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Mr. Douglas M. Bell
Chair
Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20208

Re: Docket USTR–2013–0027, Request for Public Comment on the 2014 National Trade Estimate Report on Foreign Trade Barriers

Dear Mr. Bell:

In response to the Office of the U.S. Trade Representative’s Federal Register notice of August 19, 2013, (78 FR 50481, FR Doc. 2013–20074), requesting public comment with respect to foreign trade barriers for the National Trade Estimate (NTE) Report, Chevron Corporation (“Chevron”) hereby submits comments with respect to investment barriers and rule of law challenges faced by investors in Ecuador.

In prior years’ NTE submissions and in other submissions, we presented extensive comments demonstrating the Government of Ecuador’s failure to abide by its obligations under the U.S.-Ecuador Bilateral Investment Treaty (BIT), contracts and other agreements, and its disregard for the rule of law. These submissions are incorporated by reference.¹

Since Chevron’s October 2012 NTE submission, Ecuador not only has continued to act in ways that substantially harm or threaten to harm actual and potential U.S. investors, disrupting the integrity of the investor-State arbitration process provided for under the BIT, but has also taken further steps that give even greater cause for concern, as a matter of both law and policy, about Ecuador’s willingness to abide by its international obligations to U.S. investors. Ecuador is failing to recognize and enforce binding awards issued by a tribunal under the BIT in an investment dispute with Chevron, despite multiple opportunities to comply with those awards. Its repeated refusal to enforce a BIT Tribunal’s binding awards and its continuing actions directly counter to those awards are troubling both in regard to Chevron’s case and set a poor precedent for how Ecuador would react to disputes with U.S. investors generally. If left unchallenged by the U.S. government, Ecuador’s actions will continue to signal to other

¹ Dkt. No. USTR-2012-0019-0012 (Chevron’s petition for withdrawal or suspension of Ecuador’s ATPA eligibility, Sep. 17, 2012). Dkt. No. USTR-2012-0013-0088 (Chevron’s petition for withdrawal or suspension of Ecuador’s GSP eligibility, Oct. 2, 2012); see also Dkt. No. USTR-2012-0013-0130 (Chevron’s supplemental information re petition for withdrawal or suspension of Ecuador’s GSP eligibility, Feb. 11, 2013); further see Chevron’s second supplemental information re petition for withdrawal or suspension of Ecuador’s GSP eligibility, Mar. 18, 2013 (Dkt. No. USTR-2013-0013-0007) (detailing President Correa’s attack on the Chevron v. Ecuador tribunal and the BIT arbitration process in general). Dkt. No. USTR-2012-0013-0171 (Chevron’s comments on Ecuador’s petition to expand GSP product scope, Feb. 14, 2013); Dkt. No. USTR-2012-0013-0189 (Chevron’s post-hearing comments on Ecuador’s petition to expand GSP product scope, Mar. 27, 2013). Dkt. No. USTR–2012–0021–0006 (Chevron’s comments for the National Trade Estimate Report on Foreign Trade Barriers, October 11, 2012).

nations that not only Ecuador, but they, too, can disregard binding arbitral awards in favor of U.S. persons with impunity.

I. Current Developments and the Campaign Against Chevron

A. The Lago Agrio Case

Since Chevron's 2012 NTE submission, there have been two significant developments in the *Chevron v. Ecuador* dispute. First, Chevron's contention that Ecuador is failing to recognize and enforce awards issued by the BIT tribunal hearing the dispute was confirmed by the tribunal itself in its Fourth Interim Award issued February 7, 2013. The tribunal found that by allowing the *Lago Agrio* Judgment to become enforceable, Ecuador is "in violation of the Tribunal's First and Second Interim Awards requiring the Respondent [Ecuador], respectively, 'to take all measures at its disposal' and 'to take all measures necessary' to suspend or cause to be suspended the enforcement and recognition both within and without Ecuador of the *Lago Agrio* Judgment."² The tribunal went on to state that Ecuador's actions have resulted in the very consequences the tribunal was "seeking expressly to preclude"³ – *i.e.*, a frustration of the status quo through attempts to have the *Lago Agrio* Judgment enforced at the very moment when the tribunal is trying to decide whether that judgment and the trial that produced it are inconsistent with Ecuador's obligations under the BIT. The tribunal reiterated the need to "restrain the Respondent [Ecuador] generally from aggravating the Parties' dispute and causing irreparable harm to the Claimants [Chevron] in regard to the enforcement and execution of the *Lago Agrio* Judgment."⁴

