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October 2, 2012

Mr. William Jackson
Chairman, GSP Subcommittee
Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

RE: **2012 GSP Annual Review: Petition Requesting Withdrawal or Suspension of the Designation of Ecuador as a Generalized System of Preferences Beneficiary Country**

Dear Mr. Jackson:

Pursuant to the Generalized System of Preferences as set forth in Title V of the Trade Act of 1974 (19 U.S.C. §§ 2461 - 2467) ("GSP") and, in particular, sections 502 (b) and (d) of that Act (19 U.S.C. § 2462 (b) & (d)), the regulations promulgated under that Act (15 C.F.R. Pt. 2007), and the Notice of Initiation of the 2012 Annual GSP Product and Country Practices Review issued by the Office of the United States Trade Representative (77 Fed. Reg. 44,704 (July 30, 2012)), Chevron Corporation ("Chevron") hereby requests the withdrawal or suspension of the designation of Ecuador as a beneficiary developing country under the GSP program. The reasons for this request and evidence substantiating it are set forth in this petition.[1] Also set forth in this petition, pursuant to 15 C.F.R. § 2007.3(b), is an explanation of the unusual circumstances that warrant immediate review of the present request.

In brief, the petition is based on Ecuador's failure to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of Chevron, a corporation which is 50 percent or more beneficially owned by United States citizens, that was made by arbitrators appointed for the case known as *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (PCA Case No. 2009-23). The arbitral awards at issue are the binding First and Second Interim Awards rendered on January 25, 2012 and February 16, 2012, respectively, directing Ecuador to take certain actions in order to preserve the status quo as between claimants and itself and thereby preserve the effectiveness of the arbitral process to which the parties have consented. In particular, Ecuador has refused to follow the Second Interim Award's direction "to take all

[1]Throughout this petition, Chevron refers to evidence in support of its request that Ecuador's designation as a GSP beneficiary developing country be withdrawn or suspended. Much of this evidence is available in the public domain. According to the Notice of Initiation of the 2012 Annual GSP Product and Country Practices Review, there is a 30-page limit on submissions, including attachments. For this reason, Chevron's petition does not include as attachments all of the evidence referred to in the petition. In the event the GSP Subcommittee accepts the petition for review and provides an opportunity for submission of a written brief in support of the petition, Chevron will include all of the evidence cited in the petition as attachments to its written submission.

measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador" of an $18.2 billion Ecuadorian court judgment against Chevron known as the *Lago Agrio* Judgment and certain appellate court judgments affirming the *Lago Agrio* Judgment – including an appellate court judgment of August 3, 2012 which arbitrarily increased Chevron's alleged liability to over $19 billion. The Second Interim Award's designation as "interim" does not affect its binding character as compared with a "final" award. And the Award specifically applies to Ecuador and all of its branches of government, including the judiciary. Although the Second Interim Award does not dispose of all of the claims at issue in the arbitration, it imposes a final and binding obligation on the Republic of Ecuador by definitively resolving Ecuador's legal duty to prevent enforcement of the judgment. Ecuador cannot dispute that the BIT Tribunal has the authority to issue interim measures, and tribunals routinely do so in investor-State arbitrations. Nor can Ecuador dispute the Tribunal's authority to frame its issuance of interim measures as an "award" (as opposed to an "order," for example). The Second Interim Award's binding nature is confirmed both by the very terms of the award and the BIT itself and by international legal authorities in the U.S. and elsewhere providing for the recognition and enforcement of interim awards and orders.

Ecuador's breaches of obligations under the Awards consist not only of acts of omission but also acts of commission, including issuing the *mandamiento de ejecución*, which is the final certificate of enforceability of the Judgment, even though the BIT Tribunal expressly directed Ecuador to prevent this from happening. The BIT Tribunal emphasized that the measures Ecuador is required to take "preclude any certification by the Respondent that would cause the said judgment to be enforceable against [Chevron]." It made clear that these measures were necessary to preserve the status quo pending the conclusion of the arbitration in which the conduct of the litigation that resulted in the Judgment is at issue.

