

ECUADOR

TRADE SUMMARY

The U.S. trade deficit with Ecuador was \$2.6 billion in 2004, an increase of \$1.3 billion from \$1.3 billion in 2003. U.S. goods exports in 2004 were \$1.7 billion, up 15.2 percent from the previous year. Corresponding U.S. imports from Ecuador were \$4.3 billion, up 57.4 percent. Ecuador is currently the 50th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Ecuador in 2003 was \$1.4 billion, up from \$1.28 billion in 2002. U.S. FDI in Ecuador is concentrated largely in the mining sector.

FREE TRADE NEGOTIATIONS

In May 2004, the United States initiated free trade agreement (FTA) negotiations with three Andean nations -- Colombia, Peru and Ecuador. Bolivia is participating as an observer and is expected to become part of the agreement at a later stage. The U.S. Government will seek to address the issues described in this chapter within the context of these negotiations. The four Andean countries collectively represented a market of about \$8.5 billion for U.S. exports in 2004, and were home to about \$7.2 billion in U.S. foreign direct investment.

IMPORT POLICIES

Tariffs

When Ecuador joined the WTO in January 1996, it bound most of its tariff rates at 30 percent or less. Ecuador's average applied tariff rate is 13 percent. Ecuador applies a four-tiered structure with levels of five percent for most raw materials and capital goods, 10 percent or 15 percent for intermediate goods, and 20 percent for most consumer goods. A small number of products, including planting seeds, agricultural chemicals and veterinary products are duty-free.

As a member of the Andean Community (CAN), Ecuador grants and receives exemptions from tariffs (i.e., reduced *ad valorem* tariffs and no application of the Andean Price Band System) for products from the other CAN countries (Bolivia, Colombia, Peru and Venezuela). Currently, these countries have an Andean Free Trade Zone and apply Common External Tariffs (CET), as stated in CAN Decision 370. There is a proposal for a new CET with a three-tiered structure, with levels of 5, 10 and 20 percent tariffs. The proposed structure has not been approved by the CAN. The United States is seeking the elimination of Ecuador's duties on U.S. exports in the FTA negotiations, upon entry into force of the agreement where possible and over time for the most sensitive products.

Ecuador maintains the Andean Price Band System (APBS) on 153 agricultural products (13

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“marker” and 140 “linked” products) imported from outside the CAN. The 13 “marker” products are wheat, rice, sugar, barley, white and yellow corn, soybean, soybean meal, African palm oil, soy oil, chicken meat, pork meat and powder milk. Under this system, the *ad valorem* CET is adjusted (increased or reduced) according to the relationship between international reference prices, established floor and ceiling prices and the importation price of the commodity. Upon accession to the WTO, Ecuador bound its *ad valorem* tariffs (including the additional levy from the APBS) for these commodities at between 31.5 and 85.5 percent.

As part of its WTO accession, Ecuador committed to phase out its price band system, starting in January 1996, with a total phase out by December 2001. No steps have been taken to comply with this commitment. The U.S. Government is seeking through the FTA negotiation to eliminate Ecuador’s barriers to our trade in agricultural products, while providing reasonable adjustment periods and safeguards for producers of import sensitive agricultural products.

Non-Tariff Measures

Ecuador has failed to eliminate several non-tariff barriers since its WTO accession. Importers must register with the Central Bank through approved banking institutions to obtain an import license. Ecuador requires prior authorization from various government agencies, e.g., the Ministry of Agriculture (MAG), for importation of most commodities, seeds, animals and plants. Also, the Ministry of Health must give its prior authorization (i.e., sanitary registration) before the importation of processed, canned and packed foods, food ingredients, beverages, cosmetics and pharmaceutical products. Another administrative hurdle agricultural importers must overcome is the MAG’s use of “Consultative Committees.” These committees, mainly composed of local producers, often advise the MAG against granting import permits to foreign suppliers. The MAG often requires that all local production be purchased at high prices before authorizing imports.

Ecuador also continues to maintain a preshipment inspection (PSI) regime. Preshipment inspection by an authorized inspection company (both before shipment and after specific export documentation has been completed at the intended destination) results in delays far exceeding the time saved in customs clearance. Customs authorities sometimes perform spot-checks, causing further delays. These practices generally add six to eight weeks to shipping times.

