador and the United States

Dear Mr. Forst:

We represent the Ecuadorian communities who won a significant environment judgment against Chevron Corporation in 2011 and have since endured a severe campaign of retaliatory litigation and other intimidation inflicted by the company and its agents, as set forth in the submission by the Europe / Third World Centre (CETIM) to the 29th Session of the Human Rights Council. *See* [Doc. A/HRC/29/NGO/23](#). We write to provide additional information and specific details regarding this urgent situation.

Specifically, we hope to draw your attention to a deeply troubling strategy with which Chevron has, for years, used civil and quasi-criminal lawsuits, and criminal complaints, against the human rights defenders who oppose it. The strategy is transparently a part of the company's larger objective of "tainting" the environmental judgment against it with manufactured allegations of bribery, fraud, and even "extortion." The need to manufacture such claims has led the company to deploy yet more oppressive tactics, including the filing of dozens of "discovery" lawsuits aimed at private and attorney-client privileged information, cash payments to witnesses for "fact" testimony, and the use of dozens of private investigators to spy on the defenders every move, including their privileged conversations with their attorneys.

The strategy subjects the defenders to severe intimidation, physical and emotional harassment, damage to reputation, financial burden to the point of bankruptcy, and even fear of trumped-up penal consequences. We submit that your office has a duty to remind the countries involved that international human rights law obliges them to ensure that their systems of justice have safeguards sufficient to prevent powerful actors like multinational corporations from manipulating court processes in order to intimidate or retaliate against opponents at the cost of the freedom of expression and other human rights.

Background to Retaliatory Lawsuits

A more complete background is set forth in the earlier submission of CETIM. [Doc. A/HRC/29/NGO/23](#). Among the most critical and illuminating background facts is that internal Chevron documents have revealed that as early as 2009, Chevron recognized that it was likely to face a significant adverse environmental judgment and appears to have decided to respond with what its own operatives referred to as a “*L-T [long-term] strategy to demonize*” the lawyers and community leaders behind the environmental case as a way of tainting the expected judgment and rendering it unenforceable.¹

Over the last five years, Chevron has relentlessly pursued this “demonization” strategy in the media (in particular on social media, where it maintains numerous active Twitter feeds, anonymous blogs, YouTube channels, and other outlets that constantly recycle its various attacks on its Ecuadorian opponents), in government lobbying at the highest level, and, as examined here, through an aggressive campaign of lawsuits personally attacking its opponents.

Discovery Lawsuits

Chevron began its retaliatory litigation campaign with a series of lawsuits under a U.S. law that allows a party to make “discovery” requests to a U.S.-based person in order to “aid” a foreign litigation. Chevron initiated “an extraordinary series of at least 25 [such] requests to obtain discovery from at least 30 different parties” in more than a dozen federal courts across the United States,² an effort one appellate court called “unique in the annals of American judicial history.”³ The lawsuits were aimed at lawyers, organizers, scientists, and others who had assisted the Ecuadorian communities in their environmental lawsuit over the years.⁴ The filings initiating the lawsuits were loaded with inflammatory rhetoric about alleged “fraud” and “extortion.” They demanded almost unlimited access to the respondents’ computers, files, and email accounts, as well as demands that individuals subject themselves to videotaped depositions.

The lawsuits required respondents, at great personal expense, to hire counsel to seek to “quash” the request; lawyer respondents were also required to create a “log” of every single document or communication related to the Ecuadorian cause. The costs of these responsive efforts quickly went into the tens and even hundreds of thousands of dollars. One such lawsuit was reported to have cost the respondent more than \$5 million in legal fees. For smaller respondents, Chevron would typically follow-up its filing with a threatening phone call in which lawyers would tell the respondent that the only way to avoid a crushing expense burden would be to hand over all their computers and files without any judicial oversight whatsoever.

1 See <http://j.mp/1N9qIXS>.

2 *In re Chevron*, 633 F.3d 153, 159 (3d Cir. 2011).

3 *In re Chevron*, 650 F.3d 276, 282 n.7 (3d Cir. 2011).

4 Individuals targeted by these lawsuits include the lawyers Cristobal Bonifaz, Steven Donziger, Laura Garr, Bern Johnson, Joseph Kohn, Aaron Page, Andres Snaider, Andrew Woods, and Alberto Wray; the scientists Douglas Allen, Lawrence Barnthouse, Douglas Beltman, Charles Champ, David Chapman, Ted Dunkelberger, Richard Kamp, Ann Maest, Carlos Picone, William Powers, Mark Quarles, Daniel Rourke, Robert Scardina, and Jonathan Shefftz; the former law firm Patton Boggs; the consulting firms Uhl, Baron, Rana & Associates and the Weinberg Group; the filmmaker Joe Berlinger; the environmental organizations Amazon Watch and ELAW; and others.