The *Lago Agrio* Judgment and the appellate court judgments affirming the trial court judgment and increasing the monetary award under that judgment, along with the corrupt process that led to their issuance, are at the heart of the pending international arbitration under the United States-Ecuador Bilateral Investment Treaty. Recognition and enforcement of the judgment would undermine any possibility of effectively resolving the parties' dispute through that arbitration, as will be explained in this petition. It would cause damage to Chevron which could not be undone by an eventual award of monetary damages in its favor and against Ecuador. Yet Ecuador has failed to take *any* measures, let alone "all measures necessary" to suspend or cause to be suspended the enforcement and recognition of the underlying judgment. To the contrary, Ecuador's courts have averred that the arbitral awards do not bind them, and neither Ecuador's President nor any other agent of its government has done or said anything to correct that mistaken position. Moreover, the Ecuadorian appellate court issued a series of orders affirming the *Lago Agrio* Judgment's enforceability and repeatedly denying the effect of the BIT Tribunal's First and Second Interim Awards.[2] In addition on August 3, 2012, the Provincial Court of Justice of Sucumbíos took the critical step of issuing the *mandamiento de ejecucion* ("*mandamiento*"), the certificate of enforceability of the judgment.[3] Ecuador's actions and inaction in the face of the unambiguous arbitral awards have encouraged the *Lago Agrio* Judgment creditors to begin the process of seeking to enforce the judgment, filing collection

[2] 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.
[3] Providencia, Provincial Court of Justice of Sucumbíos, Aug. 3, 2012, at 3 p.m.

actions in the Superior Court of Justice in Ontario, Canada on May 30, 2012[4] and in the Superior Court of Justice in Brazil on June 27, 2012.[5] The plaintiffs have signaled that these two actions are the start of a multi-jurisdiction campaign, which may lead to actions in venues including Argentina, Venezuela, Colombia, and Panama.[6]

Ecuador's failure to take all measures necessary to suspend or cause to be suspended the *Lago Agrio* Judgment is a failure to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of a U.S. company, which is one of the eight statutory reasons that the President "shall not designate" a country as a beneficiary developing country under GSP.[7] Because Ecuador previously had been designated a beneficiary developing country, its conduct warrants withdrawal or suspension of that designation due to changed circumstances.[8]

Moreover, this request should be treated as an urgent matter warranting "immediate review" due to "unusual circumstances."[9] In its Second Interim Award, the BIT Tribunal recognized the "substantial" and "irreparable" harm that may befall Chevron in the event the *Lago Agrio* Judgment is enforced due to Ecuador's failure to take "all measures necessary" to prevent its enforcement, in contravention of the arbitral tribunal's Awards. Any delay in considering and acting on this petition would cause an eventual withdrawal or suspension of Ecuador's beneficiary developing country designation to be ineffective if the *Lago Agrio* Judgment is enforced before such withdrawal or suspension.

In the next section of this petition, Chevron will discuss the facts underlying the arbitral awards that Ecuador has chosen to ignore. Chevron then will explain why, under those facts, Ecuador's designation as a GSP beneficiary developing country should be immediately suspended or withdrawn.

I. FACTUAL BACKGROUND

A. <u>The Petitioner</u>

As stated above, the petitioner is Chevron, which is one of the world's leading integrated energy companies. Chevron is incorporated under the laws of Delaware and headquartered in San Ramon, California. Chevron's shares are traded publicly on the New York Stock Exchange.

The arbitral awards that Ecuador has failed in good faith to recognize and enforce are awards in favor of Chevron. The GSP eligibility criterion at issue states that the President shall not designate a country as a GSP beneficiary developing country if

[4] *See* Claimants' Letter to the BIT Tribunal, June 1, 2012, at 3.
[5] *Chevron Faces Asset Seizure in Brazil Over $18 Billion Ecuador Judgment*, Amazon Defense Coalition press release, June 28, 2012.
[6] *Ecuadorians Will File New Foreign Legal Actions Against Chevron*, HOY.COM, July 26, 2012; *see also, Ecuadorian Plaintiffs Will File Collection Action Against Chevron in August*, LAINFORMACION.COM, July 27, 2012 (stating that the Plaintiffs "are preparing more legal actions in other countries").
[7] 19 U.S.C. § 2462(b)(2)(E).
[8] 19 U.S.C. § 2462(d).
[9] 15 C.F.R. § 2007.3(b).

