

ECUADOR

TRADE SUMMARY

The U.S. goods trade deficit with Ecuador was \$5.6 billion in 2008, an increase of \$2.4 billion from \$3.2 billion in 2007. U.S. goods exports in 2008 were \$3.5 billion, up 17.5 percent from the previous year. Corresponding U.S. imports from Ecuador were \$9.0 billion, up 47.5 percent. Ecuador is currently the 46th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Ecuador was \$673 million in 2007 (latest data available), up from \$554 million in 2006. U.S. FDI in Ecuador is concentrated largely in the mining, manufacturing, and wholesale trade sectors.

IMPORT POLICIES

Ecuador's new constitution, issued in October 2008, establishes broad new guidelines for trade that could affect import policy and in some instances give priority to local production. These provisions require additional legislation to define how they would be implemented.

Tariffs

When Ecuador joined the WTO in January 1996, it bound most of its tariff rates at 30 percent or less, except for agricultural products in the Andean Price Band System (APBS). Ecuador's average applied MFN tariff rate was 11.7 percent in 2007 (latest data available). Ecuador applies a four-tiered structure with levels of 5 percent for most raw materials and capital goods; 10 percent or 15 percent for intermediate goods; and 20 percent for most consumer goods. 812 agricultural-related inputs (including planting seeds, agricultural chemicals, and veterinary products) enter Ecuador duty-free, up from 207 products in 2007.

As a member of the Andean Community (CAN), Ecuador grants and receives exemptions from tariffs (*e.g.*, reduced *ad valorem* tariffs and no application of the Andean Price Band System (APBS)), for products from the other CAN countries (Bolivia, Colombia and Peru). Currently, these countries have an Andean Free Trade Zone. They had agreed to apply Common External Tariffs (CET), as stated in CAN Decision 370, but implementation of the CET has been postponed until October 20, 2009.

Ecuador maintains the APBS on 153 agricultural products (13 "marker" and 140 "linked" products) imported from outside the CAN. The 13 "marker" products are wheat, rice, sugar, barley, white and yellow corn, soybeans, soybean meal, African palm oil, soy oil, chicken meat, pork meat, and powdered milk. Under the APBS, the basic (*ad valorem*) tariff is adjusted (increased or decreased) using a variable levy. The amount of the variable levy results from the relation between bi-weekly reference prices and floor and ceiling prices established by the CAN for each marker product. The price band works to maintain protection for the domestic industry by keeping tariffs high when world prices fall, and drops tariffs when world prices rise.

When Ecuador became a WTO Member it agreed 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 phase out the price band system.

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In October 2007, Ecuador increased tariffs on approximately 600 industrial and agricultural products, largely those that compete with local production. Products with tariff increases included liquor, cellular phones, major appliances, textile and leather manufactures, livestock, powdered milk, and ceramics. In November 2008, Ecuador increased tariffs for non-FTA partners to WTO ceiling rates for 940 products, including foodstuffs, household and consumer appliances, paper products, construction materials, and others. In January 2009, Ecuador imposed further measures including surcharges above the WTO tariff bindings on a wide range of goods and limitations on 2009 imports to 65-70 percent by value of 2008 imports for many other goods. Ecuador published the measures on January 22, 2009, with immediate effect, indicating that they are temporary in nature and will be in effect for one year. On February 18, 2009, Ecuador informed the WTO that it was taking the measures because of balance of payments problems. The U.S. Government is assessing the severity of the impact of Ecuador's measures on U.S. exporters.

Tariff-Rate Quotas

During the Uruguay Round, Ecuador agreed to establish tariff-rate quotas (TRQs) for a number of agricultural imports. In May of 2000, Ecuador created a TRQ Committee to administer and manage TRQs, which have remained constant. However, quota allocations are not always requested by importers because the tariffs under the APBS are often lower than the in-quota TRQ tariffs. At the same time, the TRQ Committee sometimes does not approve TRQ requests for certain products in order to protect local production. This outcome is common with products such as poultry and powdered milk.

Products subject to TRQs include wheat, corn, sorghum, barley, barley malt, soybean meal, powdered milk, frozen turkeys, and frozen chicken parts.

Nontariff Measures

Importers must register with the Central Bank through approved banking institutions to obtain import licenses for all products. Although Ecuador phased out the prior authorization requirement for most imports, it still requires prior authorization from the Ministry of Agriculture (MAG) for imports of more than 80 agricultural items originating in countries other than CAN members, as stated in COMEXI Resolution 383 of June 11, 2007. The list of products includes a number of commodities already within the APBS such as poultry, beef, dairy, horticultural products, corn, rice, palm oil, and soybean meal. For several of these imports, the Minister or a designee must provide prior import authorization. The MAG argues that the authorization is to ensure sanitary standards and tax rules are followed, but in some instances these justifications do not appear applicable.

