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

RE: Docket USTR–2012–0006, Andean Trade Preferences Act, As Amended: Request for Public Comment Regarding Beneficiary Countries

Dear Mr. Harman:

Chevron Corporation ("Chevron") hereby submits comments in response to the Office of the U.S. Trade Representative's Federal Register notice of April 24, 2012 (77 Fed. Reg. 24,555, FR Doc. 2012–9838), requesting public comment with respect to Ecuador's compliance with the eligibility criteria of the Andean Trade Preference Act (ATPA), as amended. In particular, Chevron's comments address Ecuador's actions related to a court case in Ecuador (known as the *Lago Agrio* case) and to an arbitration initiated by Chevron under the United States-Ecuador Bilateral Investment Treaty (BIT), which is related to the court case. (As discussed below, in addition to the arbitration related to the *Lago Agrio* case, Chevron has prevailed in a separate BIT arbitration against Ecuador pertaining to certain concession agreements, and Ecuador's failure to enforce the terms of that arbitral award should bear on the question of its continued eligibility to receive ATPA trade preferences).

Chevron has made numerous detailed submissions to USTR over the years expressing concern about Ecuador's actions to nullify its settlement and release agreements with Chevron's subsidiary regarding its remediation efforts in Ecuador, actions intended to facilitate a judgment against Chevron in the *Lago Agrio* case and shift the costs of additional remediation from Petroecaudor to Chevron. Ecuador's inappropriate collusion with the plaintiffs in the *Lago Agrio* case, plus its blatant manipulation of the judicial process should make it ineligible to receive unilateral trade preferences from the United States. Since our last submission, new developments give even greater cause for concern about Ecuador's continued eligibility to receive such preferences as a matter of both law and policy.

There is now indisputable evidence, affirmed by seven U.S. courts, that the *Lago Agrio* judgment against Chevron was obtained by fraud. Despite this, in February of last year, the Ecuadorian court hearing the case ruled against Chevron and ordered the company to pay $18.2 billion in damages. Pending final review of the issues involved in this extraordinary case, an international tribunal convened under the BIT issued an interim award directing Ecuador to "take all measures necessary" to prevent enforcement and recognition of the fraudulent judgment against Chevron. Nevertheless, the plaintiffs' lawyers are urging Ecuador to ignore the BIT Tribunal's award and allow enforcement immediately, which Ecuador appears poised to do. Failure by Ecuador to recognize or enforce a legally binding arbitral award would be a violation of the mandatory eligibility criteria under both ATPA as well as the Generalized System of Preferences and should result in Ecuador being declared ineligible for U.S. trade preferences under these programs.

Chevron's Submission of Claims to Arbitration Under the U.S.-Ecuador Bilateral Investment Treaty

On February 14, 2011, the Ecuadorian court hearing the *Lago Agrio* case issued a judgment ordering Chevron to pay $18.2 billion in damages. An Ecuadorian intermediary appellate court affirmed this judgment on January 3, 2012. Chevron has sought review of the judgment by Ecuador's National Court of Justice under a procedure known as "cassation." However the request for further review does not automatically stay enforcement of the judgment. To obtain a stay, Chevron would have had to post a bond, which Chevron will not do in light of the systemic corruption that led to the judgment.

The *Lago Agrio* case was rife with fraud on the part of the plaintiffs' U.S. and Ecuadorian lawyers, as at least seven U.S. courts have found in the context of applications for discovery in aid of proceedings before foreign and international tribunals (*i.e.*, applications under 28 U.S.C. § 1782) and otherwise.[1] Misconduct in the underlying proceeding included bribery of judges, fabricating "expert" testimony, harassment of Chevron's counsel, and *ex parte* collusion with the judge in the drafting of the final judgment. In addressing one 1782 application, the United States District Court in New Jersey found that the plaintiffs' lawyers' actions could not constitute "anything but a fraud on the judicial proceeding."[2] The United States District Court for the Western District of North Carolina found that "what has blatantly occurred in this matter would