Second, on September 17, 2013, the BIT Tribunal issued a First Partial Award on the merits of the case, finding that the Settlement and Release Agreements that the Government of Ecuador entered into with TexPet (now an indirect subsidiary of Chevron) in 1995 and 1998, respectively, released TexPet and its affiliates from any liability for all public interest environmental claims (*i.e.*, collective claims, as opposed to individual claims for harms to particular persons or property) based on TexPet's work in Ecuador.⁵ In particular, the Tribunal found that: 1) Chevron and TexPet are "Releasees" under the 1995 Settlement Agreement and the 1998 Final Release; 2) Chevron can invoke and enforce its contractual rights as a Releasee; and, 3) the Government settled all public interest or collective environmental claims, including collective claims asserted by third parties (*i.e.*, not only claims asserted by the Government itself). The First Partial Award is a very significant development, because it confirms that the *Lago Agrio* trial – which seeks relief for collective environmental harm – never should have gone forward in the first place. Rather, having released TexPet and its affiliates from claims of the type asserted by the *Lago Agrio* plaintiffs, the Government of Ecuador should have carried out *its* responsibilities by remediating any environmental harm attributable to the conduct of its own state-owned enterprise, PetroEcuador. Moreover, the First Partial Award helps to substantiate Chevron's position that by allowing the *Lago Agrio* case to proceed despite the Settlement and Release Agreements, the Ecuadorian trial court denied Chevron the treatment to which it was entitled as a U.S. investor in Ecuador under the BIT.

But rather than recognize and enforce the BIT Tribunal's several Interim Awards and its most recent First Partial Award, Ecuador has responded by continuously publicly denouncing the arbitral proceeding itself. In public statements since this ruling, the Government of Ecuador has denied that the BIT Tribunal even has jurisdiction in this matter and that the BIT is not applicable. Minister of Foreign Affairs Ricardo Patiño has said that "the Government of Ecuador considers that the Court of Arbitration lacks jurisdiction.

² *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures, para. 79 (Feb. 7, 2013); *see als id.* At p. 31 (Operative Part of the Award).

³ *Chevron Corp. v. Republic of Ecuador*, Fourth Interim Award, para. 80.

⁴ *Chevron Corp. v. Republic of Ecuador*, Fourth Interim Award, para. 82.

⁵ *Chevron Corp. v. Republic of Ecuador*, First Partial Award on Track I, September 17, 2013.

And that this bilateral investment treatment [sic] is not applicable retroactively.”⁶ The Embassy of Ecuador in Washington has said that, “the tribunal is acting without jurisdiction in applying the terms of a Bilateral Investment Treaty that was entered into force long after the investor voluntarily left the country.”⁷ These statements merely repeat arguments already rejected by the Tribunal in its Third Interim Award (issued February 27, 2012), which dealt with issues of jurisdiction over and admissibility of Chevron’s and TexPet’s claims. Ecuador had argued that TexPet’s investment in Ecuador consisted of the concession agreement that came to an end in 1992, prior to the BIT entering into force in 1997, and that Chevron did not enter into the picture until it acquired Texaco in 2001, years after the investment as characterized by Ecuador came to an end. But the Tribunal disagreed with that characterization, finding that “TexPet’s investment began in 1964, it includes the 1995 Settlement Agreement; and, with the *Lago Agrio* litigation, that investment has not yet reached its complete and final demise.”⁸ As for Chevron (as distinct from TexPet), the Tribunal found that at a minimum its claims are within the Tribunal’s jurisdiction by virtue of Chevron’s indirect ownership of TexPet.⁹