Using these lawsuits, Chevron obtained hundreds of thousands if not millions of confidential and often attorney-client privileged documents and communications, as well as 600 hours of outtakes from a renowned documentary filmmaker who had been allowed to film the communities and their representatives for an award-winning 2008 film on the case, *Crude: The Real Price of Oil*. Although these materials reflected nothing incriminating or improper when reviewed fairly in their actual context, Chevron lawyers and PR strategists took snippets of the material out-of-context to weave a fabricated narrative suggesting that parts of the environmental trial process were problematic. Chevron went so far as to snip words out of the middle of video clips, professionally editing the result so that it would appear “seamless”—but mean something completely different.

Indeed, evidence has come to light that Chevron used public relations and private investigations firms for far more, and even more disturbing, intrusive, and intimidating conduct. Chevron hired firms including [Kroll](#) and [Investigative Research Inc.](#) to prepare dozens reports on individuals assisting the Ecuadorians (including reports on their family members), to offer money to individuals for obviously false testimony (see below), and to implement a vast corporate espionage scheme against the Ecuadorians and their lawyers. One of Chevron’s main targets, Steven Donziger, at one point hired his own private investigator and discovered that individuals were surreptitiously following him everywhere he went.⁵ Chevron itself occasionally submitted evidence drawn from its espionage operations in court. In at least one instance, it submitted surreptitious photos taken of a meeting between lawyers that would be covered by the attorney-client privilege. Overall, Chevron admitted in court filings that it deployed over 2,000 lawyers, PR consultants, and investigators in assembling its case against the Ecuadorians.

With all its manufactured material in hand, Chevron then took its retaliatory litigation to an even more extreme level.

“Racketeering” (RICO) Lawsuit

In February 2011, Chevron launched a “civil racketeering” lawsuit against under the U.S. “RICO” statute accusing the individual Ecuadorians who had sued it for contamination, along with some of their attorneys and scientific advisers,⁶ for alleged “fraud” and “extortion”

5 See Declaration of Denis Collins, dated May 31, 2013, at <http://j.mp/1Mmnk2T>.

6 Individuals targeted by the lawsuit include Steven Donziger, Pablo Fajardo Mendoza, Luis Yanza, Douglas Beltman, Ann Maest, Maria Aguinda Salazar, Carlos Grefa Huatatoa, Catalina Antonia Aguinda Salazar, Lidia Alexandra Aguin Aguinda, Patricio Alberto Chimbo Yumbo, Clide Ramiro Aguinda Aguinda, Luis Armando Chimbo Yumbo, Beatriz Mercedes Grefa Tanguila, Lucio Enrique Grefa Tanguila, Patricio Wilson Aguinda Aguinda, Celia Irene Viveros Cusangua, Francisco Matias Alvarado Yumbo, Francisco Alvarado Yumbo, Olga Gloria Grefa Cerda, Lorenzo Jose Alvarado Yumbo, Narcisa Aida Tanguila Narvaez, Bertha Antonia Yumbo Tanguila, Gloria Lucrecia Tanguil Grefa, Francisco Victor Tranguil Grefa, Rosa Teresa Chimbo Tanguila, Jose Gabriel Revelo Llore, Maria Clelia Reascos Revelo, Maria Magdalena Rodri Barcenes, Jose Miguel Ipiales Chicaiza, Heleodoro Pataron Guaraca, Luisa Delia Tanguila Narvaez, Lourdes Beatriz Chimbo Tanguil, Maria Hortencia Viver Cusangua, Segundo Angel Amanta Milan, Octavio Ismael Cordova Huanca, Elia Roberto Piyahua Payahuaje, Daniel Carlos Lusitand Yaiguaje, Benancio Fredy Chimbo Grefa, Guillermo Vicente Payagua Lusitante, Delfin Leonidas Payagu Payaguaje, Alfredo Donald Payagua Payaguaje, Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaj Payaguaje, Fermin Piaguaje Payaguaje, Reinaldo Lusitande Yaiguaje, Luis Agustin Payagua Piaguaje, Emilio Martin Lusitand Yaiguaje, Simon Lusitande Yaiguaje, Armando Wilfrido Piagua Payaguaje, Angel Justino Piaguag Lucitant, Kemperi Baihua Huani, Ahua Baihua Caiga, Pentibo Baihua Miipo, Dabota Tega Huani, Ahuame Huani Baihua, Aparu Quemperi Yate, Bai Baihua Miipo, Bebanca Tega Huani, Comita Huani Yate, Cope Tega Huani, Ehuenguinto Tega, Gaware Tega Huani, Martin Baihua Miipo, Mencay Baihua Tega, Menemo Huani

in bringing the environmental case in Ecuador, which Chevron claimed was “sham litigation.”⁷ What followed was a true travesty of justice. The facts are far too voluminous to address comprehensively here, but the following points illustrate some of the disturbing aspects of the process (and subsequently, the result):

