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May 6, 2013

Mr. Bennett Harman
Deputy Assistant USTR for Latin America
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

RE: USTR Report on Operation of the Andean Trade Preference Act

Dear Mr. Harman:

In response to the Office of the U.S. Trade Representative's ("USTR") Federal Register notice of April 8, 2013 (78 Fed. Reg. 21,002), Chevron Corporation ("Chevron") hereby submits its views on whether Ecuador is meeting the eligibility criteria under the Andean Trade Preference Act ("ATPA"). As Chevron will detail below, Ecuador is in clear violation of the ATPA eligibility criteria. Consequently, there is no basis for any further extension of the Andean Trade Preference Act, which now only benefits Ecuador. ATPA should be allowed to expire at the end of its current authorization on July 31, 2013.

Among the ATPA eligibility criteria is the requirement that a country not "fail[] to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute." 19 U.S.C. § 3202(c)(3). This criterion is mandatory in that the President "shall not designate any country [an ATPA] beneficiary country" if it fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of U.S. citizens or companies. It is distinct from certain discretionary criteria the President is required to "take into account" in deciding whether to designate a country as an ATPA beneficiary country. 19 U.S.C. § 3202(d).

Just as a country must meet the mandatory eligibility criteria to be designated an ATPA beneficiary country, its failure to continue meeting those criteria is grounds for terminating its beneficiary country status. 19 U.S.C. § 3202(e).

In several recent submissions to USTR, Chevron has demonstrated that Ecuador fails to meet the trade preference eligibility criterion pertaining to recognition and enforcement of arbitral awards.

These submissions have sought (a) suspension or withdrawal of Ecuador's ATPA eligibility,¹ as well as (b) suspension or withdrawal of its beneficiary developing country status under the Generalized System of Preferences ("GSP"), which contains a materially identical eligibility criterion,² and (c) rejection of Ecuador's own petitions to expand the scope of GSP preferences to compensate for the anticipated loss of ATPA preferences.³ Rather than repeat the contents of those recent submissions here, Chevron incorporates them by reference and will use the remainder of this submission to highlight certain recent developments relevant to the question of Ecuador's continued ATPA eligibility.

Since Chevron filed its September and October 2012 petitions on Ecuador, there have been new developments giving even greater cause for concern, as a matter of both law and policy, about Ecuador's continued receipt of unilateral U.S. trade preferences.

Most significantly, Chevron's contention that Ecuador is failing to recognize and enforce awards issued by a tribunal under the U.S.-Ecuador Bilateral Investment Treaty ("BIT") was confirmed by the tribunal itself in a new award issued on February 7, 2013. There, the tribunal found that by allowing the *Lago Agrio* Judgment to become enforceable, Ecuador is "in violation of the Tribunal's First and Second Interim Awards requiring the Respondent [Ecuador], respectively, 'to take all measures at its disposal' and 'to take all measures necessary' to suspend or cause to be suspended the enforcement and recognition both within and without Ecuador of the Lago Agrio Judgment."⁴ The tribunal went on to state that Ecuador's actions have resulted in the very consequences the tribunal was "seeking expressly to preclude"⁵ – *i.e.*, a frustration of the status quo through attempts to have the *Lago Agrio* Judgment enforced at the very moment when the tribunal is trying to decide whether that judgment and the trial that produced it are inconsistent with Ecuador's obligations under the BIT. The tribunal reiterated the need to "restrain the Respondent [Ecuador] generally from aggravating the Parties' dispute and causing irreparable harm to the Claimants [Chevron] in regard to the enforcement and execution of the Lago Agrio Judgment."⁶

¹ Dkt. No. USTR-2012-0019-0012 (Chevron's petition for withdrawal or suspension of Ecuador's ATPA eligibility, Sep. 17, 2012).

² Dkt. No. USTR-2012-0013-0088 (Chevron's petition for withdrawal or suspension of Ecuador's GSP eligibility, Oct. 2, 2012); *see also* Dkt. No. USTR-2012-0013-0130 (Chevron's supplemental information re petition for withdrawal or suspension of Ecuador's GSP eligibility, Feb. 11, 2013); *further see* Chevron's second supplemental information re petition for withdrawal or suspension of Ecuador's GSP eligibility, Mar. 18, 2013 (assignment of docket number pending) (detailing President Correa's attack on the *Chevron v. Ecuador* tribunal and the BIT arbitration process in general).

³ Dkt. No. USTR-2012-0013-0171 (Chevron's comments on Ecuador's petition to expand GSP product scope, Feb. 14, 2013); Dkt. No. USTR-2012-0013-0189 (Chevron's post-hearing comments on Ecuador's petition to expand GSP product scope, Mar. 27, 2013).

⁴ *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures, para. 79 (Feb. 7, 2013); *see also id.* at p. 31 (Operative Part of the Award).

⁵ *Chevron v. Ecuador*, Fourth Interim Award, para. 80.