Another administrative hurdle for agricultural importers is the MAG's use of "Consultative Committees" for import authorizations. Import authorizations are usually subject to crop absorption programs, which were to be eliminated as part of Ecuador's WTO accession in 1996. These committees, mainly composed of local producers, often advise the MAG against granting import authorizations for products such as corn, soybean meal, dairy products, and meats. The MAG often requires that all local production be purchased at high prices before authorizing imports. The impact of removing these barriers would mean an increase of U.S. exports of up to \$20 million per year according to industry estimates.

The Ministry of Health is required to provide prior authorization for processed, canned, and packaged products in the form of a sanitary registration. Importers have concerns regarding the confidentiality of information they must provide on product formulas and compositions. In general, the bureaucratic procedures that importers must follow in order to obtain authorizations continue to be lengthy and cumbersome.

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In December 2008, the government of Ecuador published new conformity assessment requirements for a broad range of products, including household and consumer appliances, footwear, brake fluids, and lubricants, among others. These requirements, which went into effect immediately, changed the way Ecuador confirmed compliance with safety and labeling standards for certain products, requiring certification by laboratories in Ecuador for domestic products or by accredited laboratories in the country of origin for imported products. Because publication and implementation were simultaneous, and because of the lack of timely WTO notification, importers were not able to comply with the new requirements and U.S. manufactured goods were held at the border. Despite new resolutions issued in January that repealed many of the problematic requirements, importers and U.S. manufacturers remain uncertain as to how they will be affected by new procedures slated to be promulgated by July 2009.

Ecuador assesses a special consumption tax (ICE) of 32 percent on imported and domestic spirits. However, the taxable base upon which Ecuador assesses the ICE differs for domestic and imported spirits. For imported spirits, the ICE is applied to the ex-customs value, which is then marked up 25 percent (*e.g.*, taxable base = [c.i.f. value + tariff + VAT] x 1.25); the ICE is assessed on this inflated value. In contrast, for domestic spirits, the ICE is assessed on the ex-factory price, and the 25 percent mark-up, although legally required, is not generally applied (*e.g.*, taxable base = [ex-factory value + VAT]). In both cases, the excise tax is based on arbitrary values and not on actual transaction values.

In December 2007, Ecuador's Constituent Assembly approved a new tax law, effective January 2008, which increased the ICE tax on a number of products, largely luxury items. The ICE tax increased for products that are largely imported rather than produced domestically, such as perfumes, luxury vehicles, all-terrain vehicles, airplanes, helicopters, and boats.

In October 2007, Ecuador passed a new Customs Law replacing its existing pre-shipment inspection (PSI) regime for imports with freight on board values of more than \$4,000 with a risk analysis system run by the Ecuadorian Customs Agency. Under this system, low-risk importers should benefit from fewer physical inspections and expedited release of their cargo. The new law also includes changes to customs processes and requirements in an effort to reduce costs and minimize delays for importers.

Ecuador maintains bans on the import of used motor vehicles and spare parts, tires, and clothing. In April 2006, Ecuador's Congress approved a Food and Nutrition Security Law. This bill invoked the precautionary principle and in practice briefly prohibited the use, handling, trade or import of any food products that may have contained organisms derived from biotechnology, since Ecuador did not possess appropriate institutions to provide proof of their safety. Ecuador's Attorney General declared this law unenforceable due to technical errors in the text.

Health Code legislation passed by Congress in December 2006 reintroduced the provisions of the Food and Nutrition Security Law. However, imports continued normally, and implementing regulations were never issued.

Article 401 of Ecuador's new constitution declares Ecuador free of transgenic seeds and cultivation. However, the President and National Assembly can allow for imports of transgenic seeds and cultivation under exceptional circumstance in the national interest. Article 15 states that the development, production, commercialization, and importation of genetically modified organisms that are harmful to human health or that are against food sovereignty or ecosystems are prohibited. These articles have not been interpreted or implemented.

