



Business Roundtable  
**Institute for Corporate Ethics**

BRI-1008

**Chiquita and the  
Department of Justice**

Heidi White, Lisa Stewart  
Dean Krehmeyer and Thomas Donaldson

## CHIQUITA AND THE U.S. DEPARTMENT OF JUSTICE

*This kind of conversation happens all the time. When you have a problem, you get on a plane with your lawyers to Washington and talk to the official involved and say, “We have a problem.” That’s the drill.<sup>1</sup>*

—James D. Cox, Duke University law professor

### Chiquita’s Board Transition

In April 2002, Chiquita Brands International (Chiquita) named Roderick Hills<sup>2</sup> and four others as its new board of directors as the company emerged from bankruptcy. At that time, Hills also was elected to be chairman of the audit committee.

Just a year later, on April 3, 2003, Chiquita’s general counsel revealed some disturbing news to Hills and the board. He informed Hills that Chiquita had been making payments to Autodefensas Unidas de Colombia (AUC), a right-wing paramilitary group in Colombia, for a number of years. Compounding this revelation, Chiquita’s management also had just learned that back in 2001 AUC was designated a terrorist group by the U.S. State Department and that, as a result, these payments were illegal.

Hills promptly called Michael Chertoff, then assistant attorney general in charge of the Criminal Division of the U.S. Department of Justice (DOJ),<sup>3</sup> to inform him about the situation and to schedule a meeting with the appropriate people to discuss the problem. Chertoff, a former law firm colleague of Hills, held the meeting in his office on April 24 with others in the DOJ, including an employee from the FBI.

---

<sup>1</sup> Neil A. Lewis, “Inquiry Threatens Ex-Leader of Securities Agency,” *New York Times*, August 16, 2007.

<sup>2</sup> Some information for this case was provided in consultation with Roderick Hills, January, 2012. The case is intended for classroom discussion purposes only. Hills thinks this statement will allow the class to better understand the issues facing the company’s audit committee but cannot be considered a full statement of relevant facts.

<sup>3</sup> Chertoff would later become Secretary of Homeland Security. See Chertoff biography at Department of Homeland Security website; [http://www.dhs.gov/xabout/history/biography\\_0116.shtm](http://www.dhs.gov/xabout/history/biography_0116.shtm) (accessed January 24, 2012).

In the meeting, Hills provided information and background surrounding Chiquita's illegal payments to AUC. Chiquita's management, Hills explained, had told him and his fellow directors that the failure to make any payment (a fixed amount at 4 U.S. cents per box of bananas sold) would certainly cause one or more of Chiquita's employees to be killed by AUC. Hills acknowledged that the payments were illegal but stated that, because of that threat, Chiquita would continue to make such payments so long as the company remained in Colombia. Chiquita was prepared to sell its property in Colombia and leave the country, Hills added, but asked that Chertoff consider several policy issues that could affect how and when Chiquita should leave. Specifically, Hills noted the following three unique complicating factors:

- Hills told the group that shortly before the April meeting, the U.S. State Department had announced a grant of \$200 million to assist the Colombian government's efforts to disarm the AUC.<sup>4</sup> He asked if Chiquita should inform the State Department of its decision to leave the country and/or coordinate the decision with the State Department's activities.
- Secondly, Hills noted that Chiquita's management was certain that most, if not all, banana producers with operations in Colombia were also making extortion payments to AUC.<sup>5</sup> He asked whether the DOJ wished to notify these other companies of the issue and to explain to the Colombian government that one and perhaps more U.S. companies would be forced to leave the country.
- Finally, given Chiquita's major presence in Colombia and its prominent position as operator of a critical port, Hills asked whether the department would like to place one or more persons in an undercover operation on Chiquita's property to secure a better idea of how AUC operated.

