



High-Level Working Group
on U.S.-Ecuador Relations

Trade and Investment
Opportunities for the
United States and
Ecuador





HIGH-LEVEL WORKING GROUP ON U.S.-ECUADOR RELATIONS

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INTRODUCTION

The United States and Ecuador have long been connected. The two countries established diplomatic relations in the 1820s, not long after both nations had won independence from Europe. In subsequent decades, the United States and Ecuador deepened relations on the basis of values enshrined in the Inter-American System, such as democracy, the rule of law, and human rights. Whether culturally or economically, the threads that bind the countries together are many.

Economic ties in particular have contributed to shared prosperity for the people of the United States and Ecuador. Today, the United States is Ecuador's principal trading partner—making Ecuador one of only three countries in South America for which trade with the United States surpasses trade with China.¹ The United States' principal exports to Ecuador include refined petroleum, machinery, computers, fertilizer, and cereals and grains. In return, Ecuador sends crude oil, seafood, bananas, cocoa, and flowers to the United States.²

While Ecuador and the United States sought to deepen economic ties in the early 2000s, extensive negotiations over a trade agreement ended amid political and social upheaval in 2006. The two governments did not resume discussions over trade and investment until the final months of the administration of President Lenín Moreno (2017-2021). His successor, President Guillermo Lasso, has emphasized the need for Ecuador to deepen trade relations with the United States, with a particular focus on labor rights, intellectual property, gender equality, and environmental sustainability. Indeed, recent developments in both countries—including the elections of new presidents—offer a unique opportunity to discuss how the two countries might work together to combat the COVID-19 pandemic, spark economic growth, and pursue other priorities.

On June 4, 2021, Global Americans announced the formation of a High-Level Working Group on U.S.-Ecuador Relations, comprised of seasoned current and former policymakers, foreign service professionals, business leaders, and scholars. In collaboration with Global Americans staff, the Working Group has produced a series of working papers, covering a diverse range of topics central to the United States-Ecuador relationship—and in particular, fundamental to any discussion of deepening commercial and economic relations between the two countries. The High-Level Working Group has served as a forum for nonpartisan and transregional expert analysis, resulting in a series of recommendations regarding the future of United States-Ecuador relations.

¹ *Joe Biden is Determined That China Should Not Displace America*, THE ECONOMIST (July 17, 2021), <https://www.economist.com/briefing/2021/07/17/joe-biden-is-determined-that-china-should-not-displace-america>.

² U.S. Relations with Ecuador: Bilateral Relations Fact Sheet, U.S. State Department, Bureau of Western Hemisphere Affairs (Jan 19, 2021), <https://www.state.gov/u-s-relations-with-ecuador>.

EXECUTIVE SUMMARY

Ecuador is unique among the Pacific-facing countries of Latin America, standing out as the only West Coast nation in the region to lack a trade accord with the United States. Despite its dollarized economy, abundant natural resources, and pro-market policies, Ecuador is among the countries with the lowest flows of foreign direct investment in the hemisphere.

This report explains why Ecuador has historically fallen behind in trade and investment. It then evaluates the opportunities for greater commercial integration between the U.S. and Ecuador given today's political and regulatory climate.

Chapter 1 lays out the different venues in which Ecuador has pursued economic integration. Ecuador began participating in regional organizations, including the Andean Community and the Latin American Integration Association (ALADI, for its initials in Spanish), during the second half of the 20th century. The country has also engaged in multilateral trade and investment dialogues through the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). Finally, Ecuador has reached bilateral trade agreements with the European Union, the European Free Trade Association, and the United Kingdom. President Guillermo Lasso aims to forge additional agreements with Canada, China, Costa Rica, the Dominican Republic, Japan, Mexico, Panama, Russia, South Korea, and the United States, in addition to the Pacific Alliance and Trans-Pacific Partnership.

Ecuador's involvement in these venues has evolved over time (Chapter 2). In the 1990s and early 2000s, Ecuador benefited from unilateral trade preferences that the United States extended to the South American countries. These preferences reduced trade barriers for Ecuadorean products entering the United States. At the same time, Ecuador adhered to a bilateral investment treaty, which governed investments between the two countries, and was a member of the International Centre for the Settlement of Investment Disputes. Ecuador and the United States participated in negotiations over a potential free trade agreement in the mid-2000s, but disagreements over the terms and political instability in Ecuador prevented the signing of an accord. The government of Rafael Correa (2007-2017) rejected talks with the United States over a new trade agreement and withdrew Ecuador from its multilateral and bilateral investment agreements. Presidents Lenín Moreno (2017-2021) and Guillermo Lasso (2021-present) have resumed certain of these investment agreements and started talks for new trade agreements.

Chapters 3 and 4 explore the current trade and investment climate between Ecuador and the United States, describing regulations in both countries in detail. These include the Generalized System of Preferences (GSP), agricultural subsidies, the Andean price band system, ICSID membership, investor-state dispute settlements (ISDS), capital controls, and provisions in the Ecuadorean constitution related to investment.

Chapter 5 offers recommendations for policymakers in both countries to deepen U.S.-Ecuador commercial ties. First, now is an opportune moment to deepen the relationship given the presence of leaders in both countries who are open to trade. Second, the U.S. should lower tariffs on Ecuadorean products, either by resuming unilateral preferences (by renewing GSP, for example) or by reaching a bilateral accord. Third, negotiators should approach agricultural liberalization with caution. Fourth, Ecuador should continue to adopt policies that attract FDI. Fifth, both countries should carefully weigh the pros and cons of including ISDS provisions in a potential agreement. Finally, any potential agreement should offer flexibility on capital controls in exceptional circumstances.



INDEX

Introduction	4
Executive Summary	5
Index	7
1. Ecuador's Role in Trade Negotiations	8
2. U.S.-Ecuador Trade Relations over Time	12
3. U.S.-Ecuador Trade Climate	16
4. U.S.-Ecuador Investment Climate	23
5. Recommendations	28

1. ECUADOR'S ROLE IN TRADE NEGOTIATIONS

Ecuador stands out among countries on the Pacific Coast of South America. While its dollarized economy provides the country with a head start in trade and investment relative to its neighbors, the country is less connected to the world. Annual foreign direct investment flows comprise only 1.2 percent of Ecuadorean GDP—less than half the regional average.³ Ecuador is the only Pacific Coast nation in the Americas without a comprehensive trade deal with the United States.⁴ The country is also absent from the Pacific Alliance—a trade bloc comprised of Mexico, Colombia, Peru, and Chile, all relatively open economies.

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Ecuador's history with trade integration helps us understand this puzzle, as well as make the most of the trade and investment opportunities for Ecuador today. This chapter describes four forums through which Ecuador has pursued trade liberalization. Ecuador has had the most success with regional trade integration through the Andean Community and the Latin American Integration Association (ALADI). The World

Trade Organization has provided a forum for Ecuador to participate in multilateral trade integration. More recently, Ecuador has participated in bilateral trade negotiations outside of these forums.

Andean Community

Ecuador's first major effort at regional trade integration occurred through the Andean Community (CAN, for its initials in Spanish). Established in 1969 as the Andean Pact, the trade bloc included Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela at its peak. While Chile withdrew in 1976 and Venezuela exited the bloc in 2006, the Andean Pact has deepened integration among its core members over five decades.

Ecuador's first major effort at regional trade integration occurred through the Andean Community.

Through the Andean Parliament, the CAN seeks to harmonize legislation across member countries on issues including trade and investment. In the late 1990s and 2000s, the CAN also served as a forum for two major trade negotiations with non-member countries.

The first of these negotiations occurred between CAN and Mercosur—a customs union comprised of Argentina, Brazil, Paraguay, Uruguay, and Venezuela.⁵ In 1998, members of both blocs reached a framework agreement for the creation of a free trade area. In 2005, members of CAN and Mercosur agreed to a series of economic

³Foreign direct investments, net inflows (% of GDP) – Ecuador, Latin America & Caribbean, Data, World Bank, https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=EC-ZJ&most_recent_value_desc=false

⁴Canada and Mexico are signatories to the USMCA. Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica are signatories to CAFTA-DR. The United States has

bilateral free trade agreements with Panama, Colombia, Peru, and Chile.

