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Mr. Pavel Sulyandziga, Chair-Rapporteur

Mr. Puvan J. Selvanathan, Member
Mr. Michael K. Addo, Member
Ms. Alexandra Guaqueta, Member
Ms. Margaret Jungk, Member

Working Group on the issue of
human rights and transnational corporations
and other business enterprises
Via wg-business@ohchr.org

Re: Access to Effective Remedy;
Due Process of Law; Environmental
Litigation against Chevron in Ecuador

Dear Mr. Chair and Members of the Working Group:

As a career human rights lawyer, and as a scholar, teacher and legal advocate of corporate human rights responsibility for two decades, I write to invite your attention to an issue not yet fully addressed in your work: the need to ensure that judicial mechanisms for redress of business-related human rights complaints meet international standards of "impartiality, integrity and ability to accord due process." (Guiding Principle 26, Commentary.) The importance of this issue is highlighted by the lack of judicial integrity in the environmental litigation in Lago Agrio, Ecuador that led to an $18.2 billion judgment against Chevron.

At the outset, I congratulate the Working Group on the energetic and inclusive manner in which you have begun your mandate. With limited resources you have continued and expanded on the momentum of John Ruggie's impressive progress.

1. My Affiliations

In early 2012 plaintiffs' lawyers and other purported representatives petitioned the Inter-American Commission on Human Rights to direct Ecuador in effect to enforce the judgment against Chevron. In response, I was invited by Chevron to submit an *amicus* brief on the company's behalf before the Commission.

I had never before agreed to represent a large multinational company. However, after reviewing voluminous documents, I concluded that the conduct of the litigation by plaintiffs' lead lawyers was fraudulent. I then co-authored and co-signed an *amicus* brief, together with lawyers who represent

Chevron in the arbitral proceeding, and James Crawford, the eminent international law scholar at Cambridge (and former rapporteur for the International Law Commission).

Shortly after we filed our *amicus* brief opposing the petition, and soon after the Commission asked petitioners to submit evidence to substantiate their assertions of imminent harm to public health in Ecuador, petitioners withdrew their request. Had they had not withdrawn it, there is little doubt that the Commission would have denied their request.

I have subsequently provided independent external consulting to Chevron. However, all views expressed in this communication are my personal views and are not subject to approval by the company. My views do not necessarily reflect the company's views. For example, in the recent *Kiobel* litigation before the US Supreme Court, involving jurisdiction over alleged corporate complicity in human rights violations outside the United States, I filed an *amicus* brief in support of plaintiffs, whereas Chevron filed an *amicus* in support of defendants.

I am also a professor of law, specializing in international human rights law, and I serve on the governing or advisory boards of several human rights and judicial reform organizations. The views I express do not necessarily reflect the views of my university or of any organization with which I am affiliated.

2. Your Findings and Recommendations

In regard to effective remedies for victims of business-related human rights abuses, you have appropriately identified the following barriers to their access to judicial mechanisms: cost; lack of resources and legal assistance; complexity of corporate structures and contractual relationships; lack of access to information; jurisdictional challenges; burden of proof; political obstacles; difficulties in enforcing judgments; lack of legal avenues at the national level; restrictive investment agreements; weak regulatory regimes; and alleged harassment, persecution and reprisals.[1]

You accordingly recommend that States and business address these barriers as follows:

To States:

"… including by increasing support for civil society organizations and human rights defenders that address barriers to access to remedy … ; protecting victims and human rights defenders from harassment, persecution and reprisals for seeking access to remedies … ; cooperating with other States to explore possible developments to address the lack of judicial remedies … ; and providing clear guidance on corporate responsibility for human rights to business enterprises operating in situations of conflict."[2]

To business:

"Cooperating with, and refraining from weakening the integrity of judicial processes for victims to access remedy for negative impact. Furthermore, cooperating with civil society organizations

[1] *Report of the Working Group*, A/HRC/23/32, 14 March 2013 (hereafter "Report"), par. 47.
[2] Report, par. 71(g).

and human rights defenders that seek to address barriers to access to remedy for victims of negative impact."[3]

3. Importance of the Integrity of Judicial Proceedings

The foregoing recommendations are vitally important. But they are incomplete. As recognized by the Commentary to Guiding Principle 26, if judicial remedies are to be effective and credible, "Their ability to address business-related human rights abuses depends on their *impartiality, integrity and ability to accord due process*." (Emphasis added.)