> [s]uch country fails 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.[10]

A threshold question is whether Chevron is "50 percent or more beneficially owned by United States citizens." Since Chevron is a publicly traded company, the identity of its owners is changing constantly. Accordingly, the GSP Subcommittee should apply a rule of thumb to determine whether Chevron meets this requirement, just as other U.S. government entities do when they are required to determine the U.S. nationality of the owners of publicly traded companies. For example, the Overseas Private Investment Corporation treats a company as owned by U.S. nationals where its shares "are held in the names of trustees or nominees (including stock brokerage firms) with addresses in the United States."[11]

Petitioner respectfully submits that the GSP Subcommittee should apply a similar rule of thumb in this case. Applying such a rule, it should take into account the following facts:

- Chevron has more than 1.972 billion shares outstanding.[12]
- More than 1 billion of Chevron's outstanding shares (51%) are held by U.S. domiciled brokers and other institutions that are registered to hold shares on behalf of others.[13]

Accordingly, the arbitral awards that are the basis for this petition are awards "in favor of . . . a corporation . . . which is 50 percent or more beneficially owned by United States citizens."

B. The *Lago Agrio* Case and the Corrupt Judgment Resulting Therefrom

This petition is based on Ecuador's failure to act in good faith in recognizing as binding or in enforcing awards in the pending *Chevron v. Ecuador* arbitration. The subject of that arbitration is a court case in Ecuador, known as the *Lago Agrio* case, which was commenced against Chevron in May 2003, was fraught with gross improprieties and denials of basic fairness and due process from beginning to end, and resulted in a judgment in February 2011 which was affirmed in January 2012 and now is under review by Ecuador's National Court of Justice in a "cassation" proceeding.

The *Lago Agrio* case was initiated by 48 individual plaintiffs seeking damages for environmental remediation for which they alleged that a Chevron subsidiary, known as TexPet, was liable based on its participation in a consortium, together with the state-owned oil company PetroEcuador, from 1964 to 1992. The 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

[10] 19 U.S.C. § 2462(b)(2)(E).
[11] OPIC Handbook at 17 n.*, available at http://www.opic.gov/sites/default/files/docs/OPIC_Handbook.pdf. The United States Agency for International Development applies a similar rule of thumb in determining eligibility for financing of suppliers of services. *See* 22 C.F.R. § 228.31(b).
[12] Chevron Investor Summary, "Top 300 Investors," March 31, 2012.
[13] Chevron Investor Summary, "Top 300 Investors," March 31, 2012.

28 U.S.C. § 1782) and otherwise.[14] 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."[15] The United States District Court for the Western District of North Carolina found that "what has blatantly occurred in this matter would . . . be considered fraud by any court."[16] Some of the more damning evidence of the fraud and lack of fundamental fairness in the underlying Ecuadorian judicial proceeding includes statements made by representatives of the *Lago Agrio* plaintiffs during filming of a documentary about the case, entitled "Crude," and other statements, as follows:

- Outtakes from "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."[17]

- 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.[18]

- Despite Ecuador's insistence that the government would not interfere in the *Lago Agrio* litigation, 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 "Crude" advising the plaintiffs' counsel on litigation strategy.[19] 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

[14] *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).

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

[16] 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.

[17]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.

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

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

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.[20]

- Video recordings revealed a $3 million bribery scheme in which the Judge Juan Núñez who was presiding over the case confirms that he will rule against Chevron and that appeals by the energy company will be denied — even though the trial is ongoing and evidence is still being received. The recorded meetings also show an individual who claims to be a representative of Ecuador's ruling political party, Alianza PAIS, seeking $3 million in bribes in return for handing out environmental remediation contracts after the verdict is handed down. Of that sum, $1 million would go to Judge Núñez, $1 million would go to "the presidency" and $1 million to the plaintiffs.[21] When these videos were made public, Judge Núñez recused himself from the Lago Agrio case.[22]

