

COLOMBIA

TRADE SUMMARY

The U.S. trade deficit with Colombia was \$2.8 billion in 2004, an increase of \$157 million from \$2.6 billion in 2003. U.S. goods exports in 2004 were \$4.5 billion, up 19.9 percent from the previous year. Corresponding U.S. imports from Colombia were \$7.3 billion, up 14.2 percent. Colombia is currently the 27th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Colombia in 2003 was \$2.8 billion, up from \$2.6 billion in 2002. U.S. FDI in Colombia is concentrated largely in the manufacturing, information and finance sectors.

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

Colombia has opened its economy considerably since the early 1990s. Customs duties were cut and many non-tariff barriers eliminated. Most duties have been consolidated into three tariff levels: zero to five percent on capital goods, industrial goods and raw materials not produced in Colombia; ten percent on manufactured goods with some exceptions; and fifteen to twenty percent on consumer and "sensitive" goods. The United States is seeking the elimination of Colombia'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.

Some important exceptions include automobiles, which are subject to a 35 percent tariff, and agricultural products, which fall under a variable "price-band" import duty system. The price-band system includes 14 product groups and covers 154 tariff lines, which at times results in duties approaching or exceeding 100 percent for important U.S. exports to Colombia, including corn, wheat, rice, soybeans, pork, poultry, cheeses and powdered milk, and negatively affects U.S. access for products such as dry pet food, some of which is made from corn. When international prices surpass the price-band ceiling, tariffs are reduced; when prices drop below the price-band floor, tariffs are raised. The price-band system has affected local competitiveness

FOREIGN TRADE BARRIERS

and has dampened consumption by raising prices, and is a barrier to U.S. exports. Processed food imports from Chile and members of the Andean Community (Peru, Ecuador, Bolivia and Venezuela) enter duty-free.

Non-Tariff Measures

Other non-tariff barriers in Colombia include discretionary import licensing, which is used to ban imports of milk powder and poultry parts. Colombia removed the “absorption” requirements for all remaining agricultural products at the end of 2003, when the WTO waiver allowing them to link imports to local purchases expired. The Colombian government replaced this system with tariff-rate quotas for rice, yellow corn, white corn and cotton, with a requirement to purchase local production in order to import under the tariff-rate quota. The U.S. Government is seeking through the FTA negotiation to eliminate Colombia’s barriers to trade in our agricultural products, while providing reasonable adjustment periods and safeguards for producers of import sensitive agricultural products.

Colombia treats remanufactured goods as used goods, thereby limiting the market access for major U.S. makers of high-quality remanufactured goods. Colombia also assesses a value-added tax (VAT) of 35 percent on whiskey aged for less than twelve years, which is more characteristic of U.S. whiskey, compared to a rate of 20 percent for whiskey aged for twelve or more years, most of which comes from Europe. Several Colombian states are engaged in practices that have restricted the ability of U.S. distilled spirits companies to conduct business in Colombia. For example, some states mandate the minimum quantity of a specific distilled spirit brand that a company must sell during the year. If a company does not meet the minimum sales requirement, the company is fined or its sales contract is revoked in that particular state. Some states also mandate the minimum price at which imported spirits may be sold. In certain cases, the minimum price is set above the price at which imported products can be sold competitively in the market. Other measures that are applied only to importers of distilled spirits include: assessment of a 7.5 percent tax on all contracts based on the minimum volume to be sold in the state; a requirement to share a percentage of profits with the state; and payment of a federal excise tax upon entry into Colombia instead of after the first sale as domestic producers are allowed to do.

STANDARDS, TESTING, LABELING AND CERTIFICATION

Regarding pet food, Colombia requires companies not only to list the ingredients but the percentage of those ingredients on their products, which U.S. companies declare as proprietary information. In some cases, SPS measures have been implemented to restrict U.S. exports. For example, Colombia has maintained restraints on U.S. exports of cattle and beef that do not appear to be consistent with the Office of International Epizootics (OIE) recommendations. Since December 2003, U.S. beef has been banned in Colombia on the basis of BSE (Bovine Spongiform Encephalopathy). However, this ban continues to be enforced without adequate scientific justification.

FOREIGN TRADE BARRIERS

U.S. companies retailing nutritional supplements in Colombia continue to experience problems due to the lack of legislation that establishes clear parameters for sanitary registration. Colombia does not have a specific classification for nutritional supplements.