Chertoff stated that he would need to consult with others in the department before he could respond and also with other departments of the government. He thanked Hills for bringing the information to him and instructed Chiquita not to contact any others in government. In response to a question from Hills, Chertoff said that because Chiquita had volunteered the information, the department would give consideration to exercising prosecutorial discretion and not prosecute Chiquita for the payments. He cautioned that the department could not condone the payments and again noted that difficult policy issues were involved. He promised to get back to the company after conferring with others. According to the *Washington Post*, the DOJ acknowledged that "the issue of continued payments was complicated." Hills left the April meeting with no conclusive directive on how Chiquita should proceed.

---

<sup>4</sup> United States Support for Colombia website, [http://www.state.gov/www/regions/wha/colombia/fs\\_000328\\_plancolombia.html](http://www.state.gov/www/regions/wha/colombia/fs_000328_plancolombia.html) (accessed October 2011).

<sup>5</sup> Steve Kroft, "The Price of Bananas," *60 Minutes* (May 11, 2008), [http://www.cbsnews.com/stories/2008/05/08/60minutes/main4080920\\_page3.shtml?tag=contentMain;contentBody](http://www.cbsnews.com/stories/2008/05/08/60minutes/main4080920_page3.shtml?tag=contentMain;contentBody) (accessed October 2010).

## History of Chiquita in Colombia

Since 1899, Chiquita had overseen a well-known banana enterprise in Colombia—one built on perseverance and production. The term *banana republic* referred to the manner in which Chiquita controlled its business along with local governments. It was regarded by many as ruthless in its manner. By the year 2000, however, Chiquita’s efforts to reform its image earned it the rare endorsement of the Rainforest Alliance.<sup>6</sup>

The company generated close to 12,500 direct and indirect jobs, contributing almost \$70 million annually to the Colombian economy in the form of capital expenditures, payroll, taxes, social security, pensions, and local purchases of goods and services.<sup>7</sup> See **Exhibit 1** for Chiquita’s financial summary and banana productivity in Colombia from 2001 to 2007.

Chiquita’s tenure in Colombia had not been smooth. Notorious for decades-long civil war, unrest, and modern-day drug trafficking, Colombia was rife with both guerilla and paramilitary activity that relied heavily on extortion payments from multinational corporations. What began as guerilla groups taxing wealthy landowners in the Urabá and Sierra Nevada de Santa Marta regions of Colombia, evolved into the formation of self-defense groups by farmers for their own protection and the protection of others. As time went by, these paramilitary self-defense forces adopted the practices of the guerillas and became extortionists. Almost 4,000 known deaths occurred at the hands of armed guerilla and paramilitary groups during the seven-year period ending in 2007. Some of these groups consequently took payment from some landowners/businesses as a means to “suppress labor activism, bar left-wing insurgents, and control territory.”<sup>8</sup>

Chiquita’s Colombian subsidiary, Chiquita Banadex SA, first began funding the AUC in 1997, after the AUC leader, Carlos Castaño, made a deal with Chiquita Banadex executives to protect their employees from murder and violence in Colombia in exchange for “security payments.” Chiquita had made similar payments to the Fuerzas Armadas Revolucionarias de Colombia (FARC) in the 1980s and 1990s to prevent FARC from attacking its property and employees in Colombia’s Urabá region.<sup>9</sup> Most payments to AUC went through organizations

---

<sup>6</sup> “Rainforest Alliance Timeline: Highlights of Our History,” Rainforest Alliance website, <http://www.rainforest-alliance.org/about/history> (accessed January 23, 2012).

<sup>7</sup> Fernando Aguirre, “An Excruciating Dilemma Between Life and Law: Corporate Responsibility in a Zone of Conflict,” *The Corporate Citizen* (e-newsletter), Business Civic Leadership Center, U.S. Chamber of Commerce, April 2007.

<sup>8</sup> W. T. Whitney, Jr., “Chiquita in the Dock for Murder,” *Agencia Prensa Rural*, December 20, 2007, <http://prensarural.org/spip/spip.php?article934> (accessed January 30, 2012).