- Evidence, in the form of the *Lago Agrio* plaintiffs' own admissions and forensic evidence, proves that it was the plaintiffs' representatives, rather than the trial judge, who drafted the *Lago Agrio* Judgment:
    - Internal communications from August 2008 and onward show the plaintiffs' representatives discussing their intent to "start the work with the new judges." The plaintiffs' representatives discussed "developing a judgment that will be enforceable in the US and elsewhere" by becoming "involved in the preparation of the final submission and proposed judgment."[23]
    - The *Lago Agrio* Judgment repeats verbatim material from the plaintiffs' internal documents (obtained through discovery in a separate action by Chevron against the plaintiffs' lead counsel and other representatives) that were never submitted into the court record or made public. For example, Dr. Robert Leonard, Professor of Linguistics and a qualified expert in the field, concluded that the *Lago Agrio* Judgment contains direct plagiarisms from the plaintiffs' internal work product that was never filed in the record. Dr. Leonard identified several instances of plagiarism from the plaintiffs' unfiled documents in the Judgment, including: (i) numerous identical strings of more than 90 words each in the final Judgment and the plaintiffs' confidential memo regarding their theory about the Chevron-Texaco "merger" (the "Fusión Memo"); (ii) the idiosyncratic use of similar citation errors and reference shorthand in the Fusión Memo; (iii) the verbatim copying of out-of-place numerical ordering from the Fusión Memo; (iv) several identical, lengthy word bundles from the plaintiffs'

[20] *In re Application of Chevron Corp.,* 10 MC 00002 (LAK) (S.D.N.Y 2010), Document 86 at 3-4.
[21] August 31, 2009 Letter to Dr. Washington Pesántez Muñoz, Prosecutor General of Ecuador, from Thomas Cullen.
[22] Romero, Simon and Clifford Krauss, "Under Pressure, Ecuadorian Judge Steps Aside in Suit Against Chevron," The New York Times, September 4, 2009.
[23] January 4, 2012 Letter to BIT Tribunal in re PCA Case No. 2009-23; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador,* p. 3 (internal footnotes omitted).

> unfiled draft *alegato* [pleading] that do not appear in the plaintiffs' filed *alegato;* and (v) repeated errors and identical word bundles from the Plaintiffs' unfiled index summary, which they used to track filings made during the *Lago Agrio* litigation.[24]

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 new Ecuadorian government to push for a specific outcome in the litigation, and . . . the Ecuadorian government intervened in ongoing litigation."[25]

Not surprisingly, given the numerous and extreme improprieties throughout the trial, on February 14, 2011, the Ecuadorian court issued a judgment ordering Chevron to pay the plaintiffs $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.

C. Arbitration Under the U.S.-Ecuador BIT and the Interim Awards

In light of the tainted judicial process in Ecuador -- which was glaringly obvious even before final judgment was rendered in February 2011 -- Chevron initiated an arbitration against Ecuador in September 2009 under the *Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment* (the "Bilateral Investment Treaty" or "BIT").[26] In the arbitration, Chevron submitted 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* litigation.

As the *Lago Agrio* trial reached its conclusion, Chevron perceived a serious risk that the court 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* litigation from becoming enforceable pending the conclusion of the arbitration in which the very conduct of that litigation was at issue.

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[24] January 4, 2012 Letter to BIT Tribunal in re PCA Case No. 2009-23; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador,* p. 4 (internal footnotes omitted).
[25] Amended Order, *In re Application of Chevron Corp.*, No. 1:10-mc-00021 (LFG) (D.N.M. Sept. 2, 2010), Document 77 at 4.
[26] S. Treaty Doc. 103-15, 103d Cong., 1st Sess. (Aug. 27, 1993).