While Chevron’s previous submissions have detailed the ways in which Ecuador has failed to recognize and enforce the awards in the *Chevron v. Ecuador* arbitration, it is useful here to highlight the conduct at issue demonstrating Ecuador’s continued attempts to deny a U.S. investor justice. Ecuador’s misconduct consists not merely of passive disregard for the BIT tribunal’s awards, but an outright attack on the arbitral tribunal itself as well as on the BIT arbitration process more generally, and threats to terminate its BIT with the United States. Using bilateral exchanges and through major multilateral summits such as the Union of South American Nations (UNASUR) and the Bolivarian Alliance for the Peoples of Our America (ALBA), the Government of Ecuador has publicly sought to enlist regional allies to join Ecuador in denouncing the arbitral awards in the *Chevron* dispute as well as the entire concept of neutral, independent international arbitration that is a cornerstone of U.S. BITs and U.S. investment policy. Indeed, President Correa recently dispatched his Minister of Foreign Affairs Ricardo Patiño on a regional mission with these objectives as the “first priority.”¹⁰ Specific Government of Ecuador efforts have included:

- February 2013: President Correa dispatched Foreign Minister Patiño, on a diplomatic mission to other Latin American countries to persuade them to join Ecuador in denouncing the Chevron tribunal’s awards and the entire BIT arbitration process as illegitimate.¹¹
- April 2013: In a press release issued on the margins of an ALBA meeting, Ecuador addressed the need to create a regional arbitration mechanism. Foreign Minister Patiño stated, “[w]e have had to face serious problems because of the abuses of multinationals and with the institutional legal

⁶ ‘Ecuador Takes on Chevron, Global Indifference in Controversial Fights to Protect Rainforest’ *Democracy Now*, September 24, 2013.

⁷ Quoted in ‘Chevron Inches Closer to Legal Victory over Ecuador Pollution’, Paul M. Barrett, *Bloomberg Businessweek*, September 19, 2013.

⁸ *Chevron v. Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, para. 4.19 (Feb. 27, 2012).

⁹ *Id.*, para. 4.24.

¹⁰ See Chevron’s second supplemental information re petition for withdrawal or suspension of Ecuador’s GSP eligibility, Mar. 18, 2013 (Dkt. No. USTR-2013-0013-0007) (detailing President Correa’s attack on the Chevron v. Ecuador tribunal and the BIT arbitration process in general).

¹¹ “Ecuador no cumplirá orden del ONU,” *Expreso* Pág 07 28/02/2013 CRE Satelital, Ecuador Inmediato 27/02/2013 available at <http://www.eltiempo.com.ec/noticias-cuenca/116603-correa-dice-que-ecuador-es-incapaz-de-cumplir-orden-arbitral-en-caso-chevron>; “Foreign Minister Ricardo Patiño travels around Latin America to discuss reform on the Inter-American System of Human rights (ISHR)” available on the website of Ecuador’s Ministry of Foreign Relations at <http://www.mmrree.gob.ec/eng/2013/bo10135.asp>.

framework of arbitration centers which that have always been against our countries. This is why we have decided to say ‘enough’; we have to make decisions to correct these abuses”.¹²

- August 2013: At the UNASUR presidential summit in Suriname, President Correa raised the need to establish a dispute resolution center to enable the States to be defended against alleged abuses of transnational corporations. He set as an example the proceedings he faces with the complaint filed by Chevron against his country.¹³

These actions are representative of a continued wholesale attack on a system that is designed to protect U.S. investors.

Ecuador’s recent acts and omissions that amount to a violation of the arbitral awards, the BIT, the rules governing the *Chevron v. Ecuador* arbitration (*i.e.*, the UNCITRAL Rules), and international law are listed below:¹⁴

- Following issuance of the BIT Tribunal’s Second Interim Award on February 16, 2012, requiring Ecuador to take all measures necessary to suspend or cause to be suspended the enforcement and recognition both within and without Ecuador of the *Lago Agrio* Judgment, the Ecuadorian court with jurisdiction over the case (Provincial Court of Justice of Sucumbíos) declared that it is not bound by the Award,¹⁵ and neither the President nor any other Ecuadorian official said or did anything to counter that position.
- On August 3, 2012, the same court issued a certificate of enforceability (*mandamiento de ejecucion*) of the *Lago Agrio* Judgment.¹⁶
- Ecuador thereafter refrained from taking actions it could have taken to stay enforcement of the Judgment, including:
 - having the Attorney General issue a legal opinion finding enforcement of the Judgment suspended in view of Ecuador’s obligations under the BIT and the arbitral awards issued by the Tribunal;
 - representing to the courts in which the *Lago Agrio* plaintiffs are seeking to enforce the Judgment that the tribunal in a BIT arbitration to which Ecuador consented has directed that enforcement of the Judgment be suspended;
 - excusing Chevron from the requirement to post a bond (or posting the bond on Chevron’s behalf) to ensure a stay of enforceability of the Judgment pending review by Ecuador’s highest court; and
 - ordering the Superintendent of Companies to enjoin the *Lago Agrio* plaintiffs or judgment-trust beneficiaries from seeking to enforce the Judgment.