<sup>9</sup> J. Mead and A. Wicks, “Chiquita in Colombia,” UVA-E-0346 (Charlottesville, VA: Darden Business Publishing, 2007).

called *convivirs* established under the direction of the Colombian government to provide protection against the guerillas of FARC.<sup>10</sup>

Security payments, which had been ongoing for years, were not internally acknowledged by Chiquita until around September 2000, when then-General Counsel Robert Olson questioned unusual payments being made by Chiquita in the form of third-party checks or income to Banadex employees. Olson, therefore, assigned one of his staff to investigate matters, and, upon completion of a review, he disclosed to the board of directors of Chiquita that existed prior to 2002 that the company indeed was making extortion payments to AUC.

According to Colombian law, if extortion was at play, it was legal to make payments to a government-licensed security organization.<sup>11</sup> Colombian attorneys concurred with this thinking, and the board decided to continue the payments in order to keep Chiquita Banadex employees safe.<sup>12</sup> As time went on, Banadex became one of Chiquita's most profitable banana operations. When the new board took control of Chiquita in 2002, the board's audit committee was told of the payments to the *convivir*, but the recollection of those directors was that they were unaware of the extortionate nature of AUC's activities.

### **Foreign Terrorist Organizations**

On September 10, 2001, the U.S. government designated AUC as a foreign terrorist organization (FTO) and shortly thereafter as a specially designated global terrorist (SDGT), thus making it illegal for the United States or any U.S.-based companies or representatives thereof to conduct business with AUC or any such labeled organizations. Although the Foreign Corrupt Practices Act of 1977 had outlined similar stipulations, up to this point in time participation in such activities had not been considered a crime. AUC's September 2001 FTO designation elevated any interaction with the organization to that of a federal crime. According to the U.S. State Department, any transaction or dealing with an FTO was prohibited, and violations were subject to federal—civil and criminal—penalties.<sup>13</sup>

Despite national and international news coverage of AUC's status change to FTO and SGDT, Chiquita's management claimed it never received information about the terrorist

---

<sup>10</sup> Michael Evans, ed. "Documents Implicate Colombian Government in Chiquita Terror Scandal: Company's Paramilitary Payoffs Made through Military's 'Convivir,'" *National Security Archive Electronic Briefing Book No. 217*, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB217/index.htm> (accessed January 13, 2012).

<sup>11</sup> Sean Harrell, "Special Litigation Committee Report Supports Chiquita Motion to Dismiss," *The Race to the Bottom* (blog), May 12, 2009, <http://www.theracetothetbottom.org/chiquita/special-litigation-committee-report-supports-chiquita-motion.html> (accessed January 30, 2012).

<sup>12</sup> Sue Reisinger, "Hard Choices," *Corporate Counsel*, December 2007.

<sup>13</sup> U.S. Department of State, "Foreign Terrorist Organization Fact Sheet," press release, September 1, 2010, <http://www.state.gov/r/pa/prs/ps/2010/09/146554.htm> (accessed January 30, 2012).

designation. Chiquita continued to make extortion payments to AUC. See **Exhibit 2** for sample media coverage of this government ruling.

### **Chiquita's Security Payments**

The chairman and CEO of Chiquita, Fernando Aguirre, commented, "As the security situation in the countryside continued to deteriorate—under a central government and military that, despite its best efforts, could not protect Colombia's citizens from these paramilitary groups—our company has been forced to make protection payments to safeguard our work force."<sup>14</sup>

On February 20, 2003, an in-house Chiquita employee came across the State Department's FTO designation of AUC via the Internet and reported it to Chiquita's senior management. Realizing the serious impact of the State Departments' designation, Chiquita contacted outside counsel, who told Chiquita it "must stop payments" or report them to the DOJ.<sup>15</sup>

In early April 2003, acting on outside counsel's advice, Chiquita's general counsel told the audit committee of the board of directors about the illegality of the payments six weeks after learning of the illegality. The audit committee immediately determined that payments should be disclosed to the DOJ.