GOVERNMENT PROCUREMENT

The Government Procurement and Contracting Law, Law 80/93 established procedures for the selection of suppliers, mainly through public tenders. In order to qualify as a potential supplier to the Government of Colombia, foreign firms must register with the local chamber of commerce and appoint a local representative. Registration must be renewed annually and includes certification of experience, finances, technical expertise and organization. The certifications are used to qualify and classify suppliers based on “bona fide” criteria. The registration requirements make the process particularly costly for foreign firms, which need to demonstrate a commercial presence in Colombia to participate in government procurement.

In July 2003, the Colombian government promulgated Law 816 to protect national industries in government procurement. Law 816 mandates that all public entities adopt criteria that support national industries and accords preferential treatment to bids that incorporate Colombian goods or services. Under Law 816, national companies are given a 10 percent to 20 percent “bonus” in their evaluation score, and companies using Colombian goods or services are given a 5 percent to 15 percent bonus. Bids without any Colombian component are scored between 5 percent and 20 percent lower than bids with such a component. Additionally, Law 816 requires foreign suppliers without local headquarters in Colombia to obtain certification from a Colombian mission in the suppliers’ home country that government procurement laws in the suppliers’ home country meet reciprocity requirements. To date, this new system, and specifically the lack of an established certification process, has proven to be a barrier against the participation of U.S. suppliers in government procurement contracts.

There have been complaints of non-transparency with respect to the awarding of major government contracts. The Colombian government has taken positive steps to fight corruption, such as working with non-governmental organizations to launch probity programs aimed at promoting entrepreneurial and public ethics. However, Colombia is not a signatory of the WTO Agreement on Government Procurement. According to industry analysts, the elimination of barriers in the government procurement sector could yield an increase of U.S. exports in the range of \$100 to \$500 million (U.S.). In the FTA negotiations the U.S. Government is seeking opportunities for U.S. companies to bid on Colombian government procurement.

EXPORT SUBSIDIES

Colombia has been working to eliminate export subsidies since its GATT accession. This process has continued under the WTO Agreement on Subsidies and Countervailing Measures. In December 2002, Colombia accepted the WTO Committee on Subsidies and Countervailing

FOREIGN TRADE BARRIERS

Measures' decision to phase out all export subsidies in free trade zones by December 31, 2006. However, free trade zones and special import-export zones will maintain their special customs and foreign exchange regimes. In June 2003, the Colombian government announced that it would eliminate the tax benefits linked to exports and will replace them with other incentives for employment generation and investment in new technologies, but no decree has since been issued.

Colombia's tax rebate certificate program (CERT) is a tax reimbursement certificate, which represents a credit that can be applied to taxes on income, customs duties and certain other taxes. It also is freely negotiable and can be sold in a secondary market, although presumably at a discount. The CERT is intended to promote non-traditional export products (specifically excluded from the CERT program are coffee, petroleum and petroleum bi-products). The amount of the CERT is calculated as a flat percentage of the value of goods exported, and varies by product and destination. In late 2002, the Colombian government suspended use of the CERT, reducing it to zero percent. Although this means that the subsidy component has disappeared, the CERT has not been eliminated, and it could be increased in the future when Colombia's budgetary conditions improve.

The other export subsidy, known as the "Plan Vallejo," allows for duty exemptions on the import of capital goods and raw materials used to manufacture goods that are subsequently exported. In order to qualify for this tax exemption, in the case of capital goods, the producer must show that at least 70 percent of the volume of product produced by the newly imported capital good is exported. In the case of raw or partially finished materials, the producer must export a value equal to 1.5 times that of the value of the imported materials as valued upon their entry by Colombian government customs. In July 2004, the Colombian government proposed to eliminate the Plan Vallejo by December 31, 2006 in the hopes that a signed FTA between Colombia and the United States would be in place, providing for duty free importation of many capital goods.

Colombia also operates producer financed export subsidies under the "price stabilization" funds for sugar, palm oil, beef and dairy. The exports under the sugar and palm oil funds are in excess of Colombia's WTO export subsidy commitments of 223,608 tons for sugar and zero for palm oil.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

Colombia has been on the Special 301 "Watch List" every year since 1991. Key concerns include lax customs enforcement and the inability to conclude legal cases against individuals arrested for trafficking or producing counterfeit goods. Colombia, which is a WTO member, has ratified its legislation to implement its obligations under the Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights. Colombia is a member of the World Intellectual Property Organization (WIPO), the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Treaty on

FOREIGN TRADE BARRIERS

the International Registration of Audiovisual Works, and the 1978 Union for the Protection of New Plant Varieties, and a signatory to the Patent Cooperation Treaty.