[1] *Chevron Corp. v. Champ*, Nos. 1:10-mc-27, 1 :10-mc-28, 2010 U.S. Dist. LEXIS 97440, at *16 (W.D.N.C. Aug. 30, 2010); *In re Chevron Corp.*, Nos. 1:10-mc-00021-22, 2010 U.S. Dist. LEXIS 119943, at *6 (D.N.M. Sept. 1, 2010); *In re Applic. of Chevron Corp.*, No. 10-cv-1146-IEG(WMC), 2010 U.S. Dist. LEXIS 94396, at *17 (S.D. Cal. Sept. 10, 2010); *In re Applic. of Chevron Corp.*, 749 F. Supp. 2d 141, 167 (S.D.N.Y. Nov. 10, 2010), *aff'd Lago Agrio Pls. v. Chevron Corp.*, 409 F. App'x 393, 395 (2d Cir. 2011); *In re Chevron Corp.*, 10 Civ. 2675 (SRC) (D.N.J.), June 11, 2010 Hr'g Tr. at 43:4-8, *aff'd In re Applic. of Chevron Corp.*, 633 F.3d 153, 166 (3d Cir. Feb. 3, 2011); *see also Chevron Corp. v. Salazar*, 275 F.R.D. 437, 442 (S.D.N.Y. 2011);*Chevron Corp. v. Page*, No. RWT-11-1942, Oral Arg. Tr. at 73:14-18, 74:17-21 (D. Md. Aug. 31, 2011); *Chevron Corp. v. The Weinberg Group*, No. 11-mc-00409-JMF, slip op. at 8 (D.D.C. Sept. 8, 2011).

[2] Hearing Transcript, *In re Application of Chevron Corp.*,10-2675 (SRC) (D.N.J., June 17, 2010) at 23.

. . . be considered fraud by any court."[3] Some of the more damning evidence of the fraud and lack of fundamental fairness in the underlying Ecuadorian judicial proceeding includes:

- Outtakes from the film documentary "Crude" show supposedly "independent" court-appointed expert Richard Cabrera meeting with the plaintiffs' attorneys *fully two weeks before the court actually appointed him to the case*. In film footage, the lead plaintiffs' attorney in Ecuador, Pablo Fajardo, explained plans for the plaintiffs' attorneys and their environmental consultants to write Mr. Cabrera's "expert report": "In other words, you see … the work isn't going to be [Mr. Cabrera's] . . . . What the expert is going to do is . . . . sign the report and review it. But all of us [unintelligible] have to contribute to that report … together."[4]

- One of the plaintiffs' attorneys' experts testified in a deposition that his report was falsified – he submitted a report finding no significant environmental impacts from the consortium's operations, but the plaintiffs' attorneys changed the conclusions and submitted it as evidence against Chevron without his knowledge.[5]

- Despite Ecuador's insistence that the government would not interfere in the *Lago Agrio* case pending before an Ecuadorian court, Alexis Mera, the chief legal advisor to President Correa, and a representative from the Ecuador Attorney General's office are shown on film in outtakes from the film documentary "Crude" advising the plaintiffs' counsel on litigation strategy.[6] As recognized by the U.S. District Court considering Chevron's complaint of racketeering by the *Lago Agrio* plaintiffs' lawyers and advisors, Mera is also shown colluding with the plaintiffs' attorneys to put "pressure on the Public Prosecutor's Office" to pursue criminal proceedings against Chevron's attorneys as a strategy to "raise the cost" to Chevron and increase the pressure to settle the case. Two of Chevron's attorneys in Ecuador were in fact later criminally indicted and forced to leave the country for their safety.[7]

- U.S. courts reviewing section 1782 applications have pointed to additional misconduct by Ecuador itself, not just plaintiffs and their lawyers. For example, the U.S. District Court for the District of New Mexico found that "the Lago Agrio attorneys . . . place[d] pressure on the

[3] Order, *Chevron Corp. v. Champ*, No. 1:10-mc-0027 (GCM-DLH) [DI 12] (W.D.N.C. Aug. 30, 2010), Document 26 at 12.

[4] Transcript of *Crude* Outtake From March 3, 2007 Meeting Between Plaintiff's Representatives and Cabrera, (CRS-191-00-CLIP-03), No. 1:10-mc-00001 (LAK) Document 4-3 at 39-40.

[5] Deposition of Charles W. Calmbacher, *In re Application of Chevron Corporation*, 1:10-MI-0076 (TWT-GGB) (N.D.G. March 29, 2010), at 111-119.

[6] Transcript of *Crude* Outtake, CRS-221-02-01.

[7] *In re Application of Chevron Corp.*, 10 MC 00002 (LAK) (S.D.N.Y 2010), Document 86 at 3-4.

