



Embassy of Ecuador in the United States
Washington D.C.



September 17, 2012

Douglas Bell
Assistant U.S. Trade Representative for Trade Policy and Economics
Office of the U.S. Trade Representative
600 17th Street N.W.
Washington, D.C. 20508

RE: Andean Trade Preference Act (ATPA): Notice Regarding the 2012 Annual Review

Dear Mr. Bell:

The Embassy of the Republic of Ecuador to the United States (Embassy) appreciates the opportunity to provide the Office of the U.S. Trade Representative (USTR) with its comments regarding Ecuador's eligibility under the Andean Trade Preference Act (ATPA).¹ This letter builds upon our letter submitted to USTR on May 22, 2012 as a response to a request for comments on ATPA's beneficiary countries (*see* Appendix A).² Further, this letter submits that the Government of Ecuador (GOE) has been and continues to be in compliance with the mandatory and discretionary eligibility criteria for ATPA.

Particularly, the Embassy emphasizes herein that: (I) Ecuador's designation as an ATPA beneficiary country is in the "national economic or security interest of the United States"; and (II) Ecuador has acted in good faith in "recognizing as binding or in enforcing arbitral awards in favor of United States citizens" or U.S. corporations. For this reason, we urge the U.S. Government to maintain ATPA benefits for Ecuador until the program's expiration on July 31, 2013 and support the extension of ATPA benefits for Ecuador beyond July 2013.

I. Ecuador's Designation as an ATPA Beneficiary Country is in the "National Economic or Security Interest of the United States"

Economic Interests

The recent USTR report to Congress regarding ATPA (USTR report) asserts that ATPA "has benefited the trade of both the Andean region and the United States."³ The USTR report goes on to state that "[o]ver the past five years, U.S. imports from the region increased 43

¹ Office of the U.S. Trade Representative, *Andean Trade Preference Act (ATPA): Notice Regarding the 2012 Annual Review*, 77 Fed. Reg. 47,910 (Aug. 10, 2012).

² *See* Embassy of Ecuador Comment Letter (May 22, 2012), in response to USTR's request for comment on "Andean Trade Preference Act (ATPA), as Amended: Request for Public Comments Regarding Beneficiary Countries," published in the Federal Register on April 24, 2012.

³ Office of the U.S. Trade Representative, *Sixth Report to the Congress on the Operation of the Andean Trade Preference Act as Amended* (June 30, 2012).

percent and U.S. exports grew 58 percent.”⁴ According to the USTR report, all of the 20 leading imports from the region in 2011 “have been eligible for duty-free treatment when the ATPA program has been in effect.”⁵ In particular, the USTR report notes that Ecuador ranked second as a destination for U.S. exports, “with \$5.5 billion in U.S. goods (30 percent).”⁶ As suggested by these numbers reported by USTR, ATPA is essential in sustaining and increasing economic growth and job creation in Ecuador. ATPA supports thousands of jobs for farmers, transportation and distribution employees, and vendors and customers both in the United States and Ecuador.⁷ Moreover, ATPA provides more choices for U.S. consumers, who have recognized Ecuadorian products as having competitive prices and high quality, without competing with U.S. products.

Security Interests

In addition to its tremendous contribution to economic growth and jobs in Ecuador and the United States, ATPA is a key element of the U.S.-Ecuador bilateral relationship and an important tool for Ecuador’s fight against narcotics trade in the Andean region. ATPA-dependent products that flourish near the north-central Colombian border, known for its opium and coca-leaf plantations, have helped displace drug production and support development in the area. These products have also benefited marginalized sectors of the population such as women heads of households (women represent a little over 50 percent of the flower industry workforce and a growing percentage of the broccoli industry workforce).⁸

As the USTR report explains, “with the support of the U.S. Government, Ecuador maintains an active drug detection and interdiction program.”⁹ Indeed, the USTR report notes that the GOE “has continued to reinforce its security presence in the northern border area with an increased number of military operations since 2007.”¹⁰ These counternarcotics efforts are recognized in the latest U.S. Department of State International Narcotics Control Strategy Report (INCSR), which indicates that “cocaine seizures in 2011 totaled 21.1 metric tons (MT) compared to 14.8 MT in 2010. Cocaine production along the borders of Colombia and Peru is common and appears to be on the rise, with Ecuadorian officials seizing more processing laboratories in 2011 than in 2010 [...]”¹¹ Importantly, the INCSR notes that some of these achievements have been a result of cooperation with regional partners and the United States.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Information provided by COMEX. Please contact the Embassy of Ecuador for additional details regarding this data.