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."[27]

Eleven months after 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 its "Second Interim Award on Interim Measures" (having issued a "First Interim Award" with similar albeit provisional effect a few weeks earlier) directing Ecuador "(whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of" the *Lago Agrio* Judgment itself, as well as the appellate judgments upholding it.[28] The tribunal specified "in particular, without prejudice to the generality of the foregoing, such measures to preclude any certification by the Respondent [Ecuador] that would cause the said judgment to be enforceable against [Chevron]."[29] Moreover, the tribunal directed Ecuador to inform it "of all measures which the Respondent has taken for the implementation of its legal obligations under this Second Interim Award."[30]

The tribunal made a point of emphasizing that its Second Interim Award has the status of an "award" within the meaning of both the instrument of consent giving rise to the arbitration (*i.e.*, the BIT) and the rules governing the arbitration (*i.e.*, the UNCITRAL Rules).[31] Specifically, the tribunal referred to Article VI(6) of the BIT, which provides: "Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement." The tribunal found that its Second Interim Award is such an award. Accordingly, it is final and binding, and Ecuador has an obligation to carry it out without delay. The tribunal also recalled that a similar obligation is imposed by Article 32(2) of the UNCITRAL Rules.[32]

As an award that is final and binding within the meaning of both the BIT and the UNCITRAL Rules, the Second Interim Award also implicates the GSP eligibility criterion requiring good faith recognition and enforcement of arbitral awards by a country designated as a GSP beneficiary developing country.

D. Ecuador's Disregard of Arbitral Awards

Despite the unambiguous requirements of the First and Second Interim Awards, Ecuador has

[27] Chevron (USA) v. Ecuador, Order for Interim Measures, PCA Case No. 2009-23, February 9, 2011, p. 3.
[28] *Chevron (USA) v. Ecuador*, Second Interim Award on Interim Measures, para. 3(i), PCA Case No. 2009-23, February 16, 2012, p. 3.
[29] *Id.*, para. 3(ii).
[30] *Id.*, para. 3(iii).
[31] The First Interim Award contained language stating in relevant part, "This Interim Award shall take effect forthwith as an Interim Award, being immediately final and binding upon all Parties as an award subject only to any subsequent modifications herein provided, whether upon the Tribunal's own initiative or any Party's application."
[32] *Id.*, para. 1.

failed to "act in good faith in recognizing as binding and enforcing" the awards. It has not taken *any* measures, let alone "all measures necessary" to prevent the *Lago Agrio* Judgment from becoming enforceable. In fact, the combined actions of Ecuador's judicial and executive branches have gone in the very opposite direction, facilitating rather than suspending enforceability of the judgment.

Ecuador had multiple opportunities to take action consistent with its obligation under the Second Interim Award, but it failed to take any of them. Among other steps, Ecuador could have: (i) declared -- whether through an Attorney General opinion, other opinion by a government official, or its courts -- that the *Lago Agrio* Judgment's enforcement is suspended; (ii) declared, through its courts or otherwise, that Chevron was not required to post a bond in order to suspend enforcement during the "cassation" review of the judgment; (iii) issued or posted a bond or security sufficient to relieve Chevron of any bond required to suspend enforcement; (iv) ordered, through its courts or otherwise, that the judgment is not enforceable under Ecuadorian law pending the outcome of the BIT arbitration, as Ecuador in fact did in response to an order by another BIT tribunal in a different case; or (v) ordered the Superintendent of Companies (the entity with supervision over trusts in Ecuador) to enjoin the *Lago Agrio* plaintiffs or judgment-trust beneficiaries from seeking to enforce the judgment. Moreover, now that the plaintiffs have initiated collection actions in courts in Canada and Brazil seeking recognition and enforcement of the judgment, Ecuador could advise the courts in those countries that the judgment's enforcement must be considered suspended in light of the interim awards of the arbitral tribunal.

Ecuador has taken none of the foregoing actions. Nor has it taken any other actions necessary to cause the *Lago Agrio* Judgment to be suspended. Ecuador has not just passively allowed the plaintiffs to seek enforcement of the *Lago Agrio* Judgment, it has actively facilitated that initiative.

