DETERMINATIONS

Having reviewed the criteria set forth in section 203 of the Andean Trade Preference Act, as amended (19 U.S.C. 3202) (ATPA or Act) and taken into account each of the factors set forth in section 203(d) of the Act (19 U.S.C. 3202(d)), I have not determined pursuant to section 208 (a)(3)(A) of the Act ((19 U.S.C. 3206(a)(2)(A)) that Bolivia satisfies the requirements set forth in section 203(c) of the Act (19 U.S.C. 3202(c)) for being designated as beneficiary country under the ATPA. Therefore, as provided for in section 208(a)(3) of the Act (19 U.S.C. 3206(a)(3)), no duty free treatment or other preferential treatment extended under the ATPA, as amended (19 U.S.C. 3201 *et seq.*) shall remain in effect with respect Bolivia after June 30, 2009.

Having reviewed the criteria set forth in section 203 of the Act, and taken into account each of the factors set forth in section 203(d) of the Act, I have not determined pursuant to section 208(a)(2)(A) of the Act (19 U.S.C. 3206(a)(2)(A)) that Ecuador does not satisfy the requirements set out in section 203(c) of the ATPA for being designated as a beneficiary country under the ATPA. Therefore, as provided for in section 208(a)(2) of the Act (19 U.S.C. 3206(a)(2)), duty-free treatment or other preferential treatment extended under the ATPA shall remain in effect with respect to Ecuador after June 30, 2009.

BACKGROUND

This report is provided pursuant to section 208(b) of ATPA (19 U.S.C. 3206(b). The ATPA was enacted in December 1991 to help four Andean countries (Bolivia, Colombia, Ecuador, and Peru) in their fight against drug production and trafficking by expanding their economic alternatives. To this end, the ATPA provided reduced-duty or duty-free treatment to most of these countries' exports to the United States. The Andean Trade Promotion and Drug Eradication Act (ATPDEA), which renewed and amended the ATPA, was enacted on August 6, 2002, as part of the Trade Act of 2002. The ATPDEA program provides for the possibility of enhanced trade benefits for the four ATPA beneficiary countries. The ATPDEA amended the ATPA to provide duty-free treatment for certain products previously excluded under the ATPA. In Presidential Proclamation 7616 of October 31, 2002, the President designated all four ATPA beneficiary countries – Bolivia, Colombia, Ecuador and Peru – as ATPDEA beneficiary countries.

The President has the authority to withdraw or suspend ATPA/ATPDEA designation, or withdraw, suspend or limit benefits, if the President finds a country's performance under the eligibility criteria to be no longer satisfactory. On November 25, 2008, after soliciting public comment and holding a public hearing as required by the Act, the President suspended Bolivia's designation as a beneficiary country under the ATPA/ATPDEA beginning on December 15, 2008. The President cited, as the reason for the suspension, Bolivia's failure to meet the ATPA/ATPDEA program's eligibility criteria related to counternarcotics cooperation. Thus, Bolivia is not currently receiving benefits under the program.

The ATPA/ATPDEA was initially set to expire on December 31, 2006. Since then, Congress has extended the program three times. Most recently, Congress extended the ATPA/ATPDEA through December 31, 2009, for Colombia and Peru. The same legislation extended the ATPA/ATPDEA for both Ecuador and Bolivia through June 30, 2009. The legislation provided

differing determinations for extending Ecuador's and Bolivia's participation in the program through the second half of 2009. Specifically, duty-free treatment under the ATPA/ATPDEA will continue for Ecuador if I do not determine by June 30, 2009, that Ecuador does not satisfy the eligibility requirements set forth in the ATPA/ATPDEA. Bolivia will be eligible for duty free treatment under the ATPA/ATPDEA only if I determine by June 30, 2009, that Bolivia has satisfied the ATPA/ATPDEA eligibility requirements. I have decided to make neither of these determinations.