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STANDARDS, TESTING, LABELING, AND CERTIFICATION

Sanitary and Phytosanitary Measures

In November 2008, Ecuador's Animal and Plant Health Inspection Service (SESA) was replaced by a new entity, the Ecuadorian Agency for Quality Assurance in Agriculture (AGROCALIDAD), which plans to overhaul and improve Ecuador's sanitary and phytosanitary (SPS) regime. According to Ecuadorian importers, under SESA bureaucratic procedures required to obtain clearance appeared to discriminate against foreign products. Denials of SPS certification often appeared to lack a scientific basis and, in certain cases, appear to have been used in a discriminatory fashion to block the import of U.S. products that compete with Ecuadorian production. This occurred most often with beef, dairy products, and fresh fruit. In May 2007, the World Organization for Animal Health (OIE) classified the United States as a "controlled risk" country for Bovine Spongiform Encephalopathy (BSE), thereby clarifying that U.S. beef and beef products are safe to trade, provided that the appropriate specified risk materials are removed. Market access for U.S. beef, beef products, and live cattle is restricted based on CAN standards related to BSE. Ecuador participated in an August 2008 trip organized by the U.S. Foreign Agriculture Service (FAS) and the U.S. Animal and Plant Health Inspection Service (APHIS) with Peru, Bolivia, and an Andean Community representative to evaluate the U.S. live cattle system with a view to improving access for U.S. live cattle to these nations.

Although Ecuador has a number of SPS measures in place for imports of agricultural products, it has only made 56 SPS notifications to the WTO. This includes notifications regarding changes to regulations aimed at complying with bilateral, multilateral, and international agreements.

SESA follows the CAN's "Andean Sanitary Standards." Some standards applicable to third countries are different from those applied to CAN members. 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.

U.S. firms report that the Izquieta Perez National Hygiene Institute (INHIP – the Ministry of Health's executive arm responsible for granting the sanitary registration certificate) accepts U.S. Certificates of Free Sale, not in lieu of sanitary registrations, but only as part of the many documents required for sanitary registration. In addition, onerous and inefficient procedures have delayed issuance beyond the 30 day limit required by the 2000 law "*Ley de Promocion Social y Participacion Ciudadana, Segunda Parte,*" and the average period for sanitary registration is seven to eight months.

GOVERNMENT PROCUREMENT

Foreign bidders must register and have a local legal representative in order to participate in government procurement in Ecuador. Bidding on government contracts can be cumbersome and relatively non-transparent. The lack of transparency subjects the procurement process to possible manipulation by contracting authorities.

In August 2008, Ecuador's Constituent Assembly passed a new public contracting law, which calls for priority for locally produced products and services in public purchases, although foreign suppliers can compete for the contracts. The law is in the process of implementation, and the government has not yet defined how it will establish priority for Ecuadorian suppliers. The law eliminates the requirement for contract awardees to obtain approval from the Attorney General and the Controller prior to being awarded a government contract. The law also creates a National Institute of Public Contracting to oversee

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transparency and timeliness of the contracting process. Bidders are required to register and submit bids for government contracts through an online system, which the government of Ecuador expects will improve transparency.

A large number of government-controlled companies (*e.g.*, fixed-line telephony providers, electric power generators and distributors, hospitals, and clinics) are not subject to Ecuador's rules on government procurement. Ecuador is not a signatory to the WTO Agreement on Government Procurement.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

The legal tenets of Ecuador's IPR regime are provided for under a domestic IPR law enacted in 1998 and Andean Community Decisions 345, 351, and 486. Ecuador's 1998 IPR law provided an improved legal basis for protecting patents, trademarks, and trade secrets. However, Ecuador's IPR regime is weak in a number of areas, including enforcement.

Concerns remain regarding several provisions, including inadequate protection of undisclosed pharmaceutical test and other data submitted for marketing approval. In effect, the government of Ecuador is allowing the test data of registered drugs from originator companies to be relied upon by others seeking approval for their own version of the same product.

U.S. companies are also concerned that the Ecuadorian government does not provide patent protection to new uses of previously known or patented products. In addition, government of Ecuador health authorities continue to approve the commercialization of new drugs that are the bioequivalent of patented drugs, thereby denying the originator companies effective patent protection for innovative drugs. A modification to Ecuador's health code in late 2006 permits sanitary registrations without regard to whether or not a medication is patented.

Enforcement

Active local trade in pirated audio and video recordings, computer software, and counterfeit brand name apparel continues. The government of Ecuador, through the Ecuadorian Intellectual Property Institute (IEPI)'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. However, weak copyright enforcement remains a significant problem, especially concerning sound recordings, computer software, and motion pictures. Although IEPI has voiced its concern, the government of Ecuador has not taken action to clarify that Article 78 of the 1999 Law on Higher Education does not permit software copyright infringement by educational institutions.