⁶ *Chevron v. Ecuador*, Fourth Interim Award, para. 82.

While Chevron's previous submissions have detailed the ways in which Ecuador has failed to recognize and enforce the awards in the *Chevron v. Ecuador* arbitration, it is useful here to highlight the conduct at issue demonstrating Ecuador's ineligibility for continued receipt of unilateral trade preferences from the United States. Ecuador's misconduct consists not merely of passive disregard for the tribunal's awards, but an outright attack on the arbitral tribunal itself, as well as the BIT arbitration process more generally, and threats to terminate its BIT with the United States. President Correa has publicly enlisted regional allies to join Ecuador in denouncing the arbitral awards in the *Chevron* dispute as well as the entire concept of neutral, independent international arbitration that is a cornerstone of U.S. BITs and U.S. investment policy. Indeed, he recently dispatched his Minister of Foreign Affairs on a regional mission with these objectives as the "first priority."⁷

Among Ecuador's acts and omissions that amount to a violation of the arbitral awards, the BIT, the rules governing the *Chevron v. Ecuador* arbitration (*i.e.*, the UNCITRAL Rules), and international law are these:⁸

- Following issuance of the BIT Tribunal's Second Interim Award on February 16, 2012, requiring Ecuador to take all measures necessary to suspend or cause to be suspended the enforcement and recognition both within and without Ecuador of the *Lago Agrio* Judgment, the Ecuadorian court with jurisdiction over the case (Provincial Court of Justice of Sucumbíos) declared that it is not bound by the Award,⁹ and neither the President nor any other Ecuadorian official said or did anything to counter that position.
- On August 3, 2012, the same court issued a certificate of enforceability (*mandamiento de ejecucion*) of the *Lago Agrio* Judgment.¹⁰
- Ecuador thereafter refrained from taking actions it could have taken to stay enforcement of the Judgment, including:
 - having the Attorney General issue a legal opinion finding enforcement of the Judgment suspended in view of Ecuador's obligations under the BIT and the arbitral awards issued by the BIT tribunal;

⁷ See Chevron's second supplemental information re petition for withdrawal or suspension of Ecuador's GSP eligibility, Mar. 18, 2013 (assignment of docket number pending) (detailing President Correa's attack on the *Chevron v. Ecuador* tribunal and the BIT arbitration process in general).

⁸ These acts and omissions are described in detail in Chevron's submissions cited in footnotes 1, 2 and 3, *supra*, and incorporated by reference in this submission.

⁹ See Judgment of the Sole Division of the Provincial Court of Sucumbíos, Mar. 1, 2012, at 4; Judgment of the Sole Division of the Provincial Court of Sucumbíos, Feb. 17, 2012.

¹⁰ Providencia, Provincial Court of Justice of Sucumbíos, Aug. 3, 2012 (3 p.m.).

- representing to the courts in which the *Lago Agrio* plaintiffs are seeking to enforce the Judgment that the tribunal in a BIT arbitration to which Ecuador consented has directed that enforcement of the Judgment be suspended;
 - excusing Chevron from the requirement to post a bond (or posting the bond on Chevron’s behalf) to ensure a stay of enforceability of the Judgment pending review by Ecuador’s highest court; and
 - ordering the Superintendent of Companies to enjoin the *Lago Agrio* plaintiffs or judgment-trust beneficiaries from seeking to enforce the Judgment.
- Senior officials, including Ecuador’s President and Attorney General, have vocally denigrated the arbitral awards and the legitimacy of the BIT proceeding in ways that have encouraged the plaintiffs to seek enforcement of the *Lago Agrio* Judgment.¹¹
 - The *Lago Agrio* court has issued *ex parte* orders purporting to embargo Chevron’s assets in Ecuador and to freeze its bank accounts, and it has issued letters rogatory which Ecuador’s Transitional Judicial Council (an executive branch entity) has certified and the Minister of Foreign Affairs has apostilled (*i.e.*, authenticated) so as to facilitate the efforts of the *Lago Agrio* plaintiffs to have courts in other countries give effect to those orders.¹² In this regard it is notable that despite the sometimes professed desire of Ecuador’s executive branch not to interfere in the *Lago Agrio* court proceedings, when the court’s freeze order purported to encompass a \$96 million debt that Ecuador owes to Chevron pursuant to an award in a commercial arbitration, Ecuador’s attorney general quickly (and successfully) intervened to have that asset excluded from the freeze order, though he did nothing else to rein in the court’s actions in light of the BIT tribunal’s awards.¹³
 - Ecuador’s Minister of Foreign Affairs apostilled at least five documents in support of the *Lago Agrio* plaintiffs’ enforcement action in Argentina, thus facilitating the prosecution of that action.¹⁴

¹¹ See, e.g., 2012.03.03 Citizen Connection Broadcast # 261 with President Rafael Correa (Correa calling arbitration proceeding a “monstrosity”); Attorney General News Release, Feb. 28, 2012 (Attorney General stating BIT tribunal cannot “act as a tribunal that may review judgments issued by the Ecuadorian judicial system”).