The lack of integrity of judicial proceedings is often yet a further barrier to victims' access to effective remedies. In some cases, however, the lack of impartiality, integrity and due process may reflect collusion between unethical plaintiffs' lawyers and corrupt local courts to exaggerate or fabricate false claims against corporate defendants.

Such cases must be of concern to human rights advocates. As a matter of principle, violations of basic principles of due process of law offend fundamental norms of human rights. Moreover, if the human rights community -- out of sympathy for alleged victims, antipathy toward large corporations, or ignorance of the proceedings -- embraces corrupt judicial proceedings, the credibility of the human rights enterprise will be at risk. The ends do not justify the means.

Finally, your recommendation that business cooperate with the "integrity of judicial processes" will be taken less seriously if judicial integrity is seen to matter only selectively, favoring plaintiffs but not defendants.

4. The Environmental Litigation against Chevron in Ecuador

The Ecuadorian judicial proceedings in the Lago Agrio environmental litigation that led to an $18.2 billion judgment against Chevron lack integrity. A mountain of evidence, summarized in the enclosure to this letter, shows that the judgment resulted from fabrication of evidence of alleged environmental harm, fraud, forgery, bribery and blackmail, orchestrated and committed by plaintiffs' lead lawyers,[4] largely in collusion with Ecuadorian judicial officials.

Much of this evidence of misconduct comes from the plaintiffs' own former environmental experts, who now admit that they found no evidence of continuing, significant health or environmental harm attributable to Chevron. (Chevron never operated in Ecuador. However, in 2001 it indirectly acquired a Texaco subsidiary whose oil operations in Ecuador ended in 1992 and were subject to an extensive clean-up during 1995-98.) In recent sworn statements, plaintiffs' experts repudiate their former claims of environmental damage as "not accurate, reliable or valid." The claims of environmental harm, they now admit, were based on assumptions given to them by plaintiffs' lead US lawyer, without any scientific or evidentiary basis, and deliberately designed to manufacture a "big number" in order to pressure Chevron.

Plaintiffs' former experts also now reveal that plaintiffs' lead US lawyer instructed them to ignore whether any contamination found was in fact caused, not by Texaco, but by the Ecuadorian State oil company, Petroecuador – the only company pumping oil in Lago Agrio for the last two decades. When scientific testing methods showed that contamination was caused by Petroecuador, plaintiffs' lead US lawyer directed that those methods no longer be used.

[3] Report, par. 72(d)(7).

[4] Plaintiffs' "lead lawyers" herein refers to the two individuals named in the enclosure to this letter.

Multiple federal courts in the United States have found the evidence of fraud in the Lago Agrio proceedings so serious as to justify invoking the rarely used "crime-fraud" exception to the confidentiality of attorney-client communications. They ordered plaintiffs' lead US lawyer to disclose to Chevron his emails, including his emails with co-counsel. As a result, the misconduct by plaintiffs' lead lawyers is now confirmed by their own emails. For example, one lawyer warned that if their correspondence becomes public, "all of us, your attorneys, might go to jail."[5]

Plaintiffs' lead lawyers are accused of false representations even by some of the clients they purport to represent. Members of the Huaorani Indigenous people – on behalf of their entire people – are suing the attorneys and their associated organization, the Amazon Defense Front, for falsely claiming to represent the Huaorani. The Huaorani allege that they never authorized either the Front or its lawyers to represent them. They accuse the Front and its lawyers of unjust enrichment by planning to keep any proceeds from the judgment for themselves and their funders, rather than for the Huaorani people.