⁵Venezuela exited CAN and joined Mercosur in 2006, citing objections to ongoing trade negotiations with the United States. In 2016, Mercosur suspended Venezuela due to human rights abuses and democratic backsliding, among other issues.

complementarity agreements (*acuerdos de complementación económica*, or ACE).⁶

A second negotiation took place between certain Andean Community members and the United States, with talks beginning in 2004.⁷ While Bolivia, Colombia, Ecuador, and Peru participated in the negotiations, domestic political turmoil caused Bolivia and Ecuador to withdraw, and Venezuelan objections to the talks led the government of Nicolás Maduro to withdraw from the CAN altogether. Colombia and Peru reached separate, bilateral agreements with the United States in 2006.⁸

Latin American Integration Association (ALADI)

The Latin American Integration Association (ALADI, for its initials in Spanish) has been a second venue for Ecuador to participate in regional integration.

Established in 1980, the ALADI included Ecuador among its founding members and now includes 13 members states in the region. It includes four major instruments for regional economic integration.

First, the ALADI requires member countries to apply preferential tariffs to other members relative to third countries.

Second, the organization requires members to apply an even more generous preferential tariff to

“relatively less economically developed countries” in the system: Bolivia, Ecuador, and Paraguay.

Third, the ALADI provides a forum for regional scope agreements, in which all member countries participate.

Fourth, members can negotiate trade deals with other members or third parties. These deals differ in their level of integration.⁹

- Partial scope agreements (*acuerdos de alcance parcial*, or AAP) lower trade barriers between two countries only in one sector.
- Economic complementarity agreements (*acuerdos de complementación económica*, or ACE) liberalize trade across all sectors but are not as comprehensive as free trade agreements.
- Free trade agreements (*tratados de libre comercio*, FTAs, or TLC) are more comprehensive than ACE, affecting trade in both goods and services.
- Association agreements (*acuerdos de asociación*, or AA) go beyond FTAs by also addressing political topics unrelated to trade.

⁶ See the section below on the Latin American Integration Association (ALADI) for a definition of ACE.

⁷ For more detail on U.S.-Andean trade negotiations, see Global Americans, “Lessons from U.S.-Latin America Previous Trade Agreements,” chapter 3 “United States-Peru Trade Promotion Agreement,” 13-16.

⁸ M. Angeles Villareal, CONG. RES. SERV., r134108, *U.S.-Peru Economic Relations and the U.S.-Peru Trade*

Promotion Agreement 1 (2007),

<https://sgp.fas.org/crs/row/RL34108.pdf>

M. Angeles Villareal, CONG. RES. SERV., RL34470, *The U.S.-Colombia Free Trade Agreement: Background and Issues 1* (2014),

<https://sgp.fas.org/crs/row/RL34470.pdf>

⁹ *Glosario*, Subsecretaría de Relaciones Exteriores, Ministerio de Relaciones Exteriores de Chile, <https://www.subrei.gob.cl/glosario>.

Between 1984 and 2020, Ecuador signed 15 ACE with countries in the region.¹⁰ Seven remain in force today: one each with Cuba, El Salvador, Guatemala, Nicaragua, and the Mercosur nations (including Venezuela, a former Mercosur member); and two with Chile.¹¹

During the same period, Ecuador signed at least 18 AAP under the ALADI framework.¹² Five remain in effect: one each with Chile, Mercosur, and Mexico; and two with Argentina.¹³

Ecuador has not negotiated any free trade agreements or association agreements within the ALADI framework.

Multilateral Trade Liberalization

Ecuador has participated in multilateral trade liberalization through the World Trade Organization, which the country joined in 2016. An active member of the Uruguay Round (1986-1994) of multilateral talks, Ecuador ratified the Marrakesh Agreement in 1996.

Since then, the General Agreement on Tariffs and Trade 1994 (GATT 1994), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) have applied to the country. Ecuador has not adopted the 2005 Amendment to the TRIPS Agreement, which creates certain exceptions to patents related to medicines.¹⁴

Bilateral Trade Negotiations

¹⁰ *Acuerdos Históricos: Ecuador*, Asociación Latinoamericana de Integración (ALADI), <https://www2.aladi.org/nsfaladi/histtextacdos.nsf/vpaisR/ecuador>;

Acuerdos Actuales: Ecuador, Asociación Latinoamericana de Integración (ALADI), <https://www2.aladi.org/nsfaladi/textacdos.nsf/vpaisR/ecuador>.

Apart from regional and multilateral negotiations, Ecuador has pursued trade integration through bilateral trade agreements, signing free trade agreements with the European Union in 2014 and the European Free Trade Association in 2018. Colombia, Ecuador, and Peru also signed a trade agreement with the United Kingdom in 2019 to continue trade preferences after the UK's exit from the EU.

The government of President Guillermo Lasso has launched an initiative to forge at least ten free trade agreements by 2025, including Canada, China, Costa Rica, the Dominican Republic, Japan, Mexico, Panama, Russia, South Korea, and the United States.

The government of President Guillermo Lasso has launched an initiative to forge at least ten free trade agreements by 2025, including Canada, China, Costa Rica, the Dominican Republic, Japan, Mexico, Panama, Russia, South Korea, and the United States. Ecuador is also seeking admission to the Pacific Alliance and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The latter agreement has been signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Figure 1 shows Ecuador's current trade agreements and ongoing FTA negotiations.

¹¹ *Acuerdos Actuales*, *supra* note 10.

¹² *Acuerdos Históricos*, *supra* note 10; *Acuerdos Actuales*, *supra* note 10.

¹³ *Acuerdos Actuales*, *supra* note 10.

¹⁴ *Amendment of the TRIPS Agreement*, World Trade Organization (WTO), https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm

2. U.S.-ECUADOR TRADE RELATIONS OVER TIME

Although Ecuador and the United States do not yet have a comprehensive free trade agreement, the two countries have gradually liberalized bilateral trade over the last 30 years. Beginning in 1991, the United States granted Ecuador unilateral tariff reductions to encourage economic development. In the years since then, the United States and Ecuador have negotiated further, eventually reaching a phase-one agreement in 2020.

1975-2004: Unilateral Trade Preferences and Bilateral Investment Deals

Beginning in 1975, the U.S. government extended unilateral trade preferences to developing countries through the Generalized System of Preferences (GSP).¹⁵ Ecuador took advantage of these preferences until the U.S. Congress allowed GSP to expire for all countries in December 2020.¹⁶

At times, the U.S. has complemented GSP with deeper unilateral preferences for specific regions. In 1991, the United States passed the Andean Trade Preference Act (ATPA), extending duty-free privileges to many imports from Bolivia, Colombia, Ecuador, and Peru.¹⁷ The legislation, scheduled to expire in 2001, intended to promote economic development for the four countries—

part of a broader U.S. strategy to provide economic alternatives to those engaged in drug trafficking and production. While ATPA expired in 2001, the U.S. Congress renewed and expanded the program months later with the 2002 Andean Trade Promotion and Drug Eradication Act (ATPDEA).

Congress repeatedly extended ATPDEA, originally scheduled to expire after four years. Peru and Colombia lost ATPDEA eligibility in 2009 and 2012, respectively, when they began implementing bilateral FTAs with the United States. The United States withdrew ATPDEA preferences from Bolivia in 2008, citing the Bolivian government's failure to combat drug trafficking.¹⁸ Ecuador received duty-free access to the United States under ATPDEA until the U.S. government terminated the program in 2013 (see below).

While unilateral preferences governed U.S.-Ecuador trade relations until the early 2010s, multilateral and bilateral agreements governed investment.

While unilateral preferences governed U.S.-Ecuador trade relations until the early 2010s, multilateral and bilateral agreements governed investment. In 1986, Ecuador joined the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank apparatus that arbitrates disputes between

¹⁵ CONG. RES. SERV., IF11232, TRADE PROMOTION AUTHORITY (TPA), IN FOCUS 1 (Jan. 13, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11232>, 1.