The reasons for my decisions are summarized in this report and are also based on the information contained in the Office of the U.S. Trade Representative's (USTR) Fourth Report to the Congress on the Operation of the Andean Trade Preference Act, as Amended, dated April 30, 2009. Below is a summary of the developments and concerns that remain to be addressed in Bolivia and Ecuador in four key areas reflecting the criteria set forth in the Act: investment policies, trade policies, counternarcotics cooperation, and workers' rights. The United States remains committed to working with Bolivia and Ecuador to address our concerns and to develop a stronger bilateral trade and investment relationship with each country.

BOLIVIA

Investment Policies

Article 56 of the new Bolivian Constitution provides that property may be expropriated for the public good or when the property does not fulfill a "social purpose," a term that is not fully defined in Bolivian law. However, Article 56 also stipulates that just compensation must be provided. In 2006, the Bolivian government issued a supreme decree "nationalizing" the hydrocarbons sector, requiring investors to renegotiate their contracts. Since May 2008, Bolivia further moved to consolidate state control over the industry, insisting on renegotiation of a number of contracts with foreign investors.

In October 2007, Bolivia became the first country ever to withdraw from the International Centre for Settlement of Investment Disputes (ICSID), a World Bank body that provides a procedural mechanism for resolution of investment disputes between foreign investors and host countries. Notwithstanding this action, under its constitution, the Bolivian government accepts binding international arbitration in all sectors if provided for under a bilateral investment treaty (BIT) or free trade agreement.

A United States-Bolivia BIT entered into force in June 2001. The Bolivian government has expressed an interest in renegotiating the BIT. Despite the difficult investment climate in Bolivia, the current BIT remains in force and no U.S. company has alleged that the Bolivian government has acted inconsistently with the ATPA's investment-related eligibility criteria.

Trade Policies

USTR recently reviewed the adequacy and effectiveness of intellectual property rights protection in Bolivia in connection with its April 30, 2009 "Special 301" Report. USTR retained Bolivia on the Special 301 Watch List, where it has been since 1999.

Prior to 2008, Bolivia had a three-tier tariff structure. Capital goods designated for industrial development entered duty-free; non-essential capital goods were subject to five percent tariffs; and most other goods were subject to 10 percent tariffs. In November 2007, President Evo Morales signed a decree that changed the tariff structure to a five-tier structure, with levels at zero, five, ten, fifteen and twenty percent. These changes, which went into effect on April 1, 2008, increased tariffs on clothing, wood, leather goods and some agricultural products.

Counternarcotics Cooperation

On September 15, 2008, the President Bush designated Bolivia as a country that had failed demonstrably over the preceding 12 months to adhere to its obligations under international counternarcotics (CN) agreements and to take the measures set forth in the Foreign Assistance Act of 1961. The President noted that the Government of Bolivia had failed to take any of the specific CN measures the U.S. Government had requested over the previous year, such as making it a top priority to eliminate excess coca production or to limit licit coca cultivation.

Subsequently, Bolivia's expulsion of Drug Enforcement Administration (DEA) employees has made counternarcotics cooperation more difficult. DEA maintained 57 employees in four cities throughout the country, and Bolivia served as DEA headquarters for the region. The loss of DEA presence and its information network has severely diminished Bolivia's interdiction capability in both the short and long term.

According to U.S. Government estimates, Bolivia's coca cultivation is approximately 32,000 hectares. The United Nations and other CN experts indicate that coca cultivation continues to increase. Bolivia's Law 1008 authorizes the cultivation of up to 12,000 hectares of coca for licit use. Regulation and control of the licit coca commerce is virtually non-existent in Bolivia and leads to high levels of diversion for cocaine production.

The current challenges include explicit acceptance and encouragement of coca production at the highest levels of the Bolivian government; government tolerance of and attractive income from increased and unconstrained growth of coca cultivation in both the Yungas and the Chapare regions; and increased and uncontrolled sale of coca to drug traffickers. The efficiency and success of eradication efforts have significantly declined in the past few years.