Despite Ecuador's own admission that the First and Second Interim Awards bind the entire State, including the judicial branch,[33] Ecuador's courts have refused to comply with the Interim Awards. The Ecuadorian appellate court issued a series of orders affirming the *Lago Agrio* Judgment's enforceability and repeatedly denying the effect of the BIT Tribunal's First and Second Interim Awards.[34] On two occasions, on February 17 and March 1, 2012, respectively, Ecuador's courts expressly denounced the First and Second Interim Awards, asserting an unspecified conflict between the awards and Ecuador's human rights obligations.[35] In its February 17 Order, the appellate court concluded that a "proceeding as . . . the Arbitration Panel orders would constitute a direct attack by us, the administrators of justice, on Ecuadorian citizens' guarantee of access to an effective system of justice."[36] And in a decision of March 21

[33] Shortly after the issuance of the February 9, 2011 Interim Measures Order, Ecuador's Attorney General described the import of the Order: "[T]he Arbitration court has ordered the entire Ecuadorian State—meaning not the Government, not the Attorney General's office, but the entire State and all Government institutions—to do everything in their power to suspend the execution of an eventual ruling given by the Court" and "it is now up to th[e judicial] branch to proceed in relation to the resolution from the arbitration court." Cable Noticias, Interview With Attorney General Diego García, Feb. 17, 2011.

[34] 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.

[35] Judgment of the Sole Division of the Provincial Court of Sucumbíos, Feb. 17, 2012; Judgment of the Sole Division of the Provincial Court of Sucumbíos, Mar. 1, 2012, at 4.

[36] Judgment of the Sole Division of the Provincial Court of Sucumbíos, Feb. 17, 2012. Just two days after the appellate panel issued its March 1 Order, President Correa publicly announced, during a three hour-long television

rejecting Chevron's motion to revoke its order of March 1, the appellate court declared that it was not required to follow the arbitral tribunal's awards and stated that Chevron had failed to analyze the conflict between "rights protected by the Arbitration Tribunal and human rights."[37]

Moreover, in addition to refusing to give any effect to the Tribunal's First and Second Interim Awards, Ecuador's courts have taken affirmative steps to promote the enforceability of the *Lago Agrio* Judgment. The March 1 Order granted the *Lago Agrio* plaintiffs' request that the appellate decision be declared enforceable for purposes of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, specifically stating that "for all purposes and procedural requirements, the declaration that the decision issued at this level of jurisdiction is final and binding."[38] Subsequently, in orders dated March 21 and 28, 2012, the appellate court also granted the plaintiffs' request for a declaration that the appellate decision has the force of *res judicata*.[39] Then on August 3, 2012, the Provincial Court of Justice of Sucumbíos took the critical step of issuing the *mandamiento*, the document causing the judgment to become enforceable as a matter of Ecuadorian law.[40] These actions directly contradict the arbitral tribunal's directive in the Second Interim Award that Ecuador take all measures necessary to suspend the enforcement and recognition of the *Lago Agrio* Judgment and the affirmances of that judgment.[41]

On this basis alone, it must be concluded that Ecuador has failed to act in good faith to recognize as binding and to enforce the awards of the arbitral tribunal. But in fact, Ecuador's acts and omissions in contravention of the awards go even further. Senior officials in the Government of Ecuador, including President Correa, have actively encouraged plaintiffs to seek enforcement of the *Lago Agrio* Judgment by denouncing the arbitration tribunal. President Correa himself went so far as to call the proceeding a "monstrosity."[42] Ecuador's Attorney General openly condemned the BIT Tribunal for assuming jurisdiction over Chevron's claims, saying that it could not "act as a tribunal that may review judgments issued by the Ecuadorian judicial system."[43] In an August 6 interview on Ecuadorian state-owned television, Ecuador's Ambassador to the United States said that "the Government of Ecuador, the Executive power,

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address, that the Second Interim Award would have no effect on the Lago Agrio Judgment's enforceability. Televised Address by President Correa, Mar. 3, 2012.

[37] Judgment of the Sole Division of the Provincial Court of Sucumbíos, Mar. 21, 2012, at 4:45 p.m.

[38] Judgment of the Sole Division of the Provincial Court of Sucumbíos, Mar. 1, 2012, 8:42 a.m., at 6. The March 1 Order also directed a police escort to deliver the entire court file to the National Court of Justice in Quito, noting the "social and legal importance" of the case, which took place on March 29, 2012.