### **Chiquita Notifies the DOJ**

Earlier in his career, Roderick Hills had served as chairman of the Securities and Exchange Commission (SEC), and he had unveiled a program that encouraged companies to investigate themselves when they learned that "questionable payments" had been made to foreign officials. When those companies conducted independent investigations of such payments, they provided a full report to the SEC and full disclosure to shareholders.<sup>16</sup>

The SEC was unlikely to prosecute unless fraud was suspected. That practice in following years became common in many regulatory agencies. It seemed that Hills very much continued to believe in this practice.

While Chiquita staunchly defended its stance to protect its Banadex employees, the DOJ processed the information but publicly commented very little. Chiquita, however, recognized its

---

<sup>14</sup> Aguirre.

<sup>15</sup> Reisinger.

<sup>16</sup> Laurie P. Cohen, "Chiquita under the Gun: After Disclosing Payments to Colombian Terrorists, Company Officials Face Legal Jeopardy," *Wall Street Journal*, August 2, 2007.

employees' lives were at stake and that serious economic and political repercussions might result for Colombia.<sup>17</sup> According to Aguirre, There was a very, very strong signal that if the company would not make payments, things would happen. And since they had already killed at least 50 people, it was clear to everyone there that these guys meant business.<sup>18</sup>

The outcome of April's meeting presented Chiquita with a more ambiguous set of circumstances. Chiquita's audit committee was told that careful consideration would be given to whether prosecutorial discretion would be used so that there would be no action for prior conduct and also that the policy issues raised by Hills would be discussed with other government officials. Years later, in its complaint against Chiquita, the DOJ stated that there was "uncertainty" about continuing payments.<sup>19</sup> As Chiquita awaited further direction from Chertoff and the DOJ, the payments continued.

### **Restructuring within the DOJ**

In June 2003, Chertoff left his DOJ post but directed Hills to follow up with then-Deputy Attorney General Larry D. Thompson, who praised Chiquita for "doing the right thing in disclosing the payments"<sup>20</sup> and confirmed that the DOJ was consulting with other agencies. Thompson, however, was not able to provide Chiquita with advice about how it should proceed before he left his position at the DOJ two months later to become a senior fellow at the Brookings Institution.<sup>21</sup>

### **Chiquita's Dilemma**

Hills had thought the DOJ understood Chiquita's position and its concern for employee safety should the payments stop; however, complicating political circumstances surrounding the payments provided numerous additional challenges. As Chiquita continued to wait on further directives from the DOJ, it proceeded to make payments to AUC. With the imminent appointment of yet another DOJ official—and the likelihood of illegal payments yet to come—Chiquita's management, with board approval, intensified discussions with a Colombian company that was interested in purchasing Chiquita's Colombian assets. After announcing the sale but two months before its consummation, the DOJ for the first time demanded that Chiquita stop the payments.

---

<sup>17</sup> Reisinger.

<sup>18</sup> Kroft.

<sup>19</sup> Justice Department Indictment, "United States of America versus Chiquita Brand International, Inc." <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB217/indictment.pdf>, March 14, 2007 (accessed October 2010).

<sup>20</sup> Carol Leonnig, "In Terrorism-Law Case, Chiquita Points to U.S.," *Washington Post*, August 2, 2007.

<sup>21</sup> "Larry D. Thompson, Bush Administration Deputy Attorney General, Joins Brookings as a Senior Fellow," Brookings Institution website, September 25, 2003, <http://www.brookings.edu/media/NewsReleases/2003/20030925thompson.aspx> (accessed January 23, 2012).

The audit committee of Chiquita was presented with a final challenge. After Chiquita's decision to sell its Colombian operations was public information,<sup>22</sup> and the DOJ insisted that Chiquita make no further payments, Chiquita's management in Colombia insisted that a failure to make this one last payment before the sale was consummated would create a severe risk that some employee would be killed. Their decision was agonizing.