¹² Taken from an April 22, 2013 press release issued by Ecuador’s Ministry of Foreign Affairs.

¹³ Several news clippings, among them: *Unasur inicia su agenda con reunión de cancilleres*, La Hora, August 29, 2013.

¹⁴ These acts and omissions are described in detail in Chevron’s submissions cited in footnote 1, *supra*, and incorporated by reference in this submission.

¹⁵ See Judgment of the Sole Division of the Provincial Court of Sucumbíos, Mar. 1, 2012, at 4; Judgment of the Sole Division of the Provincial Court of Sucumbíos, Feb. 17, 2012.

¹⁶ Providencia, Provincial Court of Justice of Sucumbíos, Aug. 3, 2012 (3 p.m.).

- Senior officials, including Ecuador's President and Attorney General, have vocally denigrated the arbitral awards and the legitimacy of the BIT proceeding in ways that have encouraged the plaintiffs to seek enforcement of the *Lago Agrio* Judgment.¹⁷
- The *Lago Agrio* court has issued *ex parte* orders purporting to embargo Chevron's assets in Ecuador and to freeze its bank accounts, and it has issued letters rogatory which Ecuador's Transitional Judicial Council (an executive branch entity) has certified and the Minister of Foreign Affairs has apostilled (*i.e.*, authenticated) so as to facilitate the efforts of the *Lago Agrio* plaintiffs to have courts in other countries give effect to those orders.¹⁸ In this regard it is notable that despite the sometimes professed desire of Ecuador's executive branch not to interfere in the *Lago Agrio* court proceedings, when the court's freeze order purported to encompass a \$96 million debt that Ecuador owes to Chevron pursuant to an award in a commercial arbitration, Ecuador's attorney general quickly (and successfully) intervened to have that asset excluded from the freeze order, though he did nothing else to rein in the court's actions in light of the BIT tribunal's awards.¹⁹ Since then, the *Lago Agrio* court has issued another order rendering the \$96 million subject to embargo.
- Ecuador's Minister of Foreign Affairs apostilled at least five documents in support of the *Lago Agrio* plaintiffs' enforcement action in Argentina, thus facilitating the prosecution of that action.²⁰
- President Correa made a personal appeal to Argentine President Cristina Fernández to "enforce the [*Lago Agrio*] judgment" during a trip to Buenos Aires in December 2012.²¹
- Ecuador's bank regulatory agency has facilitated enforcement of the Judgment by notifying all banks in the Ecuadorian financial system of an order of the *Lago Agrio* trial court freezing Chevron's accounts in Ecuador.²²

B. The Government of Ecuador's Black Hand Campaign

Most recently, in further defiance of the BIT Tribunal's awards, the Government of Ecuador has embarked on an orchestrated campaign, called the "Black Hand" campaign by the government, of public attacks against Chevron and its employees and counsel. Example of these actions include: (i) The Ecuadorian government's full-page ads in *The Washington Post* and *San Francisco Chronicle*, which officially promote the *Lago Agrio* Plaintiffs' cause and link to the Plaintiffs' website; (ii) Ecuador's establishment of a new Twitter campaign by government officials supporting the Plaintiffs' right to enforce the *Lago Agrio* Judgment; (iii) the promulgation of an official pamphlet by the Ecuadorian Ministry of Foreign Affairs praising the *Lago Agrio* Judgment as the "first big triumph," condemning

¹⁷ See, e.g., 2012.03.03 Citizen Connection Broadcast # 261 with President Rafael Correa (Correa calling arbitration proceeding a "monstrosity"); Attorney General News Release, Feb. 28, 2012 (Attorney General stating BIT tribunal cannot "act as a tribunal that may review judgments issued by the Ecuadorian judicial system").