In Colombia, the grant, registration and administration of intellectual property rights (industrial property and copyright) are carried out by four different government entities. The Superintendence of Industry and Commerce (SIC) acts as the Colombian patent and trademark office. This agency was given control of the government's IPR policy, effective January 2000. The agency suffers from inadequate financing and personnel, a high turnover rate, and a large backlog of trademark and patent applications, which has led to a large number of appeals. However, the SIC plans to provide electronic registration services for patents, industrial designs and trademarks. The Colombian Agricultural Institute (ICA) is in charge of the issuance of plant variety protection-related and agro-chemical patents. The Ministry of Social Protection is in charge of the issuance of pharmaceutical patents, while the Ministry of Justice is in charge of the issuance of literary copyrights.

Each of these entities suffers from significant financial and technical resource constraints. Moreover, the lack of uniformity and consistency in IPR registration and oversight procedures limits the transparency and predictability of the IPR enforcement regime.

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.

Patents and Trademarks

The patent regime in Colombia currently provides for 20-year protection for patents and a ten-year term for industrial designs. Provisions covering protection of trade secrets and new plant varieties have improved Colombia's compliance with its TRIPS obligations. However, U.S. companies are concerned that the Colombian government does not provide patent protection for second uses.

In 2002, the Colombian government issued Decree 2085, which improved the protection of confidential data. Until 2002, Government of Colombia health authorities approved the commercialization of new drugs that were the bioequivalent of already-approved drugs, thereby denying the originator companies the exclusive use of their data. Decree 2085 prohibited this practice, thus providing improved protection for industrial information. Under the decree, data presented for health certification of pharmaceuticals is protected for a period of three years for registrations issued in 2002, four years in 2003, and five years in 2004 and beyond. In March 2003, the Agricultural Ministry promulgated Decree 502 that provides similar protection for agricultural chemicals. However, the subsequent passage of Law 822 on July 10, 2003 established additional norms in relation to the registration, control and sale of generic agro-

FOREIGN TRADE BARRIERS

chemicals which, along with the related Resolution 770 of March 27, 2003, appear to significantly weaken the data protections established by Decree 502.

Counterfeit pharmaceutical products continue to be a major problem in Colombia. Recent surveys, such as the CRECER project, reveal that in rural areas there are more counterfeit pharmaceutical products than original products. The CRECER project found that ten percent of these counterfeit products are identical to the original product while 60 percent do not contain any active ingredient and 30 percent contain the wrong active ingredient or the wrong dosage.

Colombia is a member of the Inter-American Convention for Trademark and Commercial Protection. Enforcement of trademark legislation in Colombia is showing some progress, but contraband and counterfeiting are widespread.

Copyrights

Andean Community Decision 351 on the protection of copyrights has been in effect in Colombia since January 1, 1994. Colombia also has a modern copyright law: Law 44 of 1993. The law extends protection for computer software to 50 years but does not classify it as a literary work. Law 44 and Colombia's civil code include some provisions for IPR enforcement and have been used to combat infringement and protect rights. Colombia is a member of the Berne and Universal Copyright Conventions, the Convention on Literary and Artistic Copyright, Fourth International American Conference (Buenos Aires), the Inter-American Convention on Copyright and Literary Property (Washington), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the Geneva Convention for Phonograms, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. It is not a member of the Brussels Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.

Colombia's Criminal Code of 2001 includes copyright infringement as a crime, and significantly increased jail terms from three to five years. The code also contains provisions concerning technological protection measures and rights management information, both key obligations of the WIPO treaty. Colombia has also created a Special Investigative Unit within the Prosecutor General's Office dedicated to intellectual property rights issues. This unit began functioning in November 1999 and is currently working on a number of cases against pirate television programming broadcasters.

The International Intellectual Property Alliance estimates that in 2004 piracy levels in Colombia for recorded music reached 71 percent, with damage to U.S. industry estimated at about \$52 million, while motion picture piracy represented 75 percent of the market, valued at a loss of an estimated \$40 million. Piracy in both business software and book publishing continued to grow in 2004. Although the Colombian police have conducted raids, the judicial process is slow and cumbersome and fails to incarcerate copyright infringers.

FOREIGN TRADE BARRIERS

The Motion Picture Association of America (MPAA), in conjunction with local attorneys, took 17 criminal actions against alleged television pirates in 2000, 16 such cases in 2001, and eight in 2002. However, MPAA's anti-piracy strategy relied on enforcement by the Colombian National Television Commission (CNTV), which largely failed in its efforts. Given the CNTV's poor results in suppressing piracy, MPAA has ceased initiating action against television broadcast or home video piracy. Colombia's Television Broadcast Law increased legal protection for all copyrighted programming by regulating satellite dishes, and enforcement has begun through a licensing process. However, an MPAA estimate suggests that 75 percent of the motion picture market in Colombia is pirated, while annual losses due to audiovisual piracy remained at \$40 million in 2004. However, in 2004 CNTV launched an aggressive anti-piracy campaign and signed its first cooperation agreement with FOX Sports to combat piracy in the television market.