¹⁶ Marc L. Busch, *Is this the end of the generalized system of preference on trade?*, THE HILL (June 26, 2021), <https://thehill.com/opinion/international/560092-is-this-the-end-of-the-generalized-system-of-preferences-on-trade>

¹⁷ Philip I. Levy, *The United States-Peru Trade Agreement: What Did You Expect?* 11-12 (Am. Enterprise Inst.

Working Paper, July 15, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501243

¹⁸ Kathryn Ledebur and John Walsh, *Obama's Bolivia ATPDEA Decision – Blast from the Past or Wave of the Future? I* (WOLA, Aug. 11, 2009), <https://www.wola.org/sites/default/files/downloadable/Andes/Bolivia/Past/ATPDEABlastfromthePast.pdf>

investors and states.¹⁹ In 1990, the country signed the U.S.-Ecuador Trade and Investment Council (TIC) Agreement, which created a ministerial-level forum for trade and investment negotiations.²⁰ Ecuador and the United States also signed a bilateral investment treaty (BIT) in 1993, which limited the use of expropriation, guaranteed national treatment and free transfer of funds associated with investment, prohibited performance requirements for investments, and affirmed investors' rights to international arbitration.²¹

2004-2007: Andean-U.S. Trade Negotiations

Although ATPA and ATPDEA provided Andean countries with temporary duty-free access to the U.S. market, the governments of Bolivia, Colombia, Ecuador, and Peru sought to make this access permanent. They also aimed to lock in economic reforms and encourage investment.²²

Andean-U.S. trade talks began in May 2004. Prior to the negotiations, the U.S. Trade Representative warned that Ecuador and Peru would be invited only if they took steps to improve labor conditions and resolve investor concerns.²³ Bolivia participated in the negotiations only as an observer.²⁴

In Ecuador, several political groups mobilized against a potential trade agreement with the United States. Most prominent were the Confederation of Indigenous Nationalities of Ecuador (CONAIE)—an extra-parliamentary organization dedicated to Indigenous rights and environmental sustainability—and Pachakutik Plurinational Unity Movement – New Country—a political party associated with CONAIE.

In 2002, the Pachakutik nominee, Lucio Gutiérrez, was elected president. While Gutiérrez had campaigned as a skeptic of globalization, he governed as a free trade advocate. CONAIE mobilized against him beginning in 2002. In October 2004, the organization launched the *Ecuador Decide* campaign, demanding that Gutiérrez suspend trade talks with the United States and hold a referendum on any potential trade agreement.

Protests over trade and other issues reached a climax in April 2005, when the Ecuadorean Congress voted for Gutiérrez's removal from office. His successor, Alfredo Palacio, continued negotiations with the United States until continued protests and disagreements over patents and agricultural barriers led Ecuador and Colombia to temporarily withdraw from talks in November 2005.²⁵

After Peru continued talks, Colombia returned to the negotiating table. Both countries signed free

¹⁹ *About Member States: Ecuador*, International Center for Settlement Disputes (ICSID) – World Bank Group, <https://icsid.worldbank.org/about/member-states/database-of-member-states/member-state-details?state=ST42>.

²⁰ *Bilateral trade forum with US to restart in November*, THE ECONOMIST – ECONOMIST INTELLIGENCE UNIT (EIU) (Oct. 30, 2018), http://country.eiu.com/article.aspx?articleid=477284831&Country=Ecuador&topic=Politics&subtopic=F_9.

²¹ U.S. Department of State, *Ecuador Bilateral Investment Treaty 3*, <https://2001-2009.state.gov/documents/organization/43558.pdf>, 3.

²² For more detail on U.S.-Andean trade negotiations, see Global Americans, *supra* note 7, at 13-16.

²³ CONG. RES. SERV., RL32770, ANDEAN-U.S. FREE-TRADE AGREEMENT NEGOTIATIONS 3 (2006), https://www.everycrsreport.com/files/20060314_RL32770_3a9d2b85610fc5b97b882c76e61fec9755e9f03f.pdf

²⁴ *Id.*, 4.

²⁵ *Id.*, 4.

trade agreements with the United States in 2006.²⁶ Ecuador temporarily resumed negotiations in early 2006, until further protests and an oil-related investment dispute caused the United States to withdraw from talks in early 2006.²⁷

2007-2017: Trade During the Rafael Correa Administration

Discontent over globalization, corruption, free market reforms, and other issues led to the election of Rafael Correa in 2006. For several months in 2005, Correa had served as Minister of Economy and Finance under President Palacios, where he was a sharp critic of the United States and what he termed the “sophistry of free trade.”²⁸

Governing as an economic populist from 2007 to 2017, President Correa enacted new barriers to trade and investment. When it came to trade, Correa declined to resume FTA negotiations with the United States, and he refused to join the Pacific Alliance, founded in 2011 by Chile, Colombia, Mexico, and Peru. Correa’s economic policies and his offer of asylum to Edward Snowden—a former U.S. intelligence contractor who leaked classified information—led the U.S. Congress to threaten suspension of ATPDEA preferences.²⁹ The

Correa administration instead unilaterally rejected the preferences—although his government continued to benefit from the U.S. GSP.³⁰

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On the investment front, the Correa government expropriated assets, terminated all of Ecuador’s bilateral investment treaties, and withdrew from ICSID.³¹ The administration also suspended the U.S.-Ecuador TIC.³²

Correa did not give up on economic integration entirely, however. In 2011, Correa sought Ecuador’s adherence to Mercosur—a relatively protectionist customs union compared the Pacific Alliance’s open trade bloc. (Ecuador’s attempt to join Mercosur later failed when its dollarized economy proved to be an insurmountable obstacle.³³) And in 2016, the Correa government acceded to the European Union’s existing trade agreement with Peru and Colombia, following nine years of negotiations and indications that Correa would abandon talks.³⁴

²⁶ Levy, *supra* note 17, at 13; CONG. RES. SERV., RL34470, THE U.S.-COLOMBIA FREE TRADE AGREEMENT: BACKGROUND AND ISSUES 1 (2022), <https://sgp.fas.org/crs/row/RL34470.pdf>.

²⁷ Martin Crutsinger, *White House Says Ecuador Trade Talks Stall*, ASSOC. PRESS (May 16, 2006).

²⁸ “El sofisma del libre comercio,” Rafael Correa, Introduction, https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1232&context=abya_yala

²⁹ *Snowden’s Flight Path Strewn With Obstacles*, THE WALL STREET JOURNAL (June 27, 2013), <https://www.wsj.com/articles/SB10001424127887324328204578569270162405156>; Aliyah Frumin, *Did Edward Snowden just vade the US justice system?*, MSNBC (Aug. 1, 2013), <https://www.msnbc.com/hardball/did-edward-snowden-just-evade-the-us-justice-msna74847>.

³⁰ Catherine E. Shoichet, *Ecuador’s president to U.S.: Don’t threaten us on Snowden case*, CNN (June 28, 2013), <https://www.cnn.com/2013/06/28/world/americas/ecuador-snowden/index.html>

³¹ James H. Roberts, *Time to End Trade Preferences to Ecuador*, THE HERITAGE FOUNDATION (June 24, 2013), <https://www.heritage.org/trade/commentary/time-end-trade-preferences-ecuador>

³²

³³ *Correa admite que dolarización de Ecuador dificulta acuerdo con Mercosur*, SEMANA (June 12, 2012), <https://www.semana.com/economia/articulo/correa-admite-dolarizacion-ecuador-dificulta-acuerdo-mercosur/268991-3/>

³⁴ *Ecuador joins the EU’s trade agenda with Colombia and Peru*, Council of the European Union (2016),

2017-Present: Trade During the Lenín Moreno and Guillermo Lasso Administrations

Though he had served as vice president to Correa, President Lenín Moreno (2017-2021) broke with his predecessor on most topics, including trade and investment. Regarding trade, the Moreno administration forged an agreement with the European Free Trade Area (EFTA) in 2018.³⁵ The Ecuadorean government forged another trade agreement with the United Kingdom in 2019.³⁶ The same year, Moreno signaled his intention to join the Pacific Alliance.³⁷

Though he had served as vice president to Correa, President Lenín Moreno (2017-2021) broke with his predecessor on most topics, including trade and investment.