Ecuador maintains bans on the import of used motor vehicles, tires and clothing. Ecuador applies a 27 percent markup on imported distilled spirits for excise tax purposes. As excise taxes on imports are calculated on CIF value plus import duties, the effective rate is higher for imports than domestic products. Ecuador has not equalized the application of excise taxes between imported and domestic products.

In December 1999, the MAG, through the Ecuadorian Animal and Plant Health Inspection Service (SESA), issued a requirement that all importers must present a certificate stating that imported agricultural products (plants, animals, their products or byproducts) have not been

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produced using modern biotechnology. In November 2002, the President issued Executive Decree 3399 creating the National Commission for Biosafety as an office of the Ministry of Environment. It is responsible for biotechnology-related products and regulations issues. However, no rules have yet been enacted.

STANDARDS, TESTING, LABELING AND CERTIFICATION

Over the last two years, INEN has imposed unreasonable and costly certification requirements on imports of refrigerators, freezers and gas ranges of U.S. origin. These requirements have not been published in advance and have impeded market access for U.S. manufacturers. None of these certification requirements were notified to WTO members for comment as required by the WTO Agreement on Technical Barriers to Trade. In fact, Ecuador has never notified the WTO of any new or proposed changes in its technical regulations or conformity assessment procedures.

SESA is responsible for administering Ecuador's sanitary and phytosanitary controls. According to Ecuadorian importers, bureaucratic procedures required to obtain clearance still appear to discriminate against foreign products. Ecuador is bound by the WTO Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures, yet denials of SPS certification often appear to lack a scientific basis and to have been used in a discriminatory fashion to block the import of U.S. products that compete with Ecuadorian production. This occurs most often with poultry, turkey and pork meats, beef, dairy products and fresh fruit. The ability to import some products, such as rice, corn, soybeans and soybean meal depends entirely on the discretion of the MAG, which will often look to the Consultative Committees for advice. Ecuador has yet to fulfill its notification obligations under the WTO SPS Agreement.

SESA follows the CAN's "Andean Sanitary Standards." Some standards applicable for third countries are different from those applied to CAN members. For example, there can be differences in the requirements for CAN and third countries for the importation of live animals, animal products, and plants and plant by-products. SESA also requires certifications for each product stating that the product is safe for human consumption or, in the case of live animals, that the animal is healthy and that the country of origin or the area of production is free from certain exotic plant or animal disease. Industry sources assert that this process has been used unreasonably by SESA to prevent entry of animal products -- especially poultry -- that compete with local producers.

Sanitary registrations are required for imported as well as domestic processed food, cosmetics, pesticides, pharmaceuticals, and syringes, as well as some other consumer goods. However, in a side agreement to its WTO Accession Agreement, Ecuador committed to accept the U.S. Certificate of Free Sale authorized by the U.S. Food and Drug Administration, instead of the Government of Ecuador's Sanitary Registration. In August 2000, the Government of Ecuador passed a law (Ley de Promocion Social y Participacion Ciudadana, Segunda Parte -- also known as Trolley II), followed by regulations issued in June 2001, to reform the issuance of sanitary

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permits for food products. This is a step towards modernizing the issuance of sanitary registrations with new regulations that allow the acceptance of free sale certificates, require that the government issue sanitary permits within 30 days of the receipt of the request, and reduce the number of documents required to obtain a permit. However, it does not appear that these regulations are being applied consistently. U.S. firms report that the Izquieta Perez National Hygiene Institute (INHIP - the agency responsible for registering imported processed food products) office in Guayaquil has refused to accept U.S. Certificates of Free Sale and continues to apply the old regime for sanitary permits. In addition, non-transparent bureaucratic procedures and inefficiency have delayed issuance beyond 30 days and in some cases have reportedly blocked the entry of some imported products from the United States.

U.S. companies have expressed concerns regarding regulations issued by Ecuador's public health ministry requiring foreign food manufacturers to disclose confidential information such as formulas of imported food and pharmaceutical products. This requirement appears to go beyond the requirements of the Codex Alimentarius Commission on International Standards and Labeling.