> new Ecuadorian government to push for a specific outcome in the litigation, and . . . the Ecuadorian government intervened in ongoing litigation."[8]

In light of the tainted judicial process in Ecuador – which was glaringly obvious even before final judgment was rendered in February 2011 – Chevron submitted to arbitration under the BIT in September 2009 claims that Ecuador violated its obligations under settlement and release agreements with Chevron's subsidiary, obligations under the BIT, and obligations under other applicable international law by failing to accord fair and equitable treatment in the *Lago Agrio* case. As the underlying proceeding reached its conclusion, Chevron perceived a serious risk that the Ecuadorian courts would issue a final judgment in plaintiffs' favor; that as a matter of Ecuadorian law the judgment would become enforceable both in Ecuador and outside of Ecuador; that plaintiffs would seek to have the judgment enforced; that these actions would result in harm to Chevron which, due to limited resources, Ecuador would be unable to remedy if Chevron prevailed in the arbitration; and that this state of affairs could render the entire arbitral proceeding ineffective. In light of this risk, Chevron asked the BIT arbitration tribunal to award interim measures to preserve the status quo and prevent the arbitration from becoming an ineffective exercise. Specifically, Chevron asked the tribunal to instruct Ecuador to prevent any final judgment in the *Lago Agrio* case from becoming enforceable pending the conclusion of the arbitration in which the very conduct of that litigation was at issue.

On February 9, 2011, the BIT tribunal issued an order granting Chevron's request for interim measures and directing 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 First Claimant in the *Lago Agrio* case."[9] Following issuance of the order, Ecuador's appellate court affirmed the *Lago Agrio* judgment, and Ecuador took no action to prevent the judgment from becoming enforceable. Accordingly, Chevron asked the tribunal to clarify and expand upon its previously ordered interim measures and to set forth its direction to Ecuador in the form of an interim award. On February 16, 2012, the BIT Tribunal did just that, issuing an interim award directing Ecuador, and all of its branches of government, including the judiciary, to "take all measures necessary" to prevent enforcement and recognition of the judgment against Chevron, both within and without Ecuador, until an impartial BIT tribunal can review the merits of Chevron's claims of denial of justice, fraud, and denial of due process.[10] The award includes a specific prohibition on issuing the "certifications" of the judgment that are necessary to its enforcement by the plaintiffs.[11]

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[8] Amended Order, *In re Application of Chevron Corp.*, No. 1:10-mc-00021 (LFG) (D.N.M. Sept. 2, 2010), Document 77 at 4.

[9] Chevron (USA) v. Ecuador, Order for Interim Measures, PCA Case No. 2009-23, February 9, 2011, p. 3.

[10] Chevron (USA) v. Ecuador, Second Interim Award on Interim Measures, para. 3(i), PCA Case No. 2009-23, February 16, 2012, p. 3.

[11] Chevron (USA) v. Ecuador, Second Interim Award on Interim Measures, para. 3(ii), PCA Case No. 2009-23, February 16, 2012, p. 3.

Actions by Ecuador to Help the Plaintiffs Enforce the Judgment Would Violate Not Only the Arbitral Award, but Also Ecuador's Treaty Obligations to the United States, and ATPA Eligibility Criteria

We remain concerned that the Ecuadorian appellate court may be poised to issue the certifications that would make the *Lago Agrio* judgment enforceable, in defiance of the tribunal's interim award. This would enable the plaintiffs to seek to enforce the judgment in third countries immediately, potentially harming Chevron in ways that a final arbitral award in Chevron's favor will not be able to remedy (due to Ecuador's limited resources), thus rendering the arbitration process ineffective. This is precisely what the tribunal's interim award was meant to prevent.

Among other bases for our concern, on February 20, 2012, just days after the arbitral tribunal issued its interim award directing Ecuador to take "all measures necessary" to suspend enforcement of the *Lago Agrio* judgment or cause its enforcement to be suspended, the appellate court in Ecuador issued a decision in which it stated that it did not consider itself bound by the award.[12] Despite acknowledging the binding nature of the arbitral award, the appellate court concluded that plaintiffs' human rights trumped the arbitral award.

Moreover, the plaintiffs' lawyers are actively engaged in an attempt to find courts in third countries that will be sympathetic to their position and willing to authorize the seizure of Chevron's assets around the world, including in Venezuela and in Panama, where Chevron tankers routinely pass through the Panama Canal. While these actions are troubling in their own right, of particular relevance here is the support and assistance plaintiffs' lawyers have received and may continue to receive from Ecuador itself.