¹⁸ See Letter from Claimant to Tribunal, *Chevron v. Ecuador*, PCA Case No. 2009-23 (Nov. 22, 2012).

¹⁹ Attorney General's Motion with the *Lago Agrio* Court to Revoke Embargo Order as to Commercial Cases Award, Oct. 22, 2012.

²⁰ Power of Attorney Issued by the Canton of *Lago Agrio*, apostilled by the Minister of Exterior Relations, Aug. 9, 2012; Execution Order Issued by the Provincial Court for Sucumbíos, Oct. 15, 2012; Amplification of Execution Order Issued by the Provincial Court of Sucumbíos, Oct. 25, 2012; Letters Rogatory Certified by the *Lago Agrio* Court and requested by the National Judicial Council, Oct. 31, 2012; and Apostilled Copy of the Plaintiffs' Motion to Expand the Embargo Order, Apostille dated Oct. 31, 2012.

²¹ Correa says he will ask Cristina to "comply with the judgment" against Chevron, LA NACIÓN, Dec. 4, 2012.

²² Notice of Embargo Order by Supervisory Agency of Banks and Insurance, Oct. 17, 2012.

Chevron's "irrationality and arrogance" in seeking to defend its rights, denouncing the BIT as "abusive," and accusing the Tribunal of issuing "several illegal arbitral awards;" and (iv) the reemergence of President Correa as a spokesman for the Plaintiffs, with him accusing Chevron of trying to "destroy Ecuador" through the on-going arbitration.

In addition to his efforts to promote denouncement of the global arbitration system as described above, Ecuadorian Foreign Minister Ricardo Patiño has gone on the offensive against the BIT Tribunal and the arbitration itself. He has publicly stated that the Tribunal committed "a true abuse and a violation of international law" by even agreeing to hear Chevron's case.²³ Foreign Minister Patiño has begun an international tour, visiting Venezuela, Trinidad and Tobago, and Nicaragua to plead the merits of the case against Chevron and to seek enforcement of the fraudulent judgment against Chevron, again defying the BIT Tribunal's awards.²⁴ His efforts have been reinforced by Ecuador's embassies around the world.²⁵

The Government of Ecuador's recent efforts have not been limited to media and lobbying campaigns but have extended to direct interference in Chevron's ongoing litigation in Ecuador. After a Chevron complaint filed in September 2009 presenting video evidence of corruption in the *Lago Agrio* litigation,²⁶ Ecuador's top prosecutor, Galo Chiriboga, asked the president of the criminal division of the National Court of Justice to dismiss the complaint on August 19, 2013 without ever having properly investigated it.²⁷ Chiriboga also requested that the court designate Chevron's complaint "malicious and reckless" because, during the preliminary investigation, Chevron allegedly did not corroborate its allegations.²⁸ The next day, Chiriboga's office announced opening of an official investigation into damage to Ecuador's national image attributable to Chevron's complaint.²⁹ President Correa has said he will reveal the names of the lawyers defending Chevron in Ecuador, saying, "Let's show the country the Ecuadorian attorneys who are Chevron's attorneys, [who are] against their own country and against their own countrymen."³⁰

C. The BIT Award

Beyond the *Lago Agrio* matter, in August 2011, in a different dispute between Chevron and Ecuador, a separate tribunal under the BIT awarded Chevron about \$96 million. That case related to certain

²³ *Ecuador en Vivo: Pulso Político*, television show, Aug. 18, 2013, available at <http://www.youtube.com/watch?v=6gY35Ef9bhA> (joint appearance with Lorena Tapia Núñez, Ecuadorian Minister of the Environment, Juan Pablo Saenz, lawyer for the *Lago Agrio* Plaintiffs, and Alejandro Soto, representative of the *Lago Agrio* Plaintiffs). See also Ricardo Patiño (Foreign Minister), *Patiño: We will answer as Chevron Deserves*, ANDES, Aug. 18, 2013.