¹² See Letter from Claimant to Tribunal, *Chevron v. Ecuador*, PCA Case No. 2009-23 (Nov. 22, 2012).

¹³ Attorney General’s Motion with the Lago Agrio Court to Revoke Embargo Order as to Commercial Cases Award, Oct. 22, 2012.

¹⁴ Power of Attorney Issued by the Canton of Lago Agrio, apostilled by the Minister of Exterior Relations, Aug. 9, 2012; Execution Order Issued by the Provincial Court for Sucumbíos, Oct. 15, 2012; Amplification of Execution Order Issued by the Provincial Court of Sucumbíos, Oct. 25, 2012; Letters Rogatory Certified by the Lago Agrio Court and requested by the National Judicial Council, Oct. 31, 2012; and Apostilled Copy of the Plaintiffs’ Motion to Expand the Embargo Order, Apostille dated Oct. 31, 2012.

- President Correa made a personal appeal to Argentine President Cristina Fernández to “enforce the [Lago Agrio] judgment” during a trip to Buenos Aires in December 2012.¹⁵
- Ecuador’s bank regulatory agency has facilitated enforcement of the Judgment by notifying all banks in the Ecuadorian financial system of an order of the *Lago Agrio* trial court freezing Chevron’s accounts in Ecuador.¹⁶
- In February 2013, as noted above, President Correa dispatched Ecuador’s Minister of Foreign Affairs, Ricardo Patiño, on a diplomatic mission to other Latin American countries to persuade them to join Ecuador in denouncing the *Chevron* tribunal’s awards and the entire BIT arbitration process as illegitimate – a mission that the Minister confirmed in a February 25, 2013 interview, stating: “The Chevron case is a priority. The President has clearly instructed me this is of first priority for the Ministry of Foreign Affairs.” Both President Correa and Ecuador’s Foreign Ministry have declared publically that Ecuador refuses to recognize the authority of the BIT tribunal and will not comply with its awards.¹⁷

Each of the foregoing actions, both individually and collectively, violates Ecuador’s obligations under the BIT awards (and, consequently, the BIT itself and the rules governing the arbitration). Ecuador has identified no good-faith basis for its defiance of the awards. As a result, Ecuador is failing in good faith to recognize as binding and enforce arbitral awards in favor of a U.S. company.

Ecuador’s conduct is harmful not only to Chevron’s particular interests, but also to the broader interests of the United States in the protection of U.S. investors and investments overseas, as codified in the U.S.-Ecuador BIT and other similar U.S. treaties. The United States enters into investment treaties to help safeguard the interests of U.S. investors operating around the world. The provision of a neutral dispute settlement mechanism is a cornerstone of those treaties, giving investors a forum in which to seek redress for grievances against host States. The paramount importance of international arbitration as a dispute settlement mechanism is reflected in the inclusion of the trade preferences eligibility criterion on recognition and enforcement of arbitral awards. If the United States permits Ecuador to continue receiving unilateral trade preferences despite Ecuador’s disregard of that eligibility criterion, it risks calling into question the support the United States will give in fact for a robust international arbitration system.

¹⁵ *Correa says he will ask Cristina to “comply with the judgment” against Chevron*, LA NACIÓN, Dec. 4, 2012.

¹⁶ Notice of Embargo Order by Supervisory Agency of Banks and Insurance, Oct. 17, 2012.

¹⁷ See “Ecuador no cumplirá orden de ONU,” *Expreso* Pág. 07 28/02/2013 CRE Satelital, Ecuador Inmediato 27/02/2013 available at <http://www.eltiempo.com.ec/noticias-cuenca/116603-correa-dice-que-ecuador-es-incapaz-de-cumplir-orden-arbitral-en-caso-chevron>; “Foreign Minister Ricardo Patiño travels around Latin America to discuss reform of the Inter-American System of Human Rights (ISHR)” available on the website of Ecuador’s Ministry of Foreign Relations website at <http://www.mmrree.gob.ec/eng/2013/bol0135.asp>.

In sum, the United States should make it clear to Ecuador that ignoring its obligations under the BIT arbitral awards will have serious consequences. The current authorization of ATPA is set to expire on July 31, 2013. Since May 15, 2012, Ecuador has been the sole remaining beneficiary under the ATPA. Given Ecuador's blatant refusal to comply with the ATPA eligibility criteria, the Administration and Congress should allow ATPA to expire. There simply is no basis for continuing to extend generous trade preferences to Ecuador in light of their unwillingness to abide by the program's criteria. The United States should demonstrate to its trade partners that it takes both treaty obligations and trade preference eligibility criteria seriously.

Sincerely,

A handwritten signature in cursive script, appearing to read "Edward B. Scott".

Edward B. Scott