The International Intellectual Property Alliance (IIPA) estimates that pirated products accounted for 98 percent of the domestic record and music industry in Ecuador in 2007, with estimated damage due to music piracy of approximately \$37 million. Ecuador has made limited progress in establishing the specialized IPR courts required by Ecuador's 1998 IPR law. In 2008, the Attorney General's Office hired three new IPR specialists to improve its service on IPR cases. 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 counterfeit drugs and have sought to block compliance with Ecuador's intellectual property law.

IEPI and Ecuadorian Customs have increased enforcement actions in their areas of competence where they can act without a formal complaint by the rights holder, through administrative sanctions imposed by IEPI or through interception of counterfeit goods by Customs.

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SERVICES BARRIERS

Telecommunications

In the area of basic telecommunications, Ecuador has only undertaken WTO commitments for domestic cellular services. Accordingly, it does not have market access or national treatment obligations for other domestic and international telecommunications services, such as fixed-line voice telephony and data transmission services. In addition, Ecuador has not committed to adhere to the pro-competitive regulatory commitments of the WTO Reference Paper.

INVESTMENT BARRIERS

The transparency and stability of Ecuador's investment regime are affected by inconsistent application and interpretation of its investment laws. This legal complexity increases the risks and costs of doing business in Ecuador. U.S. companies have resorted to local courts or alternative dispute resolution mechanisms such as chambers of commerce; others have pursued international commercial dispute resolution mechanisms as provided for in their contracts or under the United States-Ecuador Bilateral Investment Treaty (BIT). A number of U.S. companies operating in Ecuador, notably in regulated sectors such as petroleum and electricity, have filed for international arbitration resulting from investment disputes. Investors in more lightly regulated sectors have fewer disputes.

In October 2007, Ecuador notified the World Bank's International Centre for Settlement of Investment Disputes (ICSID) that Ecuador will not consent to ICSID arbitration for oil and mining issues, introducing additional uncertainty to the investment climate in the natural resources sectors.

Ecuador's new constitution recognizes local or regional arbitration centers, or other forums as agreed to by the parties, and could limit arbitration options for investors, but these provisions have not been implemented. The new constitution also includes provisions which could limit the availability of international arbitration in new Ecuadorian investment treaties. These provisions do not appear to apply to existing treaties.

Certain sectors of Ecuador's economy are reserved to the state. All foreign investment in petroleum exploration and development 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. Foreign investment in domestic fishing operations, with exceptions, is limited to 49 percent of equity. Foreign companies cannot own more than a 25 percent equity in broadcast stations.

Several oil companies were involved in disputes with the government of Ecuador relating to the refund of value added taxes (VAT). In 2004, one of the disputing U.S. companies won a \$75 million international arbitration award against the government of Ecuador. In March 2008, the government of Ecuador paid the award. In 2006, Ecuador's solicitor general initiated an investigation of the same company for allegedly transferring assets to another foreign company without obtaining the required government authorization. The government of Ecuador nullified the company's contract and seized the company's considerable assets in Ecuador. The U.S. company has initiated arbitration proceedings under the BIT; the government of Ecuador is participating in the proceedings. In September 2008, the arbitral panel ruled that it had jurisdiction over the case.

In 2006, Ecuador amended its hydrocarbons law, unilaterally increasing the share of revenues owed to the government to 50 percent under existing oil production sharing contracts. In October 2007, Ecuador issued an executive decree increasing the share of extraordinary petroleum revenues owed to the

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government to 99 percent. Foreign oil companies in Ecuador argued that operations would not be feasible under this scenario. In December 2006, April 2008, and June 2008, three U.S. companies initiated international arbitration proceedings based on the changes (while continuing to pursue negotiated solutions), as did other foreign oil companies. One of the U.S. companies reached agreement with the government of Ecuador to buy out its contract in July 2008 and has since left the country. The government of Ecuador has initiated negotiations with the remaining foreign companies to renegotiate their contracts.

U.S. investors in the electricity sector face problems of chronic underpayment, due in part to government-regulated prices and the inability to cut off consumers that do not pay their bills; government subsidies only partially offset these losses and are not available to all firms. A 2006 electricity reform law attempts to address some of the problems affecting the sector, but the problem of underpayment has not been resolved. A new electricity mandate issued in July 2008 establishes a single electricity tariff and consolidates the 19 state distributors into one, which could facilitate ease of payment to generators. However, the mandate has not yet been implemented.