⁸ Information provided by the Coordinating Ministry of Economic Policy (noting that, “the role of women is essential in the cultivation: they participate actively in the agricultural tasks. In Lluclud, many women own their own parcels of land, which allows them to have their own income. In Gatazo, the manager does everything possible so that women have a bigger role in their communities [...]”). See Julie Le Gall, *El brocoli en Ecuador: la fiebre del oro verde. Cultivos no tradicionales, estrategias campesinas y globalización*, Anuario Americanista Europeo, N 6-7 (2008 – 2009), p. 279, available at http://hal-univ-diderot.archives-ouvertes.fr/docs/00/67/95/43/PDF/JULIE_LE_GALL_Anuario_2009.pdf.

⁹ Office of the U.S. Trade Representative, *Sixth Report to the Congress on the Operation of the Andean Trade Preference Act as Amended* (June 30, 2012).

¹⁰ *Id.*

¹¹ *International Narcotics Control Strategy Report*, Bureau of International Narcotics and Law Enforcement Affairs, U.S. Department of State (Mar. 2012), available at <http://www.state.gov/j/inl/rls/nrcrpt/2012/index.htm>.

The ATPA program represents the main collaborative initiative and the most effective tool for the two countries' counternarcotics efforts. Further, ATPA contributes to Ecuador's democratic institutions and fits into the United States' larger effort to strengthen its partnerships with Latin America.

II. Ecuador has Acted in Good Faith in “Recognizing as Binding or in Enforcing Arbitral Awards in Favor of United States Citizens” or U.S. Corporations

Investor Protections

As noted in our May 22, 2012 letter to USTR, Ecuador recognizes the importance of investment and market access to its economic growth and development. As such, the GOE's recently enacted Production Code establishes principles, rights, and guarantees for foreign investors, recognizing that these investors have the same privileges and obligations as national investors and will not be subject to discriminatory or arbitrary treatment. Similarly, the Production Code creates judicial stability for investors and provides them with the ability to enter into “investment contracts,” which include international arbitration alternatives and a guarantee that the investment will be established in accordance with the Production Code provisions.¹²

Arbitration Proceedings

The GOE is currently addressing several arbitration disputes before international tribunals. In handling these disputes, the GOE is following international rule of law and due process, and is required to be in compliance with any arbitration awards that may result. As such, the Office of the Attorney General in Ecuador reports that the GOE has finalized 13 arbitration disputes from 2004 to 2012, in which it has reached a mutually beneficial agreement regarding payment or it has resolved to pay the other party accordingly.¹³ In fact, Ecuador has satisfied every final adverse award against it.¹⁴

Ecuador and Chevron are currently engaged in a legal dispute that is reflected in multiple litigation and arbitration proceedings,¹⁵ all of which have their roots in a private-party environmental dispute to which Ecuador is not a party. The underlying action was filed by indigenous plaintiffs, represented by U.S. lawyers, originally in New York. It was Chevron that successfully moved to dismiss the lawsuit on *forum non conveniens* grounds, asserting that the courts of the United States were an “inconvenient forum” for adjudicating such claims and submitting multiple affidavits attesting that the Ecuadorian courts were fair, impartial, and provided an adequate alternative forum for the claims. Having successfully obtained dismissal

¹² Ecuador Report, Trade Policies, World Trade Organization WT/TPR/G/254 (Oct. 10, 2011).

¹³ Information provided by the Office of the Attorney General in Ecuador. Please contact the Embassy of Ecuador for additional details regarding this information.

¹⁴ To date, only three awards have become final: (1) *Occidental Exploration and Production Company v. Republic of Ecuador* (Case No. UN3467); (2) *Duke Energy Electroquil v. Republic of Ecuador ICSID* (Case No. ARB/04/19); and (3) *Varaderos y Talleres Duran, Vatadur v. Republic of Ecuador* (Comisión Interamericana de Arbitraje Comercial, No. 50181T00413 06). Ecuador has satisfied all three.

¹⁵ In February 2011, after eight years of litigation, Ecuadorian courts found that Texaco Petroleum deliberately discharged more than 16 billion gallons of toxic water into Amazon waterways, poisoning rivers and streams used by inhabitants for drinking. The judge ordered Chevron to pay roughly \$18 billion dollars in damages, including attorneys' fees and \$8.6 billion if Chevron refuses to apologize publicly. An appellate court in Ecuador affirmed the decision on January 3, 2012. Chevron has since filed a cassation appeal to Ecuador's National Court of Justice. Chevron is alleging that the lower courts violated the Ecuadorian constitution.

of the dispute in the United States in favor of an Ecuadorian forum, Chevron now seeks to avoid Ecuadorian justice as well.