²⁴For example, see *Chevron Case: Solidarity Committee with Ecuador will be Created in Venezuela*, Ecuadorian Ministry of Foreign Affairs Press Release, Aug. 20, 2013; *Trinidad and Tobago reject all attempts to discredit Ecuador*, Press Release by the Ecuadorian Ministry of Foreign Affairs and Human Mobility, Aug. 20, 2013; *Nicaragua joins the campaign of solidarity with Ecuador over the Chevron-Texaco case*, Press Release by the Ecuadorian Foreign Ministry, Aug. 22, 2013; Letter "To the Parliaments of the Kingdoms of Sweden, Denmark, Norway, and the Republics of Estonia." See also "Ecuador is Looking for Local Advocate for Dispute with Chevron", *The Korea Times*, September 30, 2013.

²⁵Letter "To the Parliaments of the Kingdoms of Sweden, Denmark, Norway, and the Republics of Estonia, Finland, Island [sic], Latvia, Lithuania," Ecuadorian Embassy in Stockholm, Sweden, Aug. 7, 2013. Also public events hosted by Ecuador embassies in Guatemala and the Dominican Republic, October 10 and 16, 2013, respectively.

²⁶ *Prosecutor's Office Requested Dismissal of Chevron Complaint*, Office of the Prosecutor General of Ecuador, Press Release, August 19, 2013.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Prosecutor's Office will investigate complaint by Chevron's attorney*, EL TELÉGRAFO, Aug. 20, 2013.

³⁰ *Executive Will Show Chevron's Ecuadorian Attorneys*, EL UNIVERSO, September 29, 2013.

contractual claims that TexPet had tried to pursue in Ecuadorian courts. The claims languished on the dockets of those courts for years. Chevron argued to the BIT Tribunal that this amounted to a breach of Ecuador's obligation under the BIT to provide "effective means of asserting claims and enforcing rights." The Tribunal agreed. After the Tribunal issued its award, Ecuador asked a Dutch court to set the award aside, a maneuver that is not unusual in international arbitration. What was unusual, however, was that Ecuador's next step was to initiate dispute settlement with the United States over interpretation of the BIT's "effective means" clause as an indirect way of casting doubt on the investor-State tribunal's award. It has been reported that in September 2012, the tribunal in the Ecuador v. United States matter rejected Ecuador's claims for lack of jurisdiction, though that decision has not yet been published. This matter further illustrates the lengths to which Ecuador has gone to avoid obligations under investment treaties.

In sum, as detailed in our October 2012 submission for last year's NTE Report,³¹ Ecuador has consistently failed to "act in good faith in recognizing" the BIT Tribunal's awards as binding and enforcing them. A year later, the situation has worsened. Ecuador continues to flout the BIT Tribunal's awards and to do so in an increasingly public and forceful manner that in fact ignores the BIT Tribunal's final and binding awards and demonstrates Ecuador's contempt for a BIT Tribunal process provided for by the U.S.-Ecuador BIT. Rather than acting in good faith to abide by the BIT Tribunal's rulings, Ecuador continues to act as a scofflaw whose behavior, if left unchallenged, not only is inconsistent with fair and equitable treatment and other protections Ecuador is obligated to provide U.S. investors under the BIT, but is corrosive to the very basis for these obligations in the U.S. BIT program.

II. Estimate of the Cost of Ecuador's Investment Barriers

It is difficult to quantify the full cost of the hostile investment environment Ecuador has created, but it is very substantial, with Chevron's issues alone potentially involving billions of dollars. Chevron has filed an arbitration claim against Ecuador under the BIT on the grounds that Ecuador's conduct in connection with the *Lago Agrio* case violates its obligations under the BIT, including its obligations to accord fair and equitable treatment and full protection and security to U.S. investments and to refrain from the denial of justice and from discriminatory treatment of U.S. investments and investors. Ecuador tried (unsuccessfully) to have a U.S. court enjoin that BIT arbitration. The BIT Tribunal entered an interim measures award requiring Ecuador to take all measures necessary to suspend enforcement or recognition of the *Lago Agrio* judgment within and without Ecuador pending completion of the BIT arbitration proceedings. The BIT Tribunal's award further stated that if it is finally determined that the *Lago Agrio* judgment is in breach of an obligation Ecuador owes to Chevron then any losses arising from enforcement of that judgment anywhere in the world may be losses for which Ecuador would be responsible to Chevron under international law.

