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- Contribution from Ecuador -

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Session III – Competition and Sports

Regulatory barrier in relation to access to specialized sports footwear: Ecuadorian case

- Contribution from Ecuador –*

1. Background

1. In mid-2022, the Superintendence of Economic Competition (hereinafter "SCE") became aware that regulations related to specialized sports footwear would probably be restricting the participation of economic operators in this sector, and within the framework of the powers established in the Organic Law of Regulation and Control of Market Power (hereinafter "LORCPM")¹, it opened a file for the evaluation of a possible regulatory barrier.²
2. Now, it is important to mention that the LORCPM has among its objectives to seek "[...] efficiency in the markets, fair trade and **the general welfare aswell the welfare of consumers and users**, for the establishment of a social, solidary and sustainable economic system".³
3. In this context, it is necessary to review what has been established by the World Health Organization (hereinafter "WHO"). This institution has issued Guidelines on physical activity and sedentary behaviors, and offers recommendations directed towards health,⁴ which are aimed at encouraging sport and considers "[...] public officials responsible for developing national, subregional or municipal plans to promote physical activity and reduce sedentary behaviors by population groups through guidance documents [...]"⁵.
4. On the other hand, in Ecuador, the STEPS 2018 Survey Results Report was presented, in which it was evidenced, among other issues, that:

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¹ Ecuador, *Organic Law for Regulation and Control of Market Power*, Official Gazette No. 555, October 13th, 2021, art. 38 num. 21 and 24.

² Ecuador Superintendence of Economic Competition, *Resolution No. SCPM-DS-2021-03 "Instructive for the Identification and Review of Regulatory Barriers"*, Official Gazette No. 374, Supplement, January 20, 2021, art. 1.

³ Ecuador, *Organic Law for Regulation and Control of Market Power*, art. 1.

⁴ WHO, WHO guidelines on physical activity and sedentary behaviors. 2021. p. viii. <https://apps.who.int/iris/bitstream/handle/10665/349729/9789240032194-spa.pdf?sequence=1&isAllowed=y>

⁵ *Ibíd.*, p. viii.

Of the population aged 18 to 69 years of both sexes, 17.8% did not comply with the WHO physical activity recommendations of performing at least 150 minutes of physical activity; 12.1% in men and almost double 23.3% in women did not comply with the recommendations. This prevalence was higher in the 45-69 age group, with 21.4% for both sexes, 16.2% for men and 26.6% for women.⁶

5. In view of the results, the Minister of Sport pointed out that now it will be possible to measure its own results: "[...] [N]ot only for these medals at the international level, but for how we manage to have an impact on reducing the levels of sedentary lifestyles and increase the prevalence of physical activity in our population, [...] this is an objective [...] of the Ministry [...]".⁷

6. On March 18, 2022, through Decree No. 375, sport was declared in Ecuador as public policy and as a tool that transforms lives and promotes social development.⁸ In this line, it can be said that the generation of physical activity provides great benefits to health and education, which has great relevance at country level.

7. For the realization of sports activities, it is valuable and advantageous to have specialized sports footwear and implements, which allow better execution of activities such as soccer, basketball, volleyball, tennis and athletics, which are included in the list of outstanding sports in the Ecuadorian culture;⁹ in this way, specialized sports footwear provides the user with aerodynamics, balance, grip and flexibility, so that comfort is not the only reason to use this type of product, but it is an implement designed specifically for the sport being played and is key to avoiding injuries. In this sense, "[...] it is not only about better performance, but also about guaranteeing a safer footprint; the also called 'tennis' or 'sports' shoes are part of the applied technology of sport".¹⁰

⁶ Ecuador Ministry Of Public Health, National Institute of Statistics and Census, Pan American Health Organization/World Health Organization, *STEPS Ecuador Survey: 2018*, p. 30, <https://www.salud.gob.ec/wp-content/uploads/2020/10/INFORME-STEPS.pdf>.