Notwithstanding that Ecuador has an unblemished record of satisfying every monetary arbitration award against it, Chevron makes two arguments that it contends render Ecuador ineligible. First, Chevron now argues that Ecuador has not yet satisfied an arbitral award of \$96 million. However, even Chevron has noted that the Dutch courts are currently considering the validity of that award.¹⁶ Those proceedings are ongoing. Further, the Republic of Ecuador has committed to Chevron, in writing, to satisfy this award if the legal process in the Dutch courts upholds the award. There is no hint of even an intent to disregard the potential adverse award, should it be affirmed.

Second, Chevron argues that Ecuador has allegedly failed to honor a tribunal's interim (non-monetary) awards that would have the effect of interfering with the domestic private-party litigation. In fact, the Attorney General immediately issued a notice of the awards to the President, the Council on the Judiciary, and to other Ecuadorian authorities. Because the Government of Ecuador has no power to order the courts to interfere in private-party litigation any more than the Government of the United States can order its courts to do so, the precise effect of the interim award was left to the courts. After the private litigants briefed the implications of the interim award to the appropriate Ecuadorian court, the court noted a conflict in the State's respective international law obligations, and found that, under applicable domestic law, the State's obligations under human rights conventions prevail over other international obligations.¹⁷ There is no basis to conclude that the courts acted in bad faith. In similar circumstances, the U.S. Supreme Court has affirmed the primacy of domestic law, even where to do so left the United States unable to comply with an interim award of the International Court of Justice.¹⁸ In any event, as it has here, Chevron has argued to the tribunal that Ecuador is in violation of the interim awards. There has been no finding by the tribunal. That matter is instead currently being briefed and will be further addressed at a hearing to take place in November 2012 in London.

We continue to reiterate, as we have in the past, that regardless of the parties' divergent views of the facts and applicable law, *legal* disputes should be resolved in the *legal* arena. We submit that the United States and Ecuador should not permit bilateral relations to be damaged, or political decisions influenced, on account of a private litigant's efforts to use the political process to affect the judicial processes. Indeed, we join with those members of the U.S. Congress who

¹⁶ See Letter from Edward B. Scott, Vice President and General Counsel of Chevron Corp. to Mr. Bennett Harman, Deputy Ass't USTR for Latin America, at p. 6 (May 18, 2012) ("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."). Chevron acknowledged that there is no current obligation to pay, only a contingent obligation should Ecuador's appeal from an adverse district court action be rejected. *Id.* ("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.").

¹⁷ See Ecuador Constitution, Art. 424 ("The Constitution is the supreme law of the land and prevails over any other legal regulatory framework. The standards and acts of public power must be upheld in conformity with the provisions of the Constitution; otherwise, they shall not be legally binding. The Constitution and international human rights treaties ratified by the State that recognize rights that are more favorable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by public power.").

¹⁸ *Medellin v. Texas*, 552 U.S. 491 (2008).

have in the past urged that the USTR should not use trade policy “as leverage to interfere in private claims processing through Ecuador’s legal process,” or in any other forum worldwide.¹⁹

We are confident that U.S. foreign policy will continue to focus on the countries’ mutual interests, including ATPA’s success in controlling drug trafficking and promoting economic growth and development in Ecuador at no cost to the U.S. taxpayer.

* * * *

We thank you for the opportunity to comment on the importance of ATPA and urge you to maintain ATPA benefits for Ecuador and support their extension beyond July 2013.

A handwritten signature in black ink, appearing to read "Nathalie Cely", written over a horizontal line.

Nathalie Cely
Ambassador of the Republic of Ecuador
Washington, D.C.

¹⁹ See M. Angeles Villareal, CRS Report, ATPA Renewal: Background and Issues (Apr. 14, 2011), *quoting* Rosella Brevetti, Sanchez, 25 House Members Urge USTR to Reject Chevron ATPA Lobbying, International Trade Reporter (Dec. 24, 2009). For their part, the U.S. courts rejected Chevron’s attempts to obtain indemnification from the Republic for any losses that may be sustained by Chevron in the underlying litigation. *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007), *aff’d*, 296 F. App’x 124, 2008 WL 4507422 (2d Cir. Oct. 7, 2008), *cert. denied*, 129 S. Ct. 2862 (2009).