- Chevron used a mechanism to maneuver the RICO case to a judge who had previously expressed both open contempt for the Ecuadorian cause, which he maligned as a product of “the imagination of American lawyers” who wanted so much money they would “fix the balance of payments deficit” between the U.S. and Ecuador, as well as outright favoritism toward Chevron, who he thought should be protected so that the American consumer wouldn’t “pull his car into a gas station to fill up and find that there isn’t any gas there because these folks [the Ecuadorians] have attached it in Singapore or wherever else.” This judge even publicly suggested that Chevron bring the RICO case before Chevron actually brought it.
- The U.S. court subjected the Ecuadorians and their attorneys to massive discovery and pre-trial briefing obligations, burning through their limited funds to the point that all the lawyers (except one solo practitioner) were forced to withdraw six months before trial. Just before trial, three lawyers agreed to represent the Ecuadorian side without compensation, but they had no familiarity with the facts of the case.
- The court refused to allow the defense (the Ecuadorian side) to conduct any discovery or make any arguments referencing Chevron’s massive contamination in Ecuador, *i.e.* the fundamental basis of the Ecuador lawsuit and the motivations of the defendants. Just before trial, the judge indicated that he would impose sanctions on any defense lawyer who even mentioned the word “contamination.”
- Just before trial, the U.S. court allowed Chevron to ***drop all its damages claims yet still proceed with the case.*** The tactic allowed the court to deny the defense their right to have the case be heard by an impartial jury. In the

Baihua, Miipo Yatehue Kemperi, Minihua Huani Yate, Nama Baihua Huani, Namu Huani Yate, Omari Apica Huani, Omene Baihua Huani, Yehua Tega Huani, Wagui Coba Huani, Weica Apica Huani, Tepaa Quimontari Waiwa, Nenquimo Venancio Nihua, Compa Guiquita, Conta Nenquimo Quimontari, Daniel Ehuengei, Nantoqui Nenquimo, Okata Quipa Nihua, Cai Baihua Quemperi, Omayihue Baihua, Tapare Ahua Yete, Teweyene Luciana Nam Tega, Abamo Omene, Onenca Enomenga, Pego Enomenga, Wane Ima, Wina Enomenga, Cahuiya Omaca, Mima Yeti, Cristóbal Bonifaz, Russell DeLeon, Karen Hinton, Julio Prieto, Juan Pablo Saenz, Alberto Wray, and the environmental organizations Amazon Watch and Rainforest Action Network.

7 As set forth in the original CETIM submission, the *bona fides* of the Ecuador litigation could not be more obvious. Countless news organizations have documented the massive toxic waste pits at the center of the lawsuit, *see, e.g.*, Simon Romero and Clifford Krauss, *In Ecuador, Resentment of an Oil Company Oozes*, New York Times, May 14, 2009, at <http://j.mp/1OdRPbH>, as well as the individuals who have suffered the consequences, *see, e.g.*, Lou Dematteis, *Chevron Says These People Don't Matter*, Huffington Post, Apr. 12, 2012, at <http://j.mp/1OdRV32>. Recently, videos have come to light showing Chevron’s own technical field staff darkly laughing over their inability to find clean soil to present to the Ecuador court as a pretense that the environment was clean and safe. *See, e.g.*, Robert S. Eshelman, *The Chevron Tapes: Video Shows Oil Giant Allegedly Covering Up Amazon Contamination*, Vice News, Apr. 8, 2015, at <http://j.mp/1OdRTZ6>.

U.S., all criminal cases and all civil cases demanding more than \$20 must be heard by a jury. With this tactic, Chevron was allowed to thread the needle and have the notoriously biased judge described above decide the case by himself. (After trial, the judge allowed Chevron to reinstate a damages claim for \$32 million in attorneys fees against the defendants.)

- At trial, the U.S. court allowed Chevron to continue with tactics designed to crush the defense with brute force alone. For example, Chevron was allowed to submit over 2,000 exhibits in one day, and when the defense didn't object to each exhibit individually in four days time, all objections were waived.
- The U.S. court allowed Chevron to submit testimony from secret "John Doe" witnesses; from witnesses who were deposed *ex parte* (i.e. without the other side's lawyers being present); and, most problematically, from a disgraced former Ecuadorian judge named Alberto Guerra, who admitted to taking and paying bribes his entire career, admitted to approaching Chevron offering to sell his testimony, and to whom Chevron indeed paid millions of dollars in cash and benefits, all in flagrant violation of ethical principles against paying "fact" witnesses. Mr. Guerra was Chevron's "star" witness—he was the *only* witness who testified (falsely) to alleged bribery in the environmental case.