On April 17, 2012, in direct contravention of the Tribunal's Interim Awards, the appellate panel forwarded the *ejecutoria* to the trial court. Provincial Court of Justice of Sucumbíos, Order, Apr. 17, 2012, 4:44p.m. (acknowledging receipt of the *ejecutoria* from the appellate panel). The *ejecutoria* consisted of, *inter alia*, the Judgment and a certification by the appellate court secretary that the Judgment is final, as well as numerous documents from the court file that the Plaintiffs requested be included. Art. 991 of the Ecuadorian Code of Civil Procedure. This brought the trial court one step closer to issuing the *mandamiento de ejecución*, which would order Chevron to pay sums due under the Judgment or to turn over assets of equivalent value within a defined period of time. Arts. 438 and 488 of the Ecuadorian Code of Civil Procedure.

[39] Judgment of the Sole Division of the Provincial Court of Sucumbíos, Mar. 21, 2012, at 4:45 p.m.; Judgment of the Sole Division of the Provincial Court of Sucumbíos, Mar. 28, 2012, at 6:24 p.m.

[40] Providencia, Provincial Court of Justice of Sucumbíos, Aug. 3, 2012, at 3:00 p.m.

[41] Second Interim Award on Interim Measures, Feb. 16, 2012, Point 3(i).

[42] 2012.03.03 Citizen Connection Broadcast #261 with President Rafael Correa

[43] Attorney General News Release, Feb. 28, 2012.

can do absolutely nothing" to give effect to the Second Interim Award.[44] In some countries such statements might be dismissed as empty political rhetoric. But in Ecuador, given the susceptibility of the judiciary to political influence (a fact acknowledged by the U.S. Department of State)[45] 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 arbitral tribunal's interim awards.

II. Ecuador's Failure to Act in Good Faith to Recognize and Enforce the Arbitral Tribunal's Interim Awards is a Changed Circumstance Warranting Withdrawal or Suspension of Ecuador's Designation as a GSP Beneficiary Developing Country

Ecuador currently enjoys substantial economic benefits as a GSP beneficiary developing country.[46] Those benefits could well grow substantially in the near future, given the possibility that Ecuador will lose its status as a beneficiary country under the Andean Trade Preferences Act, either through expiration of that Act or presidential action in response to a petition filed by Chevron under that Act on the basis of the same conduct at issue here.

To be designated as a GSP beneficiary developing country, Ecuador had to meet various statutory criteria including the criterion of not failing to act in good faith in recognizing as binding and enforcing arbitral awards in favor of U.S. companies. Had it not met that criterion, it could not have been designated as a beneficiary country.[47] The trade benefits Ecuador obtains from GSP are considerable. In 2011, more than $147 million in imports from Ecuador entered the United States duty-free under GSP.[48] Top products imported from Ecuador under GSP include cut flowers, plywood, fresh or dried fruit, sugar, electric conductors, sardines, porcelain bath fixtures, and plastic sacks and bags.[49]

Since 1991, Ecuador also has been a beneficiary country under the Andean Trade Preference Act ("ATPA"), which was expanded in 2002 by the Andean Trade Preference and Drug Eradication Act ("ATPDEA").[50] Because imports under the ATPA/ATPDEA are not subject to competitive need limit waivers and the scope of product coverage is broader, Ecuador has traditionally used ATPA/ATPDEA more extensively than GSP. However, Ecuador is the only remaining beneficiary country in ATPA/ATPDEA and the program is set to expire in June 2013. In 2011

[44] Transcript of interview with Ecuador's Ambassador to the United States Nathalie Cely, CN Plus, Primera Hora, August 2, 2012 at 2.

[45] *See* U.S. State Department, 2011 Human Rights Report: Ecuador at 7. ("While the constitution provides for an independent judiciary, in practice the judiciary was susceptible to outside pressure and corruption. The media reported on the susceptibility of the judiciary to bribes for favorable decisions and faster resolution of legal cases. Judges occasionally reached decisions based on media influence or political and economic pressures.").

[46] In addition to GSP, since 1991 Ecuador has also a beneficiary country under the Andean Trade Preferences Act ("ATPA") and the Andean Trade Preference and Drug Eradication Act ("ATPDEA").

[47] 19 U.S.C. § 2462 (b)(2)(E).

[48] U.S. ITC Dataweb, 2011 U.S. imports for consumption from Ecuador under GSP.

