

Petition Regarding Ecuador's Benefits Under the Andean Trade Preference Act

Under section 203(e) of the ATPA, as amended (19 U.S.C. 3202(e)), the President may withdraw or suspend the designation of any country as an Andean Trade Preference Act or Andean Trade Preference and Drug Eradication Act (jointly "ATPA") beneficiary country, and may also withdraw, suspend, or limit preferential treatment for any product of any such beneficiary country, if the President determines that, as a result of changed circumstances, the country is not meeting the eligibility criteria of either Act.

Congress raised concerns regarding Ecuador's compliance with ATPA criteria in December 2008, when it provided only a short six-month extension of the program and asked the United States Trade Representative to evaluate and report on Ecuador's performance with respect to the ATPA's eligibility criteria in order to continue Ecuador's benefits for an additional six months (through December 2009). On June 30, the President provided a report to Congress, approved on a broad inter-agency basis, evaluating Ecuador's compliance with ATPA eligibility criteria, noting several issues of concern:

- The President's report to Congress noted that the United States-Ecuador Bilateral Investment Treaty provides for international arbitration of disputes at the investor's initiative. Ecuador had been a member of the International Centre for Settlement of Investment Disputes ("ICSID") and is a party to the Convention on the Recognition of Foreign Arbitral Awards (New York Convention). On May 30, 2009, Ecuadorian President Rafael Correa announced that his country would be withdrawing from ICSID. Ecuador's Congress voted on June 12, 2009 to denounce ICSID's arbitration facility. Ecuador is only the second country, after Bolivia, to withdraw from ICSID which has 156 signatory States. The report indicated that the United States government will be closely monitoring Ecuador for compliance with its BIT obligations.
- While not citing Chevron by name, the President's report also cited concerns that statements by top Ecuadorian officials in support of the plaintiffs were politicizing the proceedings of a lawsuit against a U.S. company. The report further indicated that the U.S. Government had encouraged Ecuadorian government officials to refrain from commenting on ongoing judicial cases.

In addition to the concerns raised in the President's report, the U.S. Department of State's 2009 Investment Climate Statement cites problems in Ecuador with respect to "systemic weakness and susceptibility to political or economic pressures in the rule of law." Similar issues were noted in World Bank Institute data for Ecuador shown on the Millennium Challenge Corporation's FY2009 scorecard, showing the country below the median with regard to Rule of Law, and more troubling, a clear pattern of sustained decline for this indicator for the five-year period reported.

Ecuador Fails to Follow the Rule of Law

As discussed in detail elsewhere in this petition, Congress, USTR, the State Department and independent organizations such as Transparency International and the International Bar Association have raised numerous concerns with the application of the rule of law in Ecuador. Even after being made aware that grave concerns with its performance exist, rather than working toward making improvements in this area, Ecuador continues to fall short of international norms.

Outside organizations agree that over the past several years judicial independence and adherence to the rule of law have eroded in Ecuador.

- The U.S. Department of State’s 2009 Investment Climate Statement cites problems in Ecuador. The report indicates that “systemic weakness and susceptibility to political or economic pressures in the rule of law constitute the most important problem faced by U.S. companies investing in or trading with Ecuador. The Ecuadorian judicial system is hampered by processing delays, unpredictable judgments in civil and commercial cases, inconsistent rulings, and limited access to the courts. Criminal complaints and arrest warrants against foreign company officials have been used to pressure companies involved in commercial disputes. There have been cases in which foreign company officials have been prevented by the courts from leaving Ecuador due to pending claims against the company. Ecuadorians involved in business disputes can sometimes arrange for their opponents, including foreigners, to be jailed pending resolution of the dispute.”¹
- The State Department’s report further recognizes that “[Ecuador’s] courts are often susceptible to outside pressure and bribes,” and that “neither Congressional oversight nor internal judicial branch mechanisms have shown a consistent capacity to investigate effectively and discipline allegedly corrupt judges.”²
- The Government of Ecuador has established a pattern of pressuring judges and removing those that rule against the Government’s interests. In December 2004, Congress dismissed and replaced 27 members of the Supreme Court of Justice.³ Then-President Lucio Gutiérrez justified the removals on the grounds that “the judges apparently decided against the Country’s interests and agreed to hear the oil reimbursement claims on behalf of various foreign companies.”⁴
- After the enactment of a new Constitution that extended the president’s tenure and authorized the president to dissolve Congress and hold new elections,⁵ President Correa stated:

¹ U.S. Department of State, “2009 Investment Climate Statement on Ecuador” viewed at <http://www.state.gov/e/eeb/rls/othr/ics/2009/117668.htm>.