GOVERNMENT PROCUREMENT

Government procurement is regulated by the 1990 public contracting law. Foreign bidders must be legally represented in Ecuador. The law does not discriminate against U.S. or foreign suppliers. Bidding for government contracts can be cumbersome and insufficiently transparent. This can lead to multiple cancellations of bid solicitations, unnecessarily adding to the costs of submitting bids, and opens the process to possible manipulation by contracting authorities. Ecuador is not a signatory to the WTO Agreement on Government Procurement. In the FTA negotiations the U.S. Government is seeking opportunities for U.S. companies to bid on Ecuadorian government procurement.

EXPORT SUBSIDIES

Ecuador has created a semi-independent agency, the Corporation for the Promotion of Exports and Investments (Corpei), to promote Ecuadorian exports. Using a European Union loan, Corpei offers matching grants to exporters to help fund certain expenses, including international promotional events and export certifications.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

In 1998, Ecuador enacted a comprehensive law that significantly improved the legal basis for protecting intellectual property, including patents, trademarks and copyrights. The intellectual property law provides greater protection for intellectual property; however, it is deficient in a number of areas and the law is not being adequately enforced.

Ecuador's current intellectual property regime is provided for under its IPR law and Andean Pact

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Decisions 486, 345 and 351. Ecuador is a member of the World Intellectual Property Organization (WIPO) and is a member of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Furthermore, Ecuador has ratified the Berne Convention for the Protection of Literary and Artistic Works, the Geneva Phonograms Convention, the Paris Convention for the Protection of Industrial Property and the WIPO Patent Cooperation Treaty.

The United States is currently negotiating IPR provisions under the ongoing Andean FTA negotiations to improve protection and strengthen enforcement of IPR. The U.S. Government is seeking to address specific U.S. industry concerns related to the protection and enforcement of copyrights and related rights, patents, proprietary data for pharmaceutical and agricultural products, trademarks and geographical indications.

Copyrights

The Government of Ecuador, through the National Copyright Office's Strategic Plan against Piracy, has committed to take action to reduce the levels of copyright piracy, including implementation and enforcement of its 1998 Copyright Law. Enforcement of copyrights remains a significant problem, especially concerning sound recordings, computer software and motion pictures. The Government of Ecuador has taken no action to clarify Article 78 of the 1999 Law on Higher Education, which could be interpreted to permit software copyright violations by educational institutions.

Patents and Trademarks

Ecuador's 1998 IPR law provided an improved legal basis for protecting patents, trademarks, and trade secrets. However, concerns remain regarding several provisions, including a working requirement for patents, compulsory licensing and the lack of enforcement in the protection of test data. U.S. companies also are concerned that the Ecuadorian government does not provide patent protection to second uses, which would allow a company with a patented compound for one use to subsequently patent a second use of that compound.

Government of Ecuador health authorities continue to approve the commercialization of new drugs which are the bioequivalents of already approved drugs, thereby denying the originator companies the exclusive use of their data. In effect, the Government of Ecuador is allowing the test data of registered drugs from originator companies to be used by others seeking approval for their own pirate version of the same product.

Enforcement

There continues to be an active local trade in pirated audio and video recordings, computer software and counterfeit brand name apparel. The International Intellectual Property Alliance estimates that piracy levels in Ecuador for both motion pictures and recorded music has reached 95 percent, with estimated damage due to music piracy of \$50 million to \$60 million. At times,

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judges in IPR cases, before issuing a preliminary injunction, demand a guaranty and evidentiary requirements that exceed legal requirements and in effect limit the ability of rights holders to enforce their rights. Ecuador has made no progress in establishing the specialized IPR courts required by Ecuador's 1998 IPR law. The national police and the customs service are responsible for carrying out IPR enforcement but do not always enforce court orders. Some local pharmaceutical companies produce or import pirated drugs and have sought to block improvements in patent protection. U.S. industry estimates damage due to the failure to provide data exclusivity is at least \$5 million.

SERVICES BARRIERS

Ecuador has ratified the WTO Agreement on Financial Services. The 1993 Equity Markets Law and the 1994 General Financial Institutions Law significantly opened markets in financial services and provided for national treatment for foreign suppliers. Foreign professionals are subject to national licensing requirements. The Superintendent of Banks must certify accountants.