SERVICES BARRIERS

Liberalization has progressed furthest in telecommunications, accounting/auditing, energy and tourism. It has occurred to a lesser extent in legal services, insurance, distribution services, advertising and data processing. The provision of legal services is limited to law firms licensed under Colombian law. Foreign law firms can operate in Colombia only by forming a joint venture with a Colombian law firm and operating under the licenses of the Colombian lawyers in the firm.

Economic needs tests are required for foreign providers of professional services to operate temporarily in Colombia. Moreover, residency requirements restrict trans-border trade of certain professional services, such as accounting, bookkeeping, auditing, architecture, engineering, urban planning, and medical and dental services. For firms with more than ten employees, no more than ten percent of the general workforce and 20 percent of specialists may be foreign nationals.

A commercial presence is required to provide information processing services. Foreign educational institutions must have resident status in Colombia in order to receive operational authority from the Ministry of Education.

Trans-border transportation services are restricted in Colombia. Land cargo transportation must be provided by natural or legal persons with commercial presence in the country and licensed by the Ministry of Transportation. Colombia's law permits international cabotage companies to provide cabotage services "only when there is no national capacity to provide the service." Cargo reserve requirements in transport have been eliminated. However, the Ministry of Foreign Trade reserves the right to impose restrictions on foreign vessels of those nations that impose reserve requirements on Colombian vessels.

FOREIGN TRADE BARRIERS

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

Financial Services

Colombia permits 100 percent foreign ownership of insurance firm subsidiaries. It does not, however, allow foreign insurance companies to establish local branch offices. Insurance companies must maintain a commercial presence in order to sell policies other than those for international travel or reinsurance. Colombia denies market access to foreign maritime insurers.

International banking institutions are required to maintain a commercial presence in Colombia through subsidiary offices and therefore must comply with the same capital and other requirements as local financial institutions. Colombian legislation has limits on the operation of banks and other financial institutions by separating fiduciary, investment banking, commercial loans, leasing and insurance services, from banking services. Current legislation (Law 389 of 1997) permits banking institutions to develop such activities in the same office/building, but the management of such services must be separate. Colombian legislation permits 100 percent foreign ownership in financial services, although the use of foreign personnel in the financial services sector remains limited to administrators, legal representatives and technicians. In April 2000, the Central Bank completely removed previous reserve requirements on foreign borrowing operations.

Further constraints on foreign financial institutions are found in Decree 2951, dated September 13, 2004. This decree requires foreign institutions to establish a commercial presence if their promotions target Colombian residents. A banking relationship with a Colombian resident and a financial entity abroad is permitted if the relationship was initiated by the Colombian resident without any publicity or promotion in Colombian territory. Industry experts estimate that the elimination of trade barriers in the financial services sector could create opportunities for U.S. firms to achieve \$100 to \$500 million in sales.

Basic Telecommunications Services

Significant barriers to entry include high license fees (\$150 million for a long distance license), cross subsidies, commercial presence requirements and economic needs tests. The Telecommunications Regulatory Commission (CRT) may require an economic needs test for the approval of licenses in voice, facsimile, e-mail and other value-added services. The parameters that determine an “economic needs test”, however, are not clearly established. In addition, lack of transparency in the interconnection and trunk access policies and guidelines applied by the regulatory authority further limit competition for the provision of local, long distance and mobile services.

In the WTO negotiations on basic telecommunications services, Colombia made fairly liberal commitments on most basic telecommunications services and adopted the WTO reference paper. However, Colombia specifically prohibited “callback” services, and excluded fixed and mobile satellite systems. Colombia also limited licenses or concessions for the supply of telecommunications services to enterprises legally established in Colombia. Most other restrictions on foreign participation in telecommunications services have been lifted and Colombia currently permits 100 percent foreign ownership of telecommunications providers.

In 2003, Colombia opened the mobile telecommunications market to Personal Communications Services (PCS) competition. The government issued a PCS license to new competitor Colombia Movil, effectively ending Colombia’s mobile telecommunications duopoly and opening the door for competition (Telefonica and Comcel share approximately 80 percent of the mobile market). Colombia Movil received a 10-year concession to develop the market and compete against the current cellular providers. The municipality-owned telephone companies, ETB (Empresa de Telecomunicaciones de Bogota) and EPM (Empresas Publicas de Medellin), own Colombia Movil.