The Bolivian government has maintained its support for interdiction efforts. Interdiction of drugs and precursor chemicals continues to rise, and the Bolivian counternarcotics police and other CN units have improved coordination effectiveness. However, increased seizures also reflect increased cocaine production and transshipment. The Bolivian government estimates that of all the cocaine seized in Bolivia, a significant percentage originates outside Bolivia, establishing Bolivia not only as a producing country, but also increasingly as a transit country for cocaine destined primarily for Brazil and Europe.

Workers' Rights

The Bolivian government has taken steps to afford internationally recognized worker rights to workers in Bolivia. While Bolivia's labor code ensures workers the right to establish and join organizations of their choosing, formation of a new trade union requires approval by the Bolivian government. In addition, the government may dissolve a trade union by administrative decree if it determines that the union fails to meet legal requirements. About 25 percent of workers in the formal economy belong to labor unions, and over 50 percent of salaried public employees are unionized. Labor laws provide for a wide range of benefits and protections, but are written in language that only covers permanent workers in the formal sector. Some employers have exploited this shortcoming by shifting their workforces to temporary or informal employment to avoid protective laws. Some incidents involving indigenous forced labor were reported in 2005, but the Bolivian workforce is, in general, sufficiently protected from extreme forms of labor exploitation.

Bolivian labor laws provide for a range of benefits for full-time salaried employees. However, due to contradictions embedded in Bolivia's frequently amended body of labor law, workers in some cases do not receive the full range of pay, vacation, and severance benefits. Moreover, employers have shifted towards forms of temporary or informal employment that do not require payment of the same benefits.

ECUADOR

Investment Policies

The United States-Ecuador BIT provides for international arbitration of disputes at the investor's initiative. Ecuador is a member of ICSID and is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). However, Ecuador recently indicated its intention to withdraw from ICSID. My Administration will monitor Ecuador's investment policies to ensure that Ecuador continues to meet its BIT obligations.

In 2008, Ecuador resolved three investment disputes with U.S. companies that had been in international arbitration. A court in Ecuador upheld an arbitration award involving a U.S. company's claim regarding its eligibility for value-added tax (VAT) refunds. The court decision was issued in November 2007 and the Ecuadorian government paid the award in March 2008. In August 2008, another U.S. company received payment from the Government of Ecuador, under mutually agreed terms, to compensate the company for its unrealized investment, and the company withdrew its arbitration case. Also in August 2008, another U.S. company received a favorable arbitral award in its claim against the Government of Ecuador; the government paid the arbitral award in December 2008.

In 2006, Ecuador's Solicitor General initiated an investigation of the U.S. company that brought the arbitration case over VAT refunds in 2004, referenced above, for allegedly transferring assets to another foreign company without obtaining the required government authorization. In May 2006, the Government of Ecuador nullified the company's contract and seized the company's

considerable assets in Ecuador. The U.S. company initiated arbitration proceedings against Ecuador under the BIT. In September 2008, the arbitral panel ruled that it had jurisdiction over the case, which remains pending with the Government of Ecuador participating in the proceedings.

A different U.S. company has been sued by private parties in Ecuadorian courts over allegations that it failed adequately to remediate environmental damage allegedly caused by the company's previous operations in Ecuador. The company argues that the Ecuadorian government bears legal responsibility for any damage under the terms a release agreement. The government contests that argument. Concerns have been raised that statements by top Ecuadorian officials in favor of the plaintiffs have politicized the proceedings. The U.S. Government has encouraged Ecuadorian government officials to refrain from commenting on ongoing judicial cases.

Trade Policies

One concern relating to Ecuador's trade policies arose recently, in January 2009, when Ecuador imposed higher tariffs and quotas on a large number of imports, including those from the United States, at levels that exceed Ecuador's bound rates under GATT 1994. The measures were set to expire in January 2010. On February 18, 2009, Ecuador notified the World Trade Organization (WTO) that it was invoking the WTO's balance of payments safeguard provisions as a justification for these measures. In May and June of 2009, the WTO Balance of Payments (BOP) Committee held consultations regarding these measures. The U.S. Government, among others, expressed concern that, contrary to WTO guidelines for BOP measures, Ecuador's restrictions were not applied to the general level of imports, and included quantitative restrictions, notwithstanding the stated preference in the WTO Understanding on Balance of Payment Provisions of GATT 1994 for price-based measures. In a positive development, at the June 2009 meeting, Ecuador agreed, *inter alia,* to phase out many of the quantitative restrictions earlier than the planned January 2010 expiration date.