To encourage investment, Ecuador resumed TIC meetings with the United States. In 2020, the Ecuadorean government signed a protocol to the TIC Agreement. This protocol, often referred to as a “phase-one trade agreement,” is the first step since the mid-2000s toward a comprehensive trade and investment deal between the two countries (See Chapter 3).³⁸

<https://www.consilium.europa.eu/en/press/press-releases/2016/11/11/ecuador-joins-eu-trade-agreement-colombia-peru/>

³⁵ *Free Trade Agreement – Ecuador*, European Free Trade Association, <https://www.efta.int/free-trade/Free-Trade-Agreement/Ecuador>

³⁶ *Agreement, done at Quito on 15 May 2019, between the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru on Trade*, UK Parliament (2019), <https://api.parliament.uk/view/treaty/oXvXERK5>

³⁷ *Marco Aquino, Ecuador to join market-friendly Pacific Alliance under Moreno*, REUTERS (July 6, 2019),

President Guillermo Lasso has deepened Ecuador’s commitment to international trade and investment since taking office in May 2021.

President Guillermo Lasso has deepened Ecuador’s commitment to international trade and investment since taking office in May 2021. In August 2021, the Ecuadorean Congress rejoined ICSID.³⁹ Over the following months, Lasso has entered FTA negotiations with China, South Korea, and Russia while continuing to pursue membership in the Pacific Alliance. He has also sought broader trade negotiations with the United States and liberalized key sectors of the economy. The following two chapters examine the changes that President Lasso has made, as well as the broader trade and investment climate between the United States and Ecuador

<https://www.reuters.com/article/us-pacific-alliance-ecuador/ecuador-to-join-market-friendly-pacific-alliance-under-moreno-idUSKCN1U10P6>

³⁸ *Join Statement by the United States and Ecuador*, Office of the U.S. Trade Representative (Aug. 16, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/joint-statement-united-states-and-ecuador>

³⁹ *Ecuador Re-Ratifies The ICSID Convention: Impact Of The Ratification In Ecuador And In The Region*, CLEARLY GOTTLIEB (Aug. 9, 2012), <https://www.clearlygottlieb.com/-/media/files/alert-memos-2021/ecuador-re-ratifies-the-icsid-convention.pdf>

3. U.S.-ECUADOR TRADE CLIMATE

Ecuador's dollarized economy, natural resources, and pro-market policies make the country an apt trading partner for the United States. The U.S., meanwhile, acts as a large market for Ecuadorean exports and a major supplier of imports.

U.S.-Ecuador Trade

Ecuador is one of only three countries in South America to have higher trade volumes with the United States than with China.⁴⁰ In 2021, the United States exported \$5.02 billion of goods to Ecuador, while Ecuador exported \$8.16 billion to the U.S.⁴¹ Generally, Ecuador exports raw materials to the United States, while the U.S. sends manufactured goods to the South American country.

Ecuador is one of only three countries in South America to have higher trade volumes with the United States than with China.

Crude oil comprised 57 percent of Ecuadorean exports to the United States in 2019, the last year for which data are available. Vegetable products accounted for 16 percent of exports, with bananas and cut flowers among the primary sources of revenue. Other leading exports included animal

products (primarily crustaceans and fish), foodstuffs, and gold.⁴²

The principal U.S. exports to Ecuador are refined petroleum products, coal tar oil, and petroleum gases comprised 49 percent in 2019. Machines contributed another 16 percent. Other key sectors included chemical products, foodstuff (primarily soybean meal), plastics and rubbers, and vegetable products (primarily wheat).⁴³

U.S. Trade Policies: Tariffs and the Generalized System of Preferences

Until the program expired in December 2020, the majority of Ecuadorean exports to the United States benefited from the Generalized System of Preferences. Since GSP involved additional bureaucratic hurdles compared to normal trade relations, and because the margin between GSP treatment and normal relations is usually small, most eligible countries underutilized the program. In 2019 (the last year for which data are available), countries used the preferences for only 43 percent of their GSP-eligible exports to the United States; they exported their remaining GSP-eligible products through normal trade relations, paying tariffs to avoid time-consuming paperwork.⁴⁴ Ecuador stood out among GSP beneficiaries, using the preferences for nearly 90 percent of GSP-eligible products—second in the world only to Cambodia.⁴⁵ When the U.S. Congress failed to renew GSP, Ecuador was disproportionately impacted.

⁴⁰ *Joe Biden is Determined That China Should Not Displace America*, *supra* note 1.

⁴¹ U.S. Census, Trade in Goods with Ecuador, <https://www.census.gov/foreign-trade/balance/c3310.html>.

⁴² *Ecuador/United States - 2020*, The Observatory of Economic Complexity, <https://oec.world/en/profile/bilateral-country/ecu/partner/usa>.

⁴³ *Id.*

⁴⁴ CONG. RES. SERV., RL33663, GENERALIZED SYSTEM OF PREFERENCES (GSP) – OVERVIEW AND ISSUES FOR CONGRESS 28 (Jan. 2021), GSP utilization figures are calculated by import value; <https://sgp.fas.org/crs/misc/RL33663.pdf>, 28.

⁴⁵ *Id.*, 29.

GSP proponents argue that by ending generalized preferences for all countries, U.S. policymakers lost an opportunity to negotiate higher labor or environmental standards in exchange for renewing GSP. In 2013, after the United States suspended Bangladesh from the GSP program over labor concerns, Bangladeshi and U.S. officials agreed to a new framework for strengthening workers' rights.⁴⁶

When the U.S. Congress failed to renew GSP, Ecuador was disproportionately impacted.

Opponents of GSP argue that by granting preferences to only select products, the system leads beneficiary countries such as Ecuador to produce more of those goods than is economically efficient.⁴⁷ They argue further that by granting unilateral duty-free access, the United States allows trade partners to maintain harmful economic policies.⁴⁸ According to this view, a bilateral free trade agreement would be a better solution than unilateral preferences.

As of this report's publication, the U.S. Congress is considering a renewal of GSP under the

America COMPETES Act of 2022. The U.S. House of Representatives and Senate passed two different versions of the bill in February and March 2022, respectively. Both versions would renew the Generalized System of Preferences, but it remains undecided how long the renewal will last, whether it will be retroactive for products traded since 2020, and whether it will include new labor, human rights, environmental, or rule-of-law conditions.⁴⁹ The two chambers are currently resolving differences between their versions of the bill in conference.⁵⁰ Beyond the prospect for GSP renewal in general, the products included under GSP are subject to change. In October 2020, for example, the United States Trade Representative added fresh cut roses, a major Ecuadorean export, to the list of goods that benefit from GSP.⁵¹

Table 1 shows the U.S. tariffs applied to major Ecuadorean products. Since GSP expired, Ecuadorean goods are now subject to normal trade relations (NTR) tariffs upon entering the United States. The U.S. simple average tariff was 4.8 percent in 2018, the last year for which data are available. In general, agricultural products receive a higher tariff than non-agricultural goods.⁵²

⁴⁶ CONG. RES. SERV., *supra* note 44, at 30.

⁴⁷ Bernard Herz and Marco Wagner, *The Dark Side of the Generalized System of Preferences*, German Council of Economic Experts, Working Paper 02/2010, February 2010.

⁴⁸ Marc L. Busch, *Is this the end of the generalized system of preference on trade?*, THE HILL (June 26, 2021), <https://thehill.com/opinion/international/516296-congress-should-retire-not-reform-the-generalized-system-of-preferences>.

⁴⁹ <https://www.natlawreview.com/article/recent-developments-bipartisan-innovation-act-formal-conference-imminent-prospect?amp>.