Also troubling are statements from senior officials in the Government of Ecuador, including President Correa, actively denouncing the arbitration tribunal and calling the proceeding a "monstrosity."[13] In some countries such statements might be dismissed as political rhetoric. But in Ecuador, given the susceptibility of the judiciary to political influence (a fact acknowledged repeatedly by the U.S. Department of State)[14] statements by the president and other senior officials encouraging the court to take particular action cannot be so easily dismissed. Such statements are a blatant interference with the judicial process, which in this case, amounts to a breach of Ecuador's obligation to recognize and enforce the BIT tribunal's interim award. Moreover, such statements quite likely constitute a failure to "act in good faith in recognizing as binding or enforcing an arbitral award," as section 3202(c)(3) of the ATPA requires in order for Ecuador to remain eligible to receive ATPA benefits. And certainly Ecuador will have clearly crossed the line under that statutory criterion if it takes the next step by issuing a decree

[12] Garcia, Eduardo. "Ecuador Court Snubs Arbitration Panel on Chevron," Reuters, February 20, 2012.

[13] 2012.03.03 Citizen Connection Broadcast #261 with President Rafael Correa

[14] U.S. State Departments' 2010 Human Rights Report**,** Section 1(e) available at http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154504.htm.

declaring the *Lago Agrio* judgment to be enforceable, in direct contravention of its obligations under the arbitral award to take "all measures necessary" to *prevent* recognition and enforcement of the judgment.

The policy behind the ATPA eligibility criterion pertaining to arbitral awards is clear: the United States should not be giving unilateral trade preferences to countries that fail to abide by their obligations to recognize and enforce the rights of U.S. citizens and U.S. companies under arbitration awards. The policy imperative is particularly acute when the arbitration at issue is arbitration under a treaty with the United States, where the rights at stake are not only the rights of an individual investor, but also the rights of the United States itself.

Other Arbitration Under BIT

In addition to the BIT arbitration involving the *Lago Agrio* case, in December 2006, Chevron submitted to arbitration – also under the BIT – claims involving suits that Chevron's subsidiary, TexPet, had filed in Ecuadorian courts over certain concession agreements TexPet had with the state-owned oil company, Petroecuador. The suits had languished for years, and Chevron charged that the persistent inaction by the courts amounted to a failure by Ecuador to "provide effective means of asserting claims and enforcing rights with respect to investment," as it is required to do under the BIT. An arbitral tribunal agreed, and on August 31, 2011, it rendered an award holding Ecuador liable to Chevron for approximately $96 million. Ecuador filed a lawsuit in the Netherlands (which was the seat of the underlying arbitration) seeking to have the award set aside on various grounds. On May 2, 2012, the District Court of the Hague denied Ecuador's petition in its entirety. Although Ecuador may appeal from the District Court's judgment, this decision is an important milestone. Absent a successful appeal of the denial of its set-aside petition, Ecuador will be liable under the arbitral award and the BIT to pay Chevron. Its failure to do so promptly would be further grounds for denying Ecuador continued access to U.S. trade preference programs.

In this regard, Chevron recalls the unusual step Ecuador took in June 2011 by filing a notice of State-to-State arbitration with the United States seeking an interpretation of the BIT's "effective means" clause, which was at issue in the arbitration with Chevron. This maneuver was a transparent attempt by Ecuador to circumvent the ordinary post-arbitral award enforcement process. It is obviously Ecuador's hope, through arbitration with the United States, to get a "second bite at the apple" with respect to interpretation of the treaty provision that was the basis for Chevron's successful arbitration claims and thereby influence the views of any forum in which Chevron may seek to enforce its award against Ecuador. This cynical ploy by Ecuador is a further illustration of Ecuador's lack of good faith, which should cause the United States to reevaluate the desirability of continuing to give trade preferences to Ecuador.

Conclusion

By its actions described in this submission and in previous submissions by Chevron to USTR, Ecuador has demonstrated its lack of regard for due process and the rights of U.S. persons who have invested in Ecuador. Ecuador now has obligations to Chevron under the interim award in

the BIT arbitration related to the *Lago Agrio* case and the final award in the BIT arbitration related to TexPet concession agreements. Its failure to honor those obligations would be harmful not only to Chevron, but also to the United States, which has a strong interest in enforcing its rights under investment treaties. That interest extends to assuring U.S. stakeholders of the value of the protections afforded by investment treaties to which the United States is a party. If Ecuador suffers no consequences for its failure to recognize and enforce arbitral awards under the BIT, the value of those protections will be in doubt.

The United States should make it clear to Ecuador that ignoring its obligations under the BIT arbitral awards is a violation of the ATPA's program's mandatory criteria and Ecuador's trade preferences could be revoked if Ecuador does not take measures to abide by the arbitral awards. The Administration must demonstrate to its trade partners that it takes both treaty obligations and trade preference eligibility criteria seriously.

Sincerely,

E. B. Scott