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The Hon. Harold Hongju Koh
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Dear Harold:

Thank you for taking the time to meet with the Chevron team last Tuesday to discuss the fast-moving developments in the investment treaty arbitration related to the fraudulent *Lago Agrio* judgment. Given longstanding U.S. interest in and commitment to a reliable international arbitration system for the settlement of disputes between investors and host States this case is of significant importance to the United States.

Two notable events have transpired just since our meeting on Tuesday. On Wednesday, the BIT tribunal converted its February 2011 interim order into an interim award, as Chevron had requested. The operative part of the January 25, 2012 award directs Ecuador "to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio Case." This is a welcome decision, and while we hope Ecuador will comply with the interim award, we know from experience that we cannot assume it will do so. That is why we are asking the United States for support, as we discussed at our meeting.

On January 26, the Second Circuit issued its anticipated opinion in the appeal of Chevron's preliminary injunction. As the court had previously ordered, it vacated the injunction, but it did so on the narrowest possible grounds, holding that Chevron could not assert its defenses under New York law unless the Lago Agrio Plaintiffs brought or threatened an action in New York. In the Second Circuit's view, "[j]udgment-debtors can challenge a foreign judgment's validity under the [New York] Recognition Act only defensively, in response to an attempted enforcement – an effort that the defendants-appellees have not yet undertaken anywhere, and might never undertake in New York." The court did not question Judge Kaplan's extensive factual findings regarding the fraud and corruption that taints the Ecuadorian judgment, nor did it reach any of Chevron's grounds for non-enforcement of that fraudulent judgment.

That the *Lago Agrio* proceeding was corrupt from start to finish is beyond question. It is a particularly egregious example of the types of problems the State Department has described in its annual human rights reports as endemic to the judicial system in Ecuador since 2006 (that is, after the original *Aguinda* lawsuit was dismissed on *forum non conveniens* grounds). What has come to light since the BIT tribunal issued

its interim order in February 2011 is additional evidence of corruption not just in the proceeding, but in the drafting of the judgment itself. The packet we left with you summarizes the evidence that the judgment was written by the plaintiffs' lawyers and not by the judge who actually signed it.

In addition, the past year has also seen Ecuadorian President Correa further erode the rule of law in Ecuador, accelerating what the Washington Post recently called "the most comprehensive and ruthless assault on free media underway in the Western Hemisphere." Correa's primary tool in this assault has been the Ecuadorian judiciary, now under his complete control. As we discussed on Tuesday, Correa has obtained a patently fraudulent $40 million judgment against a leading Ecuadorian paper, and obtained prison terms for several of its key figures—all based on a judicial opinion that an independent investigation has determined was actually written by Correa's attorney. Other journalists have received prison terms and huge fines for acting against Correa's wishes. As the New York Times recently observed, "There is no doubt that his assault on a free press is an assault on democracy."

The question is, What now? As we discussed, Chevron is pursuing efforts to block enforcement of the *Lago Agrio* judgment on two separate, parallel tracks. We continue to seek relief from the U.S. district court for the Southern District of New York to halt the continued perpetuation of the LAPs' fraud, and to protect Chevron's interest in any judgment it ultimately obtains in that court—grounds not implicated by the Second Circuit's opinion (recognizing that even if we prevail, the relief may be incomplete to the extent the court does not have personal jurisdiction over all persons who conceivably could seek to enforce the *Lago Agrio* judgment). And in the meantime we asked the BIT tribunal to convert its February 2011 interim order into an interim award which, as mentioned, it now has done.

We appreciated your questions regarding the scope of the tribunal's power to award interim measures and we recognize the potential implications of the tribunal's actions for the United States as respondent in investment treaty arbitrations. The key issue, in our view, is the need for the tribunal to preserve its ability to bring about a meaningful resolution to the dispute the parties consented to have it resolve. The UNCITRAL Arbitration Rules that govern this matter provide (in Article 26) that the tribunal "may take any interim measures it deems necessary in respect of the subject-matter of the dispute." Here, interim measures of the kind the tribunal has awarded are necessary given the irreparable harm that Chevron would suffer in that it would never recover its payment if Ecuador stood idly by while the plaintiffs pursued enforcement of the fraudulent *Lago Agrio* judgment—the product of the Ecuadorian courts for which Ecuador is internationally responsible. Given Ecuador's inability, due to lack of resources, to satisfy the substantial award the tribunal could render if damages from Ecuador's denial of justice were compounded by enforcement of the corrupt judgment, directing Ecuador to do everything in its power to prevent that occurrence is the only way to protect the integrity of the dispute resolution process.

We recognize that there may be instances in which constitutional constraints create difficulties for a State to carry out interim measures awarded by a BIT tribunal. But the existence of those constraints cannot limit the authority of a tribunal to award measures it deems necessary to preserve the integrity of the arbitral process. Otherwise, States routinely could undercut international arbitration simply by invoking the requirements of municipal law. And, in any event, Ecuador's suggestion that in the present case its hands are tied by the requirements of separation of powers is a gross mischaracterization of municipal law.

Interference by executive branch officials with the work of the judicial branch has been a hallmark of the *Lago Agrio* proceeding at both the trial stage and the appellate stage. The trusts into which any monies eventually would be paid are administered by the executive branch, and the executive branch has colluded with the plaintiffs (including through the filing of a 1782 application in U.S. district court) to pave the way for enforcement of the judgment. For Ecuador now to profess an inability to act due to separation-of-powers constraints simply defies credibility. Therefore, even if in theory there might be situations in which an international tribunal's award of interim measures is irreconcilable with constitutional restrictions in the respondent's municipal legal system, this is not one of them.

We are encouraged by the tribunal's issuance of its interim award. At the same time, given Ecuador's history of disregard for the tribunal's orders, we foresee a scenario where despite the interim award, Ecuador continues to do nothing even if the plaintiffs seek enforcement of the judgment in a third country. If this scenario materializes, we hope that the United States – as the other Party to the investment treaty on which the arbitration is based – will advise the relevant embassies and courts of the significance of the tribunal's interim award. We see this as important not only to Chevron's interests, but to the interests of the United States in promoting respect for the international treaty-based arbitration process.

Again, I thank you for your time and thoughtful consideration of this important matter. Should you or your staff have any questions, please do not hesitate to contact me.

Sincerely,

E. B. Scott