[49] *Id.*

[50] ATPA/ATPDEA contains an identical eligibility criterion regarding a duty to act in good faith regarding relating to good faith recognition and enforcement of arbitral awards, and September 17, 2012on DATE, Chevron also has filed a petition seeking the suspension or withdrawal of Ecuador's ATPA/ATPDEA benefits for the identical reasons set forth in this petition.

Ecuador's imports under GSP were significantly higher than 2010 levels, with several products showing increases of more than 100 percent. Going forward, GSP is expected to be the only preference program available to Ecuador, making it a much more important program than it has been in recent years.

GSP benefits are not an entitlement, and a country is not guaranteed to maintain its beneficiary developing country status in perpetuity. The GSP statute provides that the President shall withdraw or suspend a country's eligibility to participate in the GSP program "if, after such designation, the President determines that as a result of changed circumstances such country would be barred from designation as a beneficiary developing country." 19 U.S.C. § 2462 (d)(2).

For the reasons set forth above, Ecuador now has ceased to meet the criterion requiring it to act in good faith in recognizing as binding and enforcing arbitral awards in favor of U.S. companies. This development is a changed circumstance since Ecuador's original designation as a GSP beneficiary developing country. In view of this changed circumstance, the President should withdraw or suspend Ecuador's designation as a beneficiary developing country, as he is authorized to do under the GSP statute.

III. This Case Involves Unusual Circumstances Warranting Immediate Review of This Petition

Chevron submits that this request should be treated as an urgent matter warranting "immediate review" due to "unusual circumstances." 15 C.F.R. § 2007.3(b). The unusual circumstance in this case is the "irreparable" harm that Chevron will suffer in the event the *Lago Agrio* Judgment is enforced due to Ecuador's failure to take "all measures necessary" to prevent its enforcement, in contravention of the arbitral tribunal's awards. Immediate review of this petition, if it leads to withdrawal or suspension of Ecuador's trade preferences, could provide a critical incentive for Ecuador to reverse course and comply with the Second Interim Award, which in turn would preserve the *status quo* and help ensure the effectiveness of the arbitral proceeding.

If the plaintiffs were to enforce the $18.2 billion judgment against Chevron in a third country before the arbitral tribunal had ruled on the merits of Chevron's denial of justice claim and other related claims, then for all practical purposes the arbitration would be rendered moot. At that point, Chevron would have suffered substantial harm, and an arbitral award in its favor would be unlikely to make it whole, in view of Ecuador's limited financial resources. Indeed, it is for this very reason that the arbitral tribunal made its interim awards in the first place and stressed the binding nature of those awards.[51]

In sum, prompt action by the United States should cause Ecuador to reconsider and reverse its disregard of the tribunal's arbitral awards. Conversely, if the *Lago Agrio* Judgment is enforced during a protracted period of consideration of the present petition, the utility of an eventual withdrawal or suspension of Ecuador's beneficiary country designation would be seriously

[51] *See Chevron (USA) v. Ecuador*, Second Interim Award on Interim Measures, para. 2(ii), PCA Case No. 2009-23, February 16, 2012, p. 2-3 (finding Claimants had established "a sufficient urgency given the risk that substantial harm may befall the Claimants before this Tribunal can decide the Parties' dispute by any final award."

diminished. It is in just such unusual circumstances that the GSP implementing regulations contemplate "immediate review" of a petition.

IV. Conclusion

The policy behind the GSP 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.[52] The policy imperative is particularly acute when, as in this case, 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 U.S. investor, but also the rights of the United States itself.

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 awards in the BIT arbitration related to the *Lago Agrio* matter. 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 must make it clear to Ecuador that ignoring its obligations under the BIT arbitral awards is contrary the GSP program's mandatory eligibility criteria. Accordingly, the President should promptly withdraw or suspend Ecuador's beneficiary developing country designation.

Chevron looks forward to your prompt acceptance of this petition and the setting of an expedited briefing schedule to ensure swift action.

Respectfully submitted,

Edward B. Scott

Attachment

[52] This policy was articulated by Senator Robert Taft upon introducing the arbitral awards criterion into the Generalized System of Preferences statute in 1974, which proposal was agreed to by unanimous consent. *See* 120 Cong. Rec. S 21,457 (Dec. 13, 1974).