Given the unbalanced nature of the proceeding, it is no surprise that the U.S. court rendered a RICO judgment in Chevron's favor in March 2014. That judgment is on appeal and hopefully will be reversed. Additionally, important new evidence has come to light, including the fact that Alberto Guerra, the star "bribery" witness who was already manifestly lacking in credibility, has openly admitted that he lied under oath during the RICO case.⁸ But regardless of the outcome of the appeal or other future development, the RICO case stands by itself as an act of severe, brutal intimidation inflicted by a powerful private actor on its human rights defender opponents, using the U.S. civil justice system as the primary weapon.

Other U.S. courts and legal authorities have recognized the danger of abuse inherent in the civil RICO procedure. Among other things, it allows a litigant to level charges of criminal conduct at an opponent, but only requires proof by a "more likely than not" standard—not "beyond a reasonable doubt," the standard in genuine criminal cases. The RICO statute has been used by litigants in other cases for its "stigmatizing" and even "terrorizing" effects, by parties "seeking to score a tactical edge or to deal the heaviest possible vengeful blow to the defendant's personal reputation."⁹ One U.S. court called it "the litigation equivalent of a thermonuclear device."¹⁰ But, to our knowledge, no company has ever used the statute against human rights defenders.¹¹

8 See, e.g., Adam Klasfeld, *Ecuadorian Judge Backflips on Explosive Testimony for Chevron*, Courthouse News Service, at <http://j.mp/1OdS32l>.

9 *Gross v. Waywell*, 2009 U.S. Dist. LEXIS 52599 (S.D.N.Y. June 16, 2009).

10 *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996).

11 In one other case—also a troubling one in many respects—the circus conglomerate Ringling Brothers Barnum & Bailey brought a lawsuit against animal rights groups such as the Humane Society based on their advocacy on behalf of circus animals. The animal rights groups ultimately agreed to settle the case and even make a payment to Ringling Bros. to avoid the enormous cost of going to trial. See, e.g., Thomas Heath, *Ringling Circus prevails in 14-year legal case*, Washington Post, May 16, 2014, at <http://j.mp/1OdRZQm>.

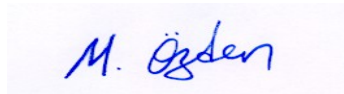
The case thus represents a “terrorizing” precedent, to say the least. It is true that U.S. law contains some tools to guard against such abuses, such as laws aimed at stopping so-called SLAPPs (Strategic Lawsuits Against Public Participation), and the “Noerr-Pennington” doctrine that is supposed to prevent retaliation based on the bringing of a genuine lawsuit like the Ecuador environmental case. But the judge in the RICO case quickly dismissed these protections. While the protections served to block some of Chevron’s retaliatory efforts in other parts of the country, Chevron demonstrated that as long as its overall campaign was large enough, it could withstand setbacks here and there.

Ecuador Criminal Complaint

Chevron has also sought to intimidate representatives of the plaintiffs in the Ecuadorian environmental litigation by pressuring prosecutorial authorities in Ecuador to open an investigation (Indagación Previa 235-2010) and potentially pursue criminal charges for alleged “falsification of documents,” a charge the representatives categorically deny. Chevron wrote letters to the Fiscalía General del Estado on at least four occasions in 2010-2011, and filed a more formal charges on several occasions in 2012.¹² In response, the Fiscalía has indicated that it has opened a file and it has received testimony from some of the representatives so accused, but otherwise makes no information available regarding the status of any investigation or its considerations regarding the merits or justifications of any investigation.

We submit that the foregoing legal actions, initiated by Chevron and clearly manifesting a strategy of intimidation and pursuit of a self-interested objective (tainting the environmental judgment against it), represent an urgent situation threatening human rights defenders and their cause. Even more specific information on these actions—such as case numbers, relevant dates, court decisions, exhibits, and other documents—is available upon request. We respectfully call on the Special Rapporteur on the Situation of Human Rights Defenders to take a stand in defense of the human rights principles and defenders under attack by way of this strategy, and to urge the United States and Ecuador to implement measures that will better protect human rights defenders from abusive civil and quasi-criminal litigation of this sort.

Sincerely,



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¹² See <http://j.mp/1SZaABI>.