To date, Ecuador has failed to comply with its obligations under the BIT and the Tribunal's interim measures awards. As evidence of Ecuador's failure to comply with its obligations, Chevron now is or has been defending against attempts to enforce an extortionate \$19 billion judgment in Argentina, Canada and Brazil, with other actions threatened globally to have the corrupt *Lago Agrio* judgment enforced.

III. Prior U.S. Government and Third-Party Recognition of Ecuador's Investment Barriers

The U.S. government has repeatedly affirmed that the situation in Ecuador presents serious issues for foreign investors. The President's June 20, 2013, report to Congress evaluating Ecuador's compliance with the Andean Trade Preferences Act eligibility criteria noted the following:

- "The United States-Ecuador BIT provides for international arbitration of disputes at the investor's initiative. However, developments in the past few years have given rise to concerns about the

³¹ Submission by Edward B. Scott, Vice President and General Counsel, Chevron Upstream and Gas, ID USTR-2012-0021-06, October 11, 2012.

government's long-term commitment to international arbitration for the settlement of investor disputes. In September 2009, President Correa requested that the Ecuadorian National Assembly approve his request to terminate BITS with thirteen countries: Argentina, Canada, Chile, China, Finland, France, Germany, the Netherlands, Sweden, Switzerland, the United Kingdom, the United States, and Venezuela. President Correa asserted that the BITS' provisions on international arbitration and national treatment conflict with the country's 2008 Constitution. The National Assembly requested Constitutional Court rulings before voting on the matter. The Court has since found all thirteen BITS to be unconstitutional, ruling on the U.S. BIT on November 25, 2010. The government subsequently requested that the National Assembly ratify the termination of each BIT, waiting until March 2013 to make such a request regarding the U.S. BIT. The National Assembly has voted in favor of terminating six of the BITS, but against terminating four others. It has not voted yet on the BIT with the United States. As of the date of this report, only Ecuador's BIT with Finland has been officially terminated. The United States-Ecuador BIT remains in force. Separately, Ecuador withdrew from the World Bank's International Center for the Settlement of Investment Disputes (ICSID) on January 7, 2010, although the government continues to participate in pending international arbitration cases.

- “In August 2011, a U.S. company obtained an arbitral award against Ecuador for violating the United States-Ecuador BIT by failing to provide effective means of resolving commercial disputes in Ecuadorian courts. The case relates to claims filed in Ecuador by the company in the early 1990s, the resolution of which the arbitral tribunal held to have been unduly delayed. The government's petition to have the award set aside was denied in May 2012. In September 2009, the company filed another arbitration claim against Ecuador under the BIT, claiming, among other things, government misconduct in connection with a then-pending lawsuit in the Ecuadorian courts, a lawsuit decided against the company in February 2011. In January and February 2012, respectively, the arbitral tribunal issued two interim awards directing the Ecuadorian government to first “take all measures at its disposal”, and subsequently, “take all measures necessary” to suspend or cause to be suspended enforcement and recognition of the judgment against the company in the lawsuit. In February 2013, the tribunal issued a further interim award declaring the Ecuadorian government in violation of the first and second interim awards, specifically for what it found was a failure to suspend or cause to be suspended enforcement actions, including those aimed at seizing the assets of the U.S. company abroad. The Administration is monitoring developments in connection with these matters under the relevant ATPA criteria.
- “On October 5, 2012, ICSID ordered Ecuador to pay \$1.77 billion plus interest to a different U.S. company. The arbitration was initially filed in May 2006 under the U.S.-Ecuador BIT, after Ecuador seized the company's assets, claiming the company had transferred 40 percent of certain rights to another entity without government approval. On January 18, 2013, an ICSIF ad hoc Committee was constituted to consider Ecuador's application for annulment of the award.”³²

Beyond the concerns raised in the President's report on the operation of the Andean Trade Preferences Act, the U.S. Department of State's 2013 Investment Climate State points to continued serious problems with Ecuador's judicial system:

- “Systemic weakness in the judicial system and its susceptibility to political or economic pressures constitute important problems 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

³² Office of the U.S. Trade Representative, *Seventh Report to the Congress on the Operation of the Andean Trade Preference Act As Amended*, June 20, 2013, pp. 16-17.