⁵⁰ <https://www.congress.gov/bill/117th-congress/house-bill/4521>; See Title IV of the engrossed Senate version and Title V of the engrossed House version for specific provisions in each bill.

⁵¹ Diaz-Balart Applauds USTR's Decision to Add Fresh-Cut Roses to the GSP Program, Oct. 30, 2020.

⁵² *Trade Policy Review – United States*, World Trade Organization (WTO) (Nov. 12, 2018).

https://www.wto.org/english/tratop_e/tpr_e/s382_e.pdf, 51.

Table 1: U.S. Tariffs Applied to Ecuadorean Goods

Product	Percentage of Ecuadorean Exports to U.S. ⁵³	NTR	GSP
Crude Petroleum ⁵⁴	57%	5.25-10.5 cents per barrel (depending on American Petroleum Institute specification)	Free
Crustaceans ⁵⁵	8%	Free (except for crabmeat, which is taxed at 7.5%)	Free
Bananas and Plantains ⁵⁶	7%	Free	Free
Cut Flowers ⁵⁷	6%	3.2-6.8% (vary by flower)	Free
Refined Petroleum ⁵⁸	3%	52.5 cents per barrel for most types	Free

⁵³ Ecuador/United States – 2020, *supra* note 42.

⁵⁴ HS Code: 2709.

⁵⁵ HS Code: 0306.

⁵⁶ HS Code: 0803.

⁵⁷ HS Code: 0603.

⁵⁸ HS Code: 2710.

U.S. Trade Policies: Agricultural Subsidies

There are two primary types of agricultural subsidies. First are domestic farm subsidies, which apply regardless of whether produce is sent abroad or consumed in the United States. Second are agricultural export subsidies, which apply exclusively to produce that is sent to foreign markets.

U.S. domestic farm subsidies have created tensions in trade negotiations, with the United States refusing to discuss the topic in bilateral talks.⁵⁹ The U.S. government has also declined to commit to domestic farm subsidy reductions through NAFTA or CAFTA-DR.⁶⁰ During negotiations over a potential Free Trade Area of the Americas, the U.S. refusal to discuss domestic agricultural subsidies was a key obstacle—particularly with Brazil, itself a major agricultural exporter.⁶¹ Instead, the U.S. has opted to discuss domestic farm subsidies only in the context of the multilateral Doha Round—where talks have stalled since 2008. It is unlikely that the United

States will discuss its domestic farm subsidies in a potential U.S.-Ecuador trade negotiation.

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The United States has been more willing to reduce agricultural export subsidies. In trade agreements with Canada, Chile, Panama, Peru, and Mexico, the U.S. and its partners agreed to reciprocal elimination or reductions of these subsidies.⁶² In 2015, all WTO members agreed to eliminate most export subsidies.⁶³ The United States maintains certain types of agricultural export promotion programs—which fall short of direct payments to farmers—to comply with this WTO rule.⁶⁴

Ecuador Trade Policies: Tariffs

⁵⁹ Kevin J. Fandl, *Bilateral Agreements and Fair Trade Practices: A Policy Analysis of the Columbia-U.S. Free Trade Agreement* 79, 10 YALE HUM. RTS. & DEV. L. J. 64 (2007),

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/yhurdrv110&div=4&id=&page=>

⁶⁰ Mary E. Burfisher, Sherman Robinson, and Karen Thierfelder, *Farm Policy Reforms and Harmonization in the NAFTA*, ECON. RESEARCH SERVICE/USDA 1 (xxxx), https://www.ers.usda.gov/webdocs/publications/40898/32569_aer771h_002.pdf?v=0; CONG. RES. SERV., RL32110, AGRICULTURAL IN THE U.S.-DOMINICAN REPUBLIC-CENTRAL AMERICAN FREE TRADE AGREEMENT (DR-CAFTA) 5 (July 2006),

https://www.everycrsreport.com/files/20060721_RL32110_84d9a5a05f679d5b5dc17c54c886eb943927b2d6.pdf;

⁶¹ ANGELES RL30935, AGRICULTURAL TRADE IN THE FREE TRADE AREA OF THE AMERICAS 12 (Oct. 2003),

https://www.everycrsreport.com/files/20031031_RL30935_24186cf6dc480e7ec8a3ef155261e614d6dc0f53.pdf

⁶² Burfisher, Robinson, and Thierfelder, *supra* note 60, at 67; CONG. RES. SERV., RL31144, THE U.S.-CHILE FREE

TRADE AGREEMENT: ECONOMIC AND TRADE POLICY ISSUES 15 (Sept. 2003),

https://www.everycrsreport.com/files/20030910_RL31144_0edc485e9c6d011e315d8c0c30e5f46e6fb6be68.pdf;

J. F. Hornbeck, CONG. RES. SERV., RL32540, THE U.S.-PANAMA FREE TRADE AGREEMENT 17 (Nov. 2012), <https://sgp.fas.org/crs/row/RL32540.pdf>; CONG. RES. SERV., *supra* note 62, at 15.

⁶³ Heiz Strubenhoff, *The WTO's decision to end agricultural exports subsidies is good news for farmers and consumers*, BROOKINGS (Feb. 8, 2016),

<https://www.brookings.edu/blog/future-development/2016/02/08/the-wtos-decision-to-end-agricultural-export-subsidies-is-good-news-for-farmers-and-consumers/>; CONG. RES. SERV., R46456, REFORMING THE WTO AGREEMENT ON AGRICULTURE 12 (July, 2020), <https://sgp.fas.org/crs/misc/R46456.pdf>

⁶⁴ CONG. RES. SERV., R46760, U.S. AGRICULTURAL EXPORT PROGRAMS: BACKGROUND AND ISSUES 17 (April, 2021),

<https://crsreports.congress.gov/product/pdf/R/R46760>, 17.

Table 2 shows that Ecuador currently applies no tariffs to major U.S. exports to the country.

Table 2: Ecuadorean Tariffs Applied to U.S. Goods

	Percentage of U.S. Exports to Ecuador ⁶⁵	Tariff ⁶⁶
Refined Petroleum ⁶⁷	31%	Free for most types
Coal Tar Oil ⁶⁸	10%	Free
Petroleum Gasses ⁶⁹	8%	Free for all liquified petroleum gasses
Soybean Meal ⁷⁰	4%	Free
Wheat ⁷¹	2%	Free

The average tariff for imports to Ecuador was 12.2 percent in 2018, the last year for which data are available. In general, tariffs on agricultural products were substantially higher than tariffs on other goods.⁷²

Ecuador Trade Policies: Dollarization

Since 2000, Ecuador has used the U.S. dollar as its only official currency—a trait it shares with El Salvador and Panama, as well as a few countries outside the Western Hemisphere.

Dollarization emerged in Ecuador following an economic crisis in the late 1990s. Today, it reduces obstacles to trade.

Dollarization emerged in Ecuador following an economic crisis in the late 1990s. Today, it reduces obstacles to trade. Ordinarily, U.S. firms looking to trade with another country must account for exchange rate risk—the chance that a trade partner’s currency will appreciate or depreciate relative to the U.S. dollar. Given

⁶⁵ *Ecuador/United States – 2020*, supra note 42.

⁶⁶ *Resolución No. 020-2017*, República de Ecuador – Comité de Comercio, <https://www.produccion.gob.ec/wp-content/uploads/2019/06/RESOLUCI%C3%93N-COMEX-020-2017.pdf>.

⁶⁷ HS Code: 2710.

⁶⁸ HS Code: 2707.

⁶⁹ HS Code: 2711.

⁷⁰ HS Code: 2304.

⁷¹ HS Code: 1001.

⁷² *Trade Policy Review – Ecuador*, World Trade Organization (WTO) 51 (Jan. 8, 2019), https://www.wto.org/english/tratop_e/tpr_e/s383_e.pdf

Ecuador's dollarized economy, the country presents less exchange rate risk for firms engaged in trade.⁷³ However, dollarization also makes Ecuadorean exports less attractive compared to goods from countries with weaker currencies.