⁷ *Ibíd.*

⁸ Ecuador General Secretariat of Communication of the Presidency, *Sport becomes a public policy that will transform the lives of Ecuadorians*, March 18th, 2022, <https://www.comunicacion.gob.ec/el-deporte-se-convierte-en-politica-publica-que-transformara-la-vida-de-los-ecuatorianos/>

⁹ EXTRA, *Ecuador's sports culture: What are the most popular sports*, March 13th, 2023, <https://www.extra.ec/noticia/buena-vida/cultura-deportiva-ecuador-son-deportes-populares-ecuatorianos-disciplinas-81822.html#:~:text=The%20m%C3%A1s%20outstanding%20are%20the%20country%20ADs%20in%20several%20international%20competitions.>

¹⁰ FIT CHOICE, *The importance of athletic footwear*. Accessed June 26, 2023, <https://eresdeportista.com/salud/lesiones/la-importancia-del-calzado-deportivo/>.

2. Legislation analyzed

8. The regulation under review was Ministerial Agreement No. 0586 by which the Ministry of Sports¹¹ issued the *Substitute Regulation for Obtaining the Certificate for the Importation of Specialized Sports Footwear and Equipment* (hereinafter "Agreement No. 0586"), specifically its article 2, where, among other requirements, numeral 6 established the presentation of the Customs Declaration of Importation (hereinafter "DAI")¹² with a validity of at least two (2) years prior to the date of application to qualify as a user in the system developed by the Ministry for the delivery of the Certificate.¹³

9. It is worth mentioning that Agreement No. 0586 is part of a public policy related to the promotion of sports¹⁴ and particularly with the objective of "[f]acilitating access to specialized footwear and sports implements appropriate for the practice of sports or physical activity of the population through the opening and reduction of import tariffs".¹⁵ The purpose of its application was to solve the problem of the use of unsuitable footwear for sports (with the consequent health problems that this entails, which over time can affect the general health of those who practice sports), as well as the high cost of specialized sports footwear (as a result of the tariffs levied on these products), which is one of the limitations for the middle and lower social strata population to access their acquisition.¹⁶

¹¹ The Ministry of Sports is the governing and planning body for sports, physical education and recreation.

Ecuador, Executive Decree No.438, Official Gazette No.278, Second Supplement, July 6th, 2018, art. 2.

¹² The IAD "is a form on which general information regarding the merchandise being imported is recorded".

Ecuador National Customs Service of Ecuador, "*Registration of the Customs Import Declaration*", National Customs Service of Ecuador. Accessed May 12th, 2023, [https://www.gob.ec/senae/tramites/registro-declaracion-aduanera-importacion#:~:text=The%20Customs%20Declaration%20of%20Importation%20\(DAI\)%20is%20a%20form%20in,is%20being%20the%20object%20of%20importation%20of%20importation%C3%B3n](https://www.gob.ec/senae/tramites/registro-declaracion-aduanera-importacion#:~:text=The%20Customs%20Declaration%20of%20Importation%20(DAI)%20is%20a%20form%20in,is%20being%20the%20object%20of%20importation%20of%20importation%C3%B3n).

¹³ Ecuador Sports Secretariat, *Substitute Regulations for Obtaining the Certificate for the Importation of Specialized Footwear and Sports Equipment* (Ministerial Agreement No. 586), December 3rd, 2020, art. 2 num. 6.

¹⁴ "The State shall protect, promote and coordinate physical culture, which includes sports, physical education and recreation, as activities that contribute to the health, training and integral development of people; it shall promote mass access to sports and sports activities at the formative, neighborhood and parish levels [...]".

Ecuador, Constitution of the Republic of Ecuador, Official Gazette No. 449, October 20th, 2008, art. 381.

¹⁵ Ecuador Ministry of Production, Foreign Trade, Investment and Fisheries and Ministry of Sport, *Technical Report No. 019-CDCAI-2018*, July 9th, 2