Audiovisual and Communication Services

As part of the de-monopolization of Colombia’s government-owned television network, Colombia passed the Television Broadcast Law, Law 182/95, effective January 1995, which increased protection for all copyrighted programming by regulating satellite dishes and permitting private television broadcasters to compete with the government-owned broadcaster. The law increased restrictions on foreign content in broadcasting and imposed a burdensome system of sub-quotas for different hours of the day. The law requires broadcasters to transmit 70 percent nationally produced programming during prime time, 7:00 p.m. to 10:30 p.m., and 50 percent nationally produced programming from 10:00 a.m. to 7:00 p.m. and between 10:30 p.m. and midnight. Regional and local stations must also transmit 50 percent of nationally produced programming. According to Law 680, national production is defined as production that is made in all stages by Colombian artists and technicians, with the participation of national actors in starring and supporting roles while foreign actors’ participation is allowed as long as it does not exceed 10 percent of the starring roles. Retransmissions of local productions are considered to fulfill only part of the national content requirement.

Television, radio broadcasting and movie production and reproduction are subject to certain limitations. According to Law 680 and Law 80, ownership by foreign operators is limited to 40 percent for broadcast TV and 25 percent for radio broadcast. Law 29 requires Colombian nationals to be directors and managers of newspapers concerned with domestic politics. All motion picture exhibitions are charged a tax to finance the national Cinematographic Development Fund. Seventy percent of the resources from the Cinematographic Development Fund must be used to promote national film productions.

FOREIGN TRADE BARRIERS

INVESTMENT BARRIERS

Colombian law requires that foreign investments be accorded national treatment. One hundred percent foreign ownership is permitted in most sectors of the Colombian economy; exceptions include activities related to national security and the disposal of hazardous waste. Investment screening has been largely eliminated, and the registration mechanisms that still exist are generally mere formalities and non-discriminatory. In the telecommunications, financial services, oil and mining sectors, for example, prospective foreign investors must comply with certain registration procedures, but there are no restrictions on the amount of foreign capital that may be invested in these sectors.

All foreign investment must be registered with the Central Bank's foreign exchange office within three months in order to ensure the right to repatriate profits and remittances. All foreign investors, like domestic investors, must obtain a license from the Superintendent of Companies and register with the local chamber of commerce.

To promote the discovery and exploitation of new oil reserves, the government changed royalties from a flat 20 percent to a sliding scale, from 8 percent to 25 percent, depending on the size of the field. Colombia also implemented in June 2003 a new hydrocarbon policy, Law 1760, designed to attract foreign oil companies to Colombia. The new policy eliminated Ecopetrol's mandatory share in joint ventures, allowed private companies 100 percent control of exploration and production projects, and restructured Ecopetrol by creating the National Hydrocarbon Agency (ANH) in mid-2003. Although Ecopetrol is still state-owned, it is now an operating company similar to any other hydrocarbon company, while the ANH regulates the hydrocarbon sector and issues exploration and production contracts. The government is also extending existing contracts on a case-by-case basis.

Colombian television broadcast laws (Law 182/95 and Law 375/96) impose several restrictions on foreign investment. For example, foreign investors must be actively engaged in television operations in their home country, and their investments must involve a transfer of technology or know how. The National Planning Department issued a new Foreign Investment Regime – Decree 2080 of October 18, 2000 – that increased the cap on foreign investment in television network and programming companies from 15 percent to 40 percent.

The U.S. Government is seeking through the FTA negotiations a range of protections with respect to the treatment of U.S. investors, as well as a guaranteed right for those investors to have recourse to international arbitration in the event of disputes with the Colombian government.

ELECTRONIC COMMERCE

Colombia's electronic commerce Law 527 of August 1999 provides electronic documents and signatures the same legal recognition as paper documents and provides a framework for their use. Law 527 allows for, and regulates, the issuance of digital certificates and grants

FOREIGN TRADE BARRIERS

enforcement and oversight responsibilities to the Superintendent of Industry and Commerce. Decree 1747 of September 2000, regulates Law 527 with regard to certificates and digital signatures, and establishes minimum capital and other requirements for agencies that have the authority to certify electronic documents and digital signatures. The Superintendent of Industry and Commerce must approve such agencies. In May 2000, the Colombian and U.S. Governments signed a joint declaration on electronic commerce to increase transparency in the sector.

However, Colombian electronic commerce is still an immature market because of the lack of capital for start-ups and consumer concerns over the safety of electronic transactions. The use of electronic business applications for customer relationship management, supply chain management or enterprise resource management is not widespread. Only a few large retail chains have established electronic commerce platforms to complement their businesses. Growth of these Internet-based endeavors is hampered by the need to validate credit card purchases over the telephone with local banks.

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.