Ecuador Trade Policies: Agricultural Subsidies and Price Bands

In general, Ecuador subsidizes its agricultural sector less than the United States. Ecuador offers some support to domestic agricultural producers through pest and disease control, research and development, agricultural insurance, and other forms that fall short of direct payments to farmers. Ecuador does not grant export subsidies.⁷⁴

While its use of agricultural subsidies is limited, the Ecuadorean government does use a price band system to impose price floors and ceilings on agricultural imports.

While its use of agricultural subsidies is limited, the Ecuadorean government does use a price band system to impose price floors and ceilings on agricultural imports. This system, meant to mitigate volatility in agricultural prices and protect domestic producers, is similar to that used by Colombia and Peru.⁷⁵ Both Colombia and Peru modified their price band systems during negotiations with the United States in order to increase market access for U.S. agricultural products.⁷⁶ Potential negotiations between the

United States and Ecuador would likely address this topic as well.

U.S.-Ecuador Trade and Investment Council

The U.S. and Ecuador formed a Trade Investment Council (TIC) to negotiate bilateral commercial issues in 1990. The government of Rafael Correa suspended TIC meetings in 2009, but in November 2018, President Moreno resumed talks.

In November 2020, TIC negotiations resulted in a phase-one trade pact, updating the 1990 TIC Agreement. The agreement avoided contentious issues such as market access or agriculture, which a future comprehensive agreement may address.

In November 2020, TIC negotiations resulted in a phase-one trade pact, updating the 1990 TIC Agreement. The agreement avoided contentious issues such as market access or agriculture, which a future comprehensive agreement may address.⁷⁷ However, it did include provisions related to trade facilitation, anti-corruption measures, regulation,

⁷³ Firms that trade with Ecuador must still account for the risk that Ecuador abandons dollarization, so there is still some exchange risk.

⁷⁴ *Trade Policy Review – Ecuador*, *supra* note 72, at 12.

⁷⁵ Nelson B. Villoria and David R. Lee, *The Andean Price Band System: Effects on Prices, Protection and Producer Welfare*, Submitted Paper for AAEE Annual Conference 3 (2002)

https://www.researchgate.net/publication/23504807_THE

[ANDEAN PRICE BAND SYSTEM EFFECTS ON PRICES PROTECTION AND PRODUCER WELFARE](#)

⁷⁶ Global Americans, *supra* note 7, at 13-16.

⁷⁷ Iván Ontaneda, Nathalie Cely, Frank Samolis, Pablo Arosemena and German Creamer, *Will a U.S.-Ecuador Trade Deal Lead to a Broader Pact?*, THE DIALOGUE (Dec. 7, 2020), <https://www.thedialogue.org/analysis/will-a-u-s-ecuador-trade-deal-lead-to-a-broader-pact/>

and small- and medium-sized enterprises.⁷⁸ The phase-one pact took effect in August 2021.⁷⁹

In February 2022, the United States and Ecuador held the most recent meeting of the TIC. They addressed topics including GSP renewal,

agricultural import licensing, labor conditions, and environmental protection. Negotiators also convened a small- and medium-sized enterprises roundtable with women and Indigenous entrepreneurs.⁸⁰

⁷⁸ *Id.*

⁷⁹ *Joint Statement by the United States and Ecuador*, Office of the U.S. Trade Representative (Aug. 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/joint-statement-united-states-and-ecuador>.

⁸⁰ *Joint Statement of the United States – Ecuador Trade and Investment Council*, Office of the U.S. Trade Representative (Feb. 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/february/joint-statement-united-states-ecuador-trade-and-investment-council>.

4. U.S.-ECUADOR INVESTMENT CLIMATE

Ecuador has historically received low levels of investment relative to its Latin American neighbors. Recent changes in policy aim to reverse this trend. U.S.-Ecuador negotiations offer an opportunity to attract more investment to the South American country.

U.S. Investment in Ecuador

Ecuador is among the lowest recipients of net foreign direct investment inflows, as a percentage of GDP, in Latin America and the Caribbean. In 2020, investment flows stood at 1.2 percent of the country's gross output—less than half the regional average.⁸¹ Rising sharply from the mid-1970s, FDI collapsed in 1999 due to the Ecuador Debt Crisis. Investment briefly rebounded but then continued to decrease until 2007 amid political instability. Since then, net FDI inflows have fluctuated between 0.2 percent and 1.7 percent of GDP.⁸²

Ecuador has historically received low levels of investment relative to its Latin American neighbors. Recent changes in policy aim to reverse this trend.

The United States is the largest source of foreign direct investment for Ecuador, providing about 7

percent of the country's FDI inflows between 2016 and 2020.⁸³ The mining, finance and insurance, and wholesale trade sectors are the largest recipients of U.S. investment in Ecuador.⁸⁴

National Treatment, Expropriation, and Sector-Specific Regulations

During the 1990s and 2000s, Ecuador was required to provide national treatment to most foreign investors under the terms of the GATT 1994 and Ecuador's bilateral investment treaties.⁸⁵ Ecuador's investment regime changed when the country enacted a new constitution in 2008, which states:⁸⁶

The State shall encourage domestic and foreign investment, and shall establish specific regulations according to investment types, giving priority to domestic investment... Foreign direct investment shall supplement domestic investment; it shall abide strictly by the country's legal framework and regulations, and the application of rights, and shall be aimed at meeting the needs and priorities laid down in the National Development Plan, as well as in the various development plans of the

⁸¹ Foreign direct investments, net inflows (% of GDP) – Ecuador, Data, World Bank, https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=EC&most_recent_value_desc=false

⁸² *Id.*

⁸³ *Ecuador – 9.5.-Foreign Direct Investment & Foreign Portfolio Investments Statistics*, Privacy Shield Framework, <https://www.privacyshield.gov/article?id=Ecuador-Foreign-Direct-Investment-Statistics>.

⁸⁴ *U.S.-Ecuador Trade Facts*, Office of the U.S. Trade Representative, <https://ustr.gov/countries-regions/western-hemisphere/ecuador>.

⁸⁵ *National Treatment on Internal Taxation and Regulation*, Article III World Trade Organization (WTO), https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art3_e.pdf

⁸⁶ Constitution of Ecuador, Article 339.

decentralized autonomous governments.

In addition to the Constitution and several executive decrees, four laws primarily govern investment in Ecuador today:⁸⁷

- Organic Law on Internal Taxation (2004)
- Organic Code of Production, Trade, and Investment (COPCI, 2010, amended in 2014);
- Organic Law on Incentives for Public-Private Partnerships and Foreign Investment (2015); and
- Organic Law on the Promotion of Production, Attraction of Investment, Generation of Employment, and Fiscal Stability and Balance (2018).

Together, these regulations limit both domestic and foreign investment in strategic sectors: energy, telecommunications, non-renewable natural resources, transport and refining of hydrocarbons, biodiversity and genetic heritage, the radio spectrum, and water.⁸⁸ According to the constitution, investors can only enter strategic

sectors through a joint partnership in which the Ecuadorean state retains a majority.⁸⁹ In recent years, however, the government has increasingly yielded to private investors.⁹⁰

Foreign investors face no such restrictions on investment in non-strategic sectors, and they must obtain the same permits as domestic investors.⁹¹ One hundred percent foreign equity ownership is permitted in these sectors.

Ecuador's trade agreements with the EU, UK, and EFTA affirm Ecuador's obligation to grant national treatment to European investors in most sectors.⁹² The COPCI allows expropriation only in exceptional cases, requiring non-discrimination and "fair and adequate compensation."⁹³

Summarizing Ecuador's investment regime in 2019, the World Trade Organization stated:⁹⁴

Ecuador grants national treatment to foreign investors and guarantees the same level of protection to domestic and foreign investment, subject to the limits set forth in the Constitution, the COPCI and national laws. Foreigners with Ecuadorian residency are considered to

⁸⁷ *Trade Policy Review – Ecuador*, *supra* note 72, at 42; Ecuador's government creates legal framework to Foster PPPs, Ferrere, Aug. 17, 2016, <https://www.ferrere.com/en/news/ecuadors-government-creates-legal-framework-to-foster-ppps/>.