² *Id.*

³ Juan Forero, *Firings on Ecuador’s Top Court Stir Opposition’s Wrath*, AP, Dec. 18, 2004.

⁴ *His statements against the former Supreme Court were used by EnCana: Gutiérrez clarifies his remarks before the London Tribunal*, EXPRESSO, Feb. 18, 2005.

⁵ United Nations, *Follow-up report submitted by the Special Rapporteur on the Independence of judges and lawyers* at 4-5, Jan. 31, 2006; *Eight Judges of the Court Questioned*, EL COMERCIO, Dec. 16, 2008; *The Supreme Court analyzes possible legal charges against Ramiro Romero Parducci*, ECUADORINMEDIATO, Oct. 17, 2007; *Casares*,

- “[T]he Executive Branch [can] exert pressure on the Judicial Branch to get the courts to ‘respond to the needs of the country[.]’”⁶
- “[T]he President of the Republic is not only the leader of the Executive Branch; he is the leader of the entire State and the State is made up of the Executive, the Legislative, and the Judicial branches[.]”⁷
- Three former Ecuadorian presidents, Sixto Durán Ballén, Osvaldo Hurtado, and Gustavo Noboa, published an open letter in June 2009 stating that “[we] are witnesses to the severe deterioration that democratic institutions have suffered under the administration of President Correa.”⁸
- Transparency International consistently ranks Ecuador near the bottom among countries it surveys in the region. Ecuador ranked 151 out of 180 countries surveyed for Transparency International’s Corruption Perceptions Index 2008 and received a score of 2 out of 10 (10-highly clean, 0-highly corrupt). In the Western Hemisphere, only two countries received lower scores than Ecuador.⁹
- The Human Rights Institute (HRI) of the International Bar Association carried out an investigative mission to Ecuador in April 2005. Among its findings, the HRI report noted that “[d]espite the fact that Ecuador has enshrined the independence of the judiciary in its law, the IBA delegation considers that in many cases no effective independence exists and that on the contrary, there is a serious politicisation of the judiciary.” HRI found that “no adequate controls exist regarding ‘conflicts of interest,’ and this has led to violation of due process [which] compromises the independence of the judicial system.” HRI concluded that “[u]rgent reform [was] required of those rules that undermine due process and allow interference in judicial matters by external forces.”¹⁰
- Ecuador is not a signatory to the OECD Convention on Combating Bribery, nor has Ecuador complied with the main requirements of the OAS Inter-American Convention Against Corruption.

New Supreme Court Justice, EL UNIVERSO, Aug. 23, 2007; *Supreme Court in Ecuador Fires Justices Suspected of Corruption*, GLOBAL INSIGHT, Sept. 20, 2006 (“Ecuador’s judiciary has a reputation for corruption and a lack of independence from the political branch.”).

⁶ *Eight Judges of the Court Questioned*, EL COMERCIO, Dec. 16, 2008; *The Supreme Court analyzes possible legal charges against Ramiro Romero Parducci*, ECUADORINMEDIATO, Oct. 17, 2007; *Casares, New Supreme Court Justice*, EL UNIVERSO, Aug. 23, 2007; *Supreme Court in Ecuador Fires Justices Suspected of Corruption*, GLOBAL INSIGHT, Sept. 20, 2006 (“Ecuador’s judiciary has a reputation for corruption and a lack of independence from the political branch.”).

⁷ *Rafael Correa: Executive Can Pressure the Courts to “Do Their Duty,” Hoy*, Nov. 8, 2008.

⁸ Statement from former presidents Sixto Durán Ballén, Osvaldo Hurtado Larrea and Gustavo Noboa Bejarano, Quito, June 15, 2009, published in HOY, June 16, 2009.

⁹ Transparency International 2008 Corruption Perceptions Index, available at www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table (2009)

¹⁰ Ecuador: Strengthening the Judiciary, International Bar Association, available at http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Americas/Ecuador.aspx, at 3, 5 (June 2005).

The Ecuadorian Government Would Substantially and Illegitimately Benefit From an Award in the Lago Agrio Litigation Against Chevron

Chevron believes the Government of Ecuador today is inappropriately assisting Ecuadorian plaintiffs who sued Chevron in 2003 in the courts of Ecuador (the “Lago Agrio Litigation”), seeking environmental remediation and other remedies allegedly owed as a result of environmental damage caused by the operations of a Consortium that included Texaco Petroleum Company (“TexPet”) as a minority partner (37.5% share) and Petroecuador, Ecuador’s state-owned oil company, as the majority partner (62.5% share). TexPet ceased operating for the Consortium in 1990, and the Consortium was formally dissolved in 1992. The Government of Ecuador refused to participate in environmental remediation upon dissolution of the Consortium. Instead, the Government directed TexPet, through negotiation, to remediate a portion of the sites corresponding to TexPet’s minority ownership interest. The remediation work was performed by a leading international contractor and the Government of Ecuador inspected the remediation work and certified that it was completed in accordance with the parties’ agreement. In 1998, Ecuador and Petroecuador provided TexPet a full release from any further responsibility for environmental impact and remediation in the former Concession area. Ecuador consequently assumed responsibility for any remaining impact as well as any future impact caused by Petroecuador’s own ongoing operations in the former Concession area.