USTR recently reviewed the adequacy and effectiveness of intellectual property rights protection in Ecuador in connection with its April 30, 2009, "Special 301" Report. USTR retained Ecuador on the Special 301 Watch List, where it has been since 2003.

Counternarcotics Cooperation

Ecuador has received full certification for its cooperation through 2008 with the United States on counternarcotics issues under the Foreign Assistance Act, as described in the *International Narcotics Control Strategy Report* of February 2009. Ecuador is not a noteworthy grower or producer of coca, but has been exploited as a transit zone and, to a lesser extent, for processing. The Ecuadorian government has criminalized the production, transportation, and sale of controlled narcotic substances, and is making efforts to monitor and control precursor chemicals and to interdict processing laboratories. In addition, Ecuador has adopted a new money laundering law, has reorganized and re-staffed its National Drug Council, and has increased military operations near its northern border, a key region for drug traffickers. Ecuador's 2008 Constitution created a Transparency and Social Control branch of government tasked with preventing and combating corruption, among other responsibilities. Nonetheless, it appears that

despite these efforts, transshipment of narcotics through Ecuadorian maritime and land routes to the United States has been increasing substantially in recent years.

Ecuador has declined to renew the lease for a U.S. Air Force forward operating facility in Manta, Ecuador, citing sovereignty concerns. However, Ecuador and the United States are considering future initiatives that would strengthen bilateral counternarcotics cooperation, thus helping the United States to continue to fulfill its counternarcotics objectives in the region.

Workers' Rights

While Ecuador's 2008 Constitution advances worker rights, to be enforceable the new provisions require adoption of implementing legislation that is expected in 2009. The issues related to worker rights are obstacles to freedom of association, including use of subcontracting to obstruct formation of unions, and child labor. Two worker rights petitions from Human Rights Watch and U.S. Labor Education in the Americas Project remain under review.

Ecuador has ratified all eight of the International Labor Organization (ILO) core labor conventions. Most workers in the private and parastatal sectors have the constitutional right to form trade unions and local law allows for unionization of any company with at least 30 employees. Private employers are required to engage in collective bargaining with recognized unions. The Labor Code prohibits discrimination against unions and requires that employers provide space for union activities. In practice, legal protections of these rights need to be strengthened and Ecuador needs to make further progress with respect to the right to organize and bargain collectively.

Except for public servants and workers in some parastatals, workers in Ecuador enjoy the right to strike. Under Ecuador's Constitution, interrupting public services such as health, education, public transportation, or utilities is prohibited. Legally striking employees are entitled to full pay and benefits and may occupy the premises under police protection, although there are restrictions on solidarity strikes. The law does not require reinstatement of workers fired for union activity, but does require compensation and fines. Most public sector employees are technically prevented from joining unions, and many are members of labor organizations that are not allowed to strike or bargain collectively.

Ecuador's Constitution includes advances on worker rights. The Constitution includes new language promoting the democratic, participatory and transparent functioning of labor unions. It prohibits any type of outsourcing or partial contracting for activities that are part of a company's core business. Outsourcing had been used in the past by some companies to have a more flexible workforce, prevent union formation, and to avoid some labor obligations. Revisions to the Labor Code to reflect the new constitutional provisions are expected in 2009.

The Constitution and the Labor Code prohibit forced labor. The law also prohibits the employment of persons under the age of fifteen, except in special circumstances, such as an apprenticeship. Enforcement of this provision is uneven, especially in rural communities. The Ecuadorian government utilizes 28 child labor inspectors; these inspectors have the authority to cite violations and sanction companies and employers found to have illegally hired child labor.