---

<sup>22</sup> "Chiquita Agrees to Sell Operations in Colombia," *PR Newswire*, June 11, 2004, <http://www.prnewswire.co.uk/cgi/news/release?id=124774> (accessed January 23, 2012).



## Exhibit 1

**CHIQUITA AND THE U.S. DEPARTMENT OF JUSTICE**

## Chiquita's Financial Reports

(In Millions)	2001*	2002	2003**	2004	2005	2006	2007
Net Sales	\$1,882	\$1,443	\$2,614	\$3,071	\$3,904	\$4,499	\$4,663
Operating income (loss)	\$33	\$32	\$140	\$113	\$188	-\$28	\$31
Total operating assets	\$1,653	\$1,642	\$1,707	\$1,780	\$2,833	\$2,739	\$2,678
Shareholder's equity	\$449	\$629	\$757	\$839	\$994	\$871	\$895

\*October 2001: Bananas accounted for over 50% of Chiquita's sales.

\*\*2003 Productivity from banana operations in Colombia: approximately 11 million boxes of bananas represent about 10% of its volume sourced from Latin America.

Data source: Chiquita Brands International annual reports, 2001-07.

Exhibit 2

**CHIQUITA AND THE U.S. DEPARTMENT OF JUSTICE**

Excerpts from FTO Media Announcements

---

**Office of the Coordinator for Counterterrorism; Designation of a Foreign Terrorist Organization**

Pursuant to section 219 of the Immigration and Nationality Act ("INA"), as added by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, section 302, 110 Stat. 1214, 1248 (1996), and amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996), the Secretary of State hereby designates, effective September 10, 2001, the following organization as a foreign terrorist organization: The "United Self-Defense Forces of Colombia", also known as the "Autodefensas Unidas de Colombia", also known as the "**AUC**".

Dated: September 5, 2001.  
Ambassador Francis X. Taylor,  
Coordinator for Counterterrorism, Department of State.  
[FR Doc. 01-22638 Filed 9-7-01; 5:00 pm]  
BILLING CODE 4710-10-P  
[Public Notice 3770]  
Document freg000020010910dx9a00029

10 September 2001  
Federal Register  
Vol. 66, No. 175

---

**Colombia paramilitaries, now dubbed terrorists by Washington, a force to be reckoned with**

By JARED KOTLER

BOGOTA, Colombia (AP) - Colombia's outlawed right-wing paramilitary militias, responsible for some of the worst atrocities in this country's decades-old civil war, say they hope one day to be considered a legitimate political force.

Their quest for respectability took a blow Monday in Washington when the U.S. State Department labeled the United Self-Defense Forces of Colombia, or **AUC**, a terrorist group - making financial support for the group illegal and requiring U.S. financial institutions to block its assets.

The **AUC** joins 30 other groups on the U.S. list, including the two leftist Colombian guerrilla armies the paramilitaries are dedicated to destroying.

The announcement from Washington precedes U.S. Secretary of State Colin Powell's visit to Colombia on Tuesday and Wednesday, and reflects growing U.S. concern about the 8,000-strong militias, which have grown into a major force and a thorn in Colombian government-rebel peace negotiations.

While few Colombians say they support the **AUC**, the group's rise is coinciding with growing anti-guerrilla sentiment across the

country. Leading candidates in next May's presidential elections are echoing the **AUC**'s call for a harder government line in peace talks with the rebels.

In some rural areas, landowners and businessmen fed up with rebel kidnappings and extortion see the **AUC** as the lesser of two evils. The paramilitaries arose in the 1980s as a vigilante force formed by drug traffickers and ranchers trying to defend themselves against rebel kidnappers.

The **AUC** has pushed the rebels out of several of their traditional strongholds. But its methods are often brutal.

Paramilitary fighters have repeatedly dragged unarmed villagers from their homes, accused them of supporting the guerrillas, and publicly executed them. In one massacre this year, officials said the **AUC** used chain saws on its victims...

11 September 2001  
Associated Press Newswires