Yet despite this complete release of liability, Ecuador has failed to take action to properly assume responsibility for any remaining and future remediation work. Rather Ecuador is now assisting the plaintiffs in the Lago Agrio Litigation in an improper effort to shift to Chevron the responsibility for the environmental impact arising from the Consortium’s historical activities (pre-1992) and from Petroecuador’s *own* operations, as well as impact caused by government-sanctioned colonization and exploitation of the Amazonian region.

Ecuador has pursued a coordinated strategy not only with the Lago Agrio plaintiffs, but also among its various organs of State. Ecuador’s executive branch has publicly and affirmatively assisted and supported the Lago Agrio plaintiffs in their claims against Chevron, and has sought and obtained the indictment of two Chevron attorneys in an attempt to effectively nullify the settlement and releases and to interfere with Chevron’s defense in the Lago Agrio Litigation. Ecuador’s judicial branch has conducted the Lago Agrio Litigation in total disregard of Ecuadorian law, international standards of fairness, and Chevron’s basic due process and natural justice rights.

It is clear that the government of Ecuador would benefit from any damages awarded in the Lago Agrio Litigation. Ecuador’s Prosecutor General Washington Pesántez has estimated that “90 percent [of any judgment against Chevron] would be split among the State for [bio-remediation activities].”¹¹ Given the potential financial windfall for the government, President Correa has consistently supported the plaintiffs in the case, most recently in his weekly press conference on Saturday, September 12, 2009. “Of course I want our indigenous friends to win,” Correa said.¹²

Correspondence between the plaintiffs’ attorneys and Ecuador’s Office of the Attorney General, discovered in a separate proceeding, provides evidence of this cooperation: the Deputy Attorney

¹¹ Press Conference with Dr. Washington Pesántez Muñoz, Prosecutor General of Ecuador, Sept. 4, 2009.

¹² Hugh Bronstein, *Ecuador Says Had No Role in Alleged Bribery Case*, REUTERS, Sept. 12, 2009.

General assured plaintiffs' attorneys that "the Attorney General's Office and all of us working on the State's defense were searching for a way to nullify or undermine the value of the remediation contract."¹³

By inappropriately supporting plaintiffs in this case for its own financial benefit, the Ecuadorian government has repeatedly taken steps to repudiate and nullify existing contracts with TexPet, which constitutes a *de facto* taking of Chevron's property and assets in violation of § 3202(c)(2)(B)(i) of the ATPA.

Conclusion

Chevron remains concerned about Ecuador's continuing failure to observe the rule of law, Ecuador's failure to uphold its existing contracts with Chevron's subsidiary, TexPet, and Ecuador's apparent intentions of enriching its government via an illegitimate judicial proceeding against Chevron. Chevron encourages the Administration to consider its concerns regarding Ecuador both in its decision on any further extension of ATPA benefits and in the context of the overall trade preference review and reforms.

The ATPA was intended to assist the people of Andean countries in developing their own export-related industries, and Ecuadorian businesses in many product areas, such as cut flowers and tuna, have received the intended benefit. Ironically, however, the Ecuadorian government itself has been the largest beneficiary of preferences given under the ATPA. In 2008, petroleum products accounted for more than 94 percent (by value) of Ecuador's exports to the United States under the ATPA. And while a small number of private oil producers remain in Ecuador, state-owned Petroecuador is by far the largest producer and exporter. In 2008 alone, the Ecuadorian government saved an estimated \$4.3 million in duties that would otherwise have been owed on Petroecuador's exports.¹⁴

If the ATPA program is extended beyond its current December 31, 2009 expiration date, Chevron believes that, because Ecuador is not meeting the ATPA's established criteria due to the government's improper conduct, the President should consider limiting Ecuador's benefits to those accruing to farmers and manufacturers in the private sector rather than to Petroecuador and the State-dominated oil sector.

¹³ Email from Martha Escobar to Alberto Wray, Cristobal Bonifaz, et al. (Aug. 10, 2005).

¹⁴ USITC Dataweb, Imports for Consumption, HS 2709 and 2710, 2008.