In the area of basic telecommunications, Ecuador only subscribed to WTO commitments for domestic cellular services. It did not make market access or national treatment commitments for a range of other domestic and international telecommunications services, such as voice telephony and data. In addition, Ecuador does not adhere to the pro-competitive regulatory commitments of the WTO Reference Paper. Several U.S. telecommunications companies have had their international circuits disconnected without proper notice of alleged infractions. The Government has also used Ecuadorian courts to delay, on questionable grounds, implementation of an arbitral award in favor of a U.S. company.

The U.S. Government is seeking through the FTA negotiations to secure greater access for U.S. providers of cross-border services to the Ecuadorian market, including in the areas of financial and telecommunications services.

INVESTMENT BARRIERS

Ecuador's foreign investment policy is governed largely by the national implementing legislation for Andean Pact Decisions 291 of 1991 and 292 of 1993. Under Ecuadorian law, foreign investors are accorded the same rights of establishment as Ecuadorian private investors, may own up to 100 percent of enterprises in most sectors without prior government approval, and face the same tax regime. There are no controls or limits on transfers of profits or capital. The U.S.-Ecuador Bilateral Investment Treaty (BIT), which entered into force in May 1997, includes obligations relating to national and most-favored-nation treatment; prompt, adequate and effective compensation for expropriation; the freedom to make investment-related transfers; and access to binding international arbitration of investment disputes. U.S. companies are sometimes reluctant to resolve commercial disputes in the Ecuadorian legal system, fearing a prolonged process and a lack of impartiality, among other things.

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In early 2005, Ecuador's Congress modified the Arbitration and Mediation Law to prohibit international arbitration if the national interest could be affected. Depending on how it is interpreted and applied, this modification of Ecuador's law could conflict with Ecuador's standing consent to binding arbitration under the U.S.-Ecuador BIT. At a minimum, the new law will create confusion among investors regarding their arbitration rights and may also reinforce negative impressions among investors of Ecuador's commitment to international arbitration.

Certain sectors of Ecuador's economy are reserved to the state. All foreign investment in petroleum exploration and development in Ecuador must be carried out under contract with the state oil company. U.S. and other foreign oil companies produce oil in Ecuador under such contracts. Several of these companies are involved in a dispute with the government of Ecuador relating to the refund of value-added taxes. In 2004, one of the disputing U.S. companies won a \$75 million international arbitration award against the government of Ecuador. The Government has requested a judicial review of the arbitration award. After notice of the award, Ecuador's Solicitor General (Procurador General) initiated an investigation of the company for allegedly transferring assets to another foreign company without obtaining the required authorization from the state. The Ecuadorian government has since advocated the nullification of the company's contract and seizure of the company's considerable assets in Ecuador.

Foreign investment in domestic fishing operations, with exceptions, is limited to 49 percent of equity. Foreign companies cannot own more than 25 percent equity in broadcast stations. Foreigners are prohibited from owning land on the borders or the coast.

Effective compensation for expropriation is provided for in Ecuadorian law but is often difficult to obtain. The extent to which foreign and domestic investors receive prompt, adequate and effective compensation for expropriations varies widely. It can be difficult to enforce property and concession rights, particularly in the agriculture, oil and mining sectors. Foreign oil, energy and telecommunications companies, among others, have often had difficulties resolving contract issues with state or local partners. The transparency and stability of the country's investment regime are significantly weakened by the existence of numerous investment-related laws which overlap or appear to have mutually inconsistent provisions. This judicial complexity increases the risks and costs of doing business in Ecuador.

The U.S. Government has worked with the Government of Ecuador both before and in parallel with the FTA negotiations to ensure a fair resolution of U.S. investor disputes, consistent with Ecuadorian law. Some of those disputes have been resolved while others remain pending.

ELECTRONIC COMMERCE

Ecuador passed an electronic commerce law in April 2002 that makes the use of electronic signatures in business transactions on the Internet legally binding and makes digital theft a crime. Ecuador has initiated a program for e-government services and to promote public access to

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information technology through funding from international financial institutions. The U.S. is seeking in the FTA negotiations to include rules prohibiting duties on and discrimination against digital products, such as computer programs, videos, images, and sound recordings, based on where they are made or the nationality of the firms or persons making them.