Plaintiffs' lead lawyers were not the only miscreants. Significant evidence indicates that the Ecuadorian court's supposedly independent expert on damages accepted large sums in bribes and hush money from the plaintiffs' representatives. In return, he permitted plaintiffs' lawyers and consultants to write his report, which he then falsely presented to the court as his own "independent" work.

In addition, a judge alleges that he took bribes from plaintiffs' representatives; his claim is corroborated by, among other records, certified copies of deposit slips into his bank account -- signed by an administrator in the plaintiffs' office.

The evidence of fraud is so strong that an international arbitration tribunal, convened under the Ecuador-US Bilateral Investment Treaty, has directed Ecuador not to enforce the judgment until the tribunal rules on Chevron's challenges to the judgment. Even Ecuador's own appointee to the tribunal, a respected Oxford University international legal scholar, joined in the tribunal's unanimous rulings.

In short, the Ecuadorian judgment against Chevron lacks integrity. Human rights advocates should not accept the judgment at face value, without carefully examining the extensive evidence of fraud and criminal misconduct.

5. Relevance to the Working Group

If the Working Group is to be seen as even-handed and judicious in its relations with all stakeholders, its findings and recommendations should reflect an awareness of the possibility of such perversions of justice. The Working Group might remind States that their duty to provide redress to victims is subject to the admonition in the Commentary to Guiding Principle 26 that judicial redress requires "impartiality, integrity and ability to accord due process."

The fraud underlying the judgment against Chevron is well-known in significant sectors of the transnational business community. However, some well-meaning but not fully informed observers may urge the Working Group to treat the Chevron case as "emblematic" of barriers facing victims in legitimate litigation. Without carefully evaluating the evidence of fraud, the Working Group should avoid embracing the case as emblematic.

[5] Email from J. Prieto to S. Donziger, Mar. 30, 2010, accessible at http://www.theamazonpost.com/wp-content/uploads/FAC-Ex.-11.pdf.

The case may also be raised at the forthcoming regional consultation in Colombia at the end of August. It is important that any presentation on the case be balanced. Balanced consideration of the case should also inform the Working Group's project on access to remedy,[6] and its thematic report on Indigenous peoples.[7]

I ask that you share this communication with the appropriate persons working on the regional consultation, the remedy project and the report on Indigenous peoples.

Conclusion

At a side event during the May-June 2013 session of the Human Rights Council, the issue of fraud in the Ecuadorian judgment was raised. Plaintiffs' lawyer Pablo Fajardo responded that Chevron had won dismissal of an earlier case in the US by arguing that Ecuador was a more convenient forum. So Chevron could not now, he implied, object to the result in Ecuador.

However, when Chevron agreed to accept the jurisdiction of Ecuadorian courts, it reserved the right to contest the validity of any judgment (1) fraudulently procured or rendered, (2) by courts lacking impartiality, or (3) in violation of due process of law. All three reservations apply to the Ecuadorian judgment. In short, Chevron agreed to be sued in Ecuador, not defrauded.

Chevron is not the only party prejudiced by the fraud perpetrated by plaintiffs' lead lawyers. Because the Lago Agrio judgment is unworthy of enforcement, any residents of the zone who may have legitimate claims will now need to consider alternative means of redress. As this case illustrates, illegitimate judicial proceedings achieve nothing but delay, diversion of resources, and discrediting of any legitimate human rights claims. Moreover, they put at risk the important ongoing efforts by the Working Group and others to persuade business to embrace its human rights responsibilities.

I thank you for your consideration. Please consider this as a public communication.

Sincerely,

Douglass Cassel

Encl.: *Summary of Fraud and Misconduct by Plaintiffs' Lawyers in the Lago Agrio Litigation Against Chevron in Ecuador*

[6] Report, par. 64.
[7] Report, par. 65.