⁸⁸ Constitution of Ecuador, Article 313.

⁸⁹ Constitution of Ecuador, Article 316.

⁹⁰ *2021 Investment Climate Statements: Ecuador*, Section 2 U.S. Department of State, Section 1, <https://www.state.gov/reports/2021-investment-climate-statements/ecuador/>.

⁹¹ *Trade Policy Review – Ecuador*, *supra* note 72, at 43.

⁹² Textual Amendments to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru, and Ecuador, of the other part,

amended Article 113,

http://www.sice.oas.org/Trade/COL_PER_EU_FTA/Ecuador/EU_ECU_Textual_Amendments_e.pdf; Trade Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru, of the other part, Article 2, http://www.sice.oas.org/tpd/AND_GBR/Texts/AND_GB_R_MS_22.2019_e.pdf; Comprehensive Economic Partnership Between the EFTA States and the Republic of Ecuador, Article 2.8, http://www.sice.oas.org/Trade/ECU_EFTA/ECU_EFTA_Text_e.asp#A1_3.

⁹³ *Trade Policy Review – Ecuador*, *supra* note 72, at 43.

⁹⁴ *Id.*

be domestic investors when their capital is generated in Ecuador.

In February 2022, the government of Guillermo Lasso submitted a new Investment Law to the National Assembly. The law, which would simplify the approval process for foreign investors and strengthen public-private partnerships, was rejected by legislators on March 24, 2022.⁹⁵

Ecuador's Bilateral Investment Treaties and ISDS Provisions

Ecuador signed a series of bilateral investment treaties (BITs) in the 1990s, including one with the United States in 1993 that constrained the use of expropriation, guaranteed national treatment and free transfer of funds associated with investment, banned performance requirements for investments, and codified investors' rights to international arbitration (see Chapter 1). Like other BITs signed by Ecuador or the United States with third parties, the U.S.-Ecuador BIT also included an article governing investor-state dispute settlements (ISDS).⁹⁶

The Correa government began to withdraw Ecuador from these BITs in 2008, while the country was undergoing a process of constitutional reform. Article 422 of the new constitution included the following text.⁹⁷

No international treaties or instruments may be concluded where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities, in disputes involving contracts or of a commercial nature, between the State and natural persons or legal entities.

By including this text in the constitution, Correa and his supporters in the Constitutional Assembly aimed to terminate existing BITs, as well as preclude future Ecuadorean leaders from signing BITs.

Correa and his supporters in the Constitutional Assembly aimed to terminate existing bilateral investment treaties, as well as preclude future Ecuadorean leaders from signing BITs.

Between 2010 and 2014, the Constitutional Court ruled that the investor-state dispute settlement procedures in Ecuador's existing BITs violated Article 422, requiring the government to terminate the agreements.⁹⁸ In 2017, Ecuador notified the United States and several other countries of its intention to withdraw from its bilateral investment treaties. Several of these agreements include sunset clauses, which protect certain investments for many years after the Correa government's decision to terminate

⁹⁵ Diana Serrano, *Ley de Inversiones, próxima a llegar a la Asamblea*, EL COMERCIO (Feb. 9, 2022), <https://www.elcomercio.com/actualidad/negocios/proyecto-ley-inversiones-lasso-asamblea.html>; Roger Vélez, *Primer debate del proyecto de Ley de inversiones arrancó entre críticas en el Pleno*, EL COMERCIO (Mar. 13, 2022), <https://www.elcomercio.com/actualidad/politica/primer-debate-ley-inversiones-comision.html>; Lasso sufre un revés de la oposición al dejarlo sin Ley de Inversiones en Ecuador, EFE (Mar. 24, 2022), [https://www.efc.com/efe/americas/economia/el-](https://www.efc.com/efe/americas/economia/el-parlamento-de-ecuador-rechaza-la-ley-inversiones-lasso-en-primer-votacion/20000011-4769231)

[parlamento-de-ecuador-rechaza-la-ley-inversiones-lasso-en-primer-votacion/20000011-4769231](https://www.efc.com/efe/americas/economia/el-parlamento-de-ecuador-rechaza-la-ley-inversiones-lasso-en-primer-votacion/20000011-4769231).

⁹⁶ U.S. Department of State, *supra* note 21, at 3; Art. VI.

⁹⁷ Constitution of Ecuador, Article 422.

⁹⁸ Gustavo Prieto, Ecuador returns to ICSID Convention: A brief assessment of its decade-long international investment law 'exit strategy', EIJL:Talk! – Blog of the European Journal of International Law (July 19, 2021), <https://www.ejiltalk.org/ecuador-returns-to-the-icsid-convention-a-brief-assessment-of-its-decade-long-international-investment-law-exit-strategy/>.

Ecuador's BITs. Investments made prior to termination of the U.S.-Ecuador BIT, for example, are covered for 10 years.⁹⁹

The governments of Lenín Moreno and Guillermo Lasso have reviewed the Correa-era policy toward BITs and investor-state dispute settlements (ISDS) more generally. In 2018, the President of the National Assembly requested that the Constitutional Court issue a clarification on Article 422.¹⁰⁰ In January 2022, the Constitutional Court declined to give a general interpretation on whether Article 422 allows ISDS. The Court noted that it could only rule on specific cases.¹⁰¹

Given this decision, the Ecuadorean government can rejoin BITs or negotiate new trade and investment agreements with ISDS clauses. However, the Court may choose to review these clauses in the future, and it is possible that the Court will find specific ISDS provisions in violation of Article 422.

ISDS provisions have been absent in the trade agreements that Ecuador has signed with the European Union, EFTA, and the UK—each signed between 2016 and 2019.¹⁰²

ICSID Membership

As noted in Chapter 1, Ecuador joined the International Centre for the Settlement of

Investment Disputes (ICSID) in 1986. While President Correa began to withdraw the country from ICSID in 2009, Ecuador rejoined the institution in June 2021 under President Lasso.

The Constitutional Court upheld Lasso's decision to rejoin ICSID, ruling that the president was not required to seek approval from the National Assembly because Ecuador had previously ratified the ICSID treaty in 1986.¹⁰³ The National Assembly condemned the Lasso government's decision to rejoin ICSID in a July 2021 resolution.¹⁰⁴

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Capital Controls

Over the last two decades, international financial institutions such as the International Monetary Fund (IMF) have cautiously grown more accepting of capital controls—measures to restrict the flow of foreign capital in and out of the domestic economy—in countries that they advise. These measures, including taxes and restrictions on the timing or volume of capital flows, may help countries mitigate the impact of financial crises.¹⁰⁵ However, many of the United

⁹⁹ 2021 Investment Climate Statements: Ecuador, *supra* note 90.

¹⁰⁰ Prieto, *supra* note 98.

¹⁰¹ Jorge R. Imbaquingo, *CC rechaza interpelación constitucional pedida por Asamblea*, EL COMERCIO (Jan. 14, 2022), <https://www.elcomercio.com/actualidad/politica/corte-constitucional-rechaza-interpretacion-asamblea-tratados.html>

¹⁰² Textual Amendments, *supra* note 92, at amended Article 111; COL-PER-EU Agreement, *supra* note 92;

Ecuador-EFTA Agreement, *supra* note 92; UK-COL-PER-ECU Agreement, *supra* note 92.

¹⁰³ Prieto, *supra* note 98.

¹⁰⁴ *Ecuador ratifica el acuerdo CIADI*, EL UNIVERSO (Aug. 4, 2021), <https://www.eluniverso.com/noticias/economia/ecuador-ratifica-el-convenio-del-ciadi-nota/>

¹⁰⁵ Joseph E. Stiglitz and Kevin P. Gallagher, *The IMF's Unfinished Business*, PROJECT SYNDICATE (Mar. 7, 2022), <https://www.project-syndicate.org/commentary/imf->

States' trade and investment agreements include provisions limiting the use of capital controls, including its FTAs with Chile, Peru, and Colombia.¹⁰⁶

Over the last two decades, international financial institutions such as the International Monetary Fund (IMF) have cautiously grown more accepting of capital controls. However, many of the United States' trade and investment agreements include provisions limiting the use of capital controls, including its FTAs with Chile, Peru, and Colombia.