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.”³³

The report further states, “According to the Rule of Law Index of The World Justice Project, Ecuador ranks very low (zero being the lowest and 1 highest score) in Regulatory Enforcement (0.46/1), Civil Justice (0.42/1), and Criminal Justice (0.44/1), among 97 countries. In December 2012, an international oversight committee submitted a report with conclusions and recommendations on the reform implementation. Currently, there are over 55,000 laws and regulations in force. Many of these are conflicting, which contributes to unpredictable and sometimes contradictory judicial decisions. Enforcement of contract rights, equal treatment under the law, IPR protection, and unpredictable regulatory regimes are major concerns for foreign investors.”³⁴

Similarly, the U.S. Department of State’s Country Report on Human Rights Practices for 2012 on Ecuador notes:

“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. Delays often occurred in cases brought against the government, whereas cases brought by the government moved quickly through the courts.”³⁵

The World Bank’s Doing Business Project, which reports on the climate for business operations and investment globally, ranks Ecuador 24th out of 33 countries in Latin America and the Caribbean in terms of protecting investors and 139 out of 185 countries globally.³⁶

Separately, Transparency International (TI) consistently ranks Ecuador near the bottom among countries it surveys in Latin America. Ecuador ranked 118th out of 176 countries/territories examined and received a score of 32 out of 100 (100= highly clean and 0=highly corrupt).³⁷

Finally, in the 2013 National Trade Estimate report, USTR itself observed that:

“Ecuador’s investment climate remains marked by uncertainty, as the government’s economic policies continue to evolve. While Ecuador is still relatively open to foreign investment in most sectors, new laws and regulations limit private sector participation in sectors deemed “strategic,” most notably in extractive industries. In addition, inconsistent application and interpretation of its investment laws negatively impacts the transparency and stability of Ecuador’s investment regime. This legal complexity increases the risks and costs of doing business in Ecuador.”³⁸

³³ U.S. Department of State, 2012 Investment Climate Statement—Ecuador (June 2013), available online at <http://www.state.gov/e/eb/rls/othr/ics/2013/204634.htm>.

³⁴ *Id.*

³⁵ U.S. Department of State, *Country Reports on Human Rights Practices for 2012 – Ecuador*, available online at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204448>

³⁶ World Bank, *Doing Business, 2013*, available online at <http://www.doingbusiness.org/rankings>.

³⁷ Transparency International, *Corruption Perceptions Index 2012*, available online at <http://www.transparency.org/cpi2012/results>.

³⁸ Office of the U.S. Trade Representative, *2013 National Trade Estimate Report on Foreign Trade Barriers*, March 2013, p. 126.

IV. Conclusion – Ecuador’s Continued Misconduct Is a Serious Barrier to U.S. Investors

As set forth in this and previous submissions by Chevron (cited above), Ecuador’s actions go well beyond what might be described as political rhetoric or smoke without fire. Ecuador seems intent on burning down the house. It is not simply content to create an environment hostile to U.S. investors. It is actively supporting a multi-billion dollar fraud against an American company. And when those actions are being successfully challenged by that company in a BIT arbitration, Ecuador has not complied with the Tribunal’s decisions. Rather, it has doubled-down on its challenges to the Tribunal’s decisions and authority. Ecuador repeatedly is ignoring the decisions of an arbitration panel duly formed under Ecuador’s treaty obligations and whose express purpose is to ensure that U.S. investors have a venue for fair and timely justice. Ecuador’s actions cannot be allowed to stand. In their specifics, they are inconsistent with Ecuador’s s treaty obligations to U.S. investors. More broadly, Ecuador’s actions and inactions damage the international framework of investment obligations and protections that the United States has advanced for decades.

Chevron therefore strongly urges that the 2014 NTE Report on Foreign Trade Barriers clearly and unequivocally point out Ecuador’s many and continued failures to abide by its treaty obligations and honor final and binding investment dispute arbitral awards, as well as Ecuador’s policy of publicly and vociferously challenging the international framework for investment protection, as serious barriers that can and do harm U.S. investors and run counter to well-established U.S. policy and practice.

Sincerely,

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

Edward B. Scott