The Ecuador-EU Free Trade Agreement requires both countries to permit the free movement of capital.¹⁰⁷ However, it also carves out exceptions, allowing the South American country to enact measures to “[ensure] the integrity and stability of its financial system.”¹⁰⁸ The agreement further states that “in exceptional

circumstances, ... Ecuador may adopt safeguard measures with regard to capital movements for a period not exceeding one year,” and that in “extremely exceptional circumstances,” Ecuador may extend these measures after consulting with its trade partners.¹⁰⁹

The Ecuador-EFTA and Ecuador-UK Free Trade Agreements include similar obligations and exceptions.¹¹⁰

The Tax Equity Reform Law of 2007 introduced capital controls in Ecuador, including a five percent currency exit tax, which investors could avoid by investing in particular sectors, keeping their funds in Ecuador for at least one year, and not withdrawing their funds to countries that the Ecuadorean government had listed as tax havens.¹¹¹ A tax reform bill enacted in 2019 broadened exceptions to this tax, and in 2021, President Lasso announced a plan to phase out the capital outflow tax completely over the course of four years.¹¹²

[review-must-embrace-capital-controls-by-joseph-e-stiglitz-and-kevin-p-gallagher-2022-03](https://www.g24.org/wp-content/uploads/2019/03/Gallagher_Capital_Flows_and_Treaties.pdf)

¹⁰⁶ Global Americans, *supra* note 7, at 26-27; Kevin P. Gallagher, Sarah Sklar, and Rachel Thrasher, Quantifying the Policy Space for Regulating Capital Flows in Trade and Investment Treaties (G-24 Working Paper, April 2019), 14, https://www.g24.org/wp-content/uploads/2019/03/Gallagher_Capital_Flows_and_Treaties.pdf.

¹⁰⁷ COL-PER-EU Agreement, *supra* note 92, at Art. 169.

¹⁰⁸ *Id.*, Art. 154.

¹⁰⁹ *Id.*, at amended Art. 170.

¹¹⁰ Ecuador-EFTA Agreement, *supra* note 92, at Art. 3.14 and 3.15; UK-COL-PER-ECU Agreement, *supra* note 92, at Art. 2.

¹¹¹ Lara Merling, *After the Argentina debacle, the IMF endorses weakening capital controls in Ecuador*, OPENDEMOCRACY (Dec. 18, 2019), <https://www.opendemocracy.net/en/oureconomy/after-argentina-debacle-imf-endorses-weakening-capital-controls-ecuador/>.

¹¹² Diego Andrés Almeida and Cesar Molina, *Ecuador: Agreements and Reforms to Reactivate the Economy*, BLOOMBERG TAX (Sept. 30, 2021), <https://news.bloombergtax.com/daily-tax-report-international/ecuador-agreements-and-reforms-to-reactivate-the-economy>.

5. RECOMMENDATIONS

The governments of both Ecuador and the United States can improve regulations to promote trade and investment. The following policy recommendations aim to benefit stakeholders in the two countries.

Overall Recommendation

- **The current political moment is opportune for deeper relations between the United States and Ecuador.** Both the United States and Ecuador have shown an interest in the bilateral relationship, and the Lasso administration has initiated policy reforms to facilitate trade and investment. The United States should acknowledge and encourage these reforms by moving forward with a comprehensive trade deal.

U.S.-Ecuador Trade Relations

- **The United States should lower tariffs on Ecuadorean products, either with unilateral preferences or a bilateral agreement.** Throughout most of the last three decades, Ecuador benefited from unilateral trade preferences in the U.S. market. The Andean Trade Promotion Act (ATPA) and Andean Trade Promotion and Drug Enforcement Act (ATPDEA) both provided market access to Ecuadorean firms. Following the dissolution of ATPDEA, Ecuador was one of the most prolific users of the U.S. Generalized System of Preferences, taking advantage of preferential access on 90 percent of its GSP-eligible products—second only to Cambodia.¹¹³ Since GSP expired in December 2020, Ecuadorean goods have been subject to higher tariffs in the United States. The United States has three options to reduce its tariffs on Ecuadorean products—renew GSP, establish a new preferential program for Ecuador similar to ATPDEA, or pursue reciprocal tariff reductions with Ecuador in a bilateral deal. While these options each come with pros and cons, any of them is preferable to the status quo, in which high tariffs harm both the United States and Ecuador.
- **U.S. and Ecuadorean negotiators should approach agricultural issues with caution.** The United States is unlikely to address its own domestic farm subsidies in a bilateral negotiation. The Ecuadorean government may compromise on its price band system for agricultural products, but agricultural producers in the South American country will likely oppose these concessions, as they did during U.S.-Ecuador trade negotiations in 2005. Though still contentious, reciprocal tariff reductions in agriculture offer greater room for negotiation. Negotiators in both countries should be aware of their counterparts' political constraints. Agricultural issues could generate opposition in both countries to a trade accord in general, and negotiators should be willing to compromise so that a final agreement is more feasible.

¹¹³ CONG. RES. SERV., *supra* note 44, at 28.

U.S.-Ecuador Investment Relations

- **The government of Ecuador should continue to adopt policies that attract foreign direct investment (FDI).** Given that Ecuador receives less than half the amount of FDI (net annual inflows as a percentage of GDP) than the average country in Latin America and the Caribbean, there is ample room for investment to grow. President Lasso has made attracting foreign investment a key aspect of his economic and foreign policy agenda. Bilateral deals can complement domestic legislation, such as the Investments Law of 2020, to attract FDI to Ecuador.
- **The United States and Ecuador should carefully consider whether or not to include investor-state dispute settlement (ISDS) provisions in a potential trade or investment accord.** The United States has historically included ISDS provisions in its bilateral investment treaties and free trade agreements—including its 1990 BIT with Ecuador. Ecuador's 2008 constitution prohibited certain forms of international arbitration, and the Constitutional Court has not yet decided whether the current government could sign a new treaty with an ISDS clause (see Chapter 4). Like agriculture, the issue of investor-state dispute settlements is a contentious one. In addition to Ecuadorean stakeholders who oppose ISDS provisions, many U.S. members of Congress oppose them, viewing ISDS provisions in trade agreements as a threat to labor and environmental standards. ISDS provisions were absent from Ecuador's recent trade accords with the EU, the European Free Trade Area, and the United Kingdom, and the 2018 U.S.-Mexico-Canada Agreement placed limits on the use of ISDS.¹¹⁴ On the other hand, ISDS clauses can attract investment, which raises growth and promotes well-being for the general population.¹¹⁵ Negotiators in both countries should carefully weigh the political, economic, and legal consequences of including an ISDS clause in a potential agreement.
- **A potential agreement between the United States and Ecuador should be more flexible on capital controls in exceptional circumstances.** While the United States' trade deals with Peru, Colombia, and Chile do place limitations on capital controls, these provisions do not reflect the somewhat greater tolerance of capital controls among economists and international financial institutions in recent years. The government of Ecuador may choose to unilaterally reduce capital controls; President Lasso, for example, has already taken steps to eliminate the country's five percent currency exit tax. Were capital controls to prove necessary in a future crisis, Ecuador may reverse these policies. A hard commitment to not impose capital controls under any circumstance would offer less flexibility.

¹¹⁴ See Chapter 4 for information about ISDS provisions in Ecuadorean trade agreements. See Global Americans, *supra* note 7, at 20-21.

¹¹⁵ Axel Berger, Matthias Busse, Peter Nunnenkamp, & Martin Roy, *Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the black box*, 10 INT'L. ECON. AND ECON. POLICY (2013).
<https://link.springer.com/article/10.1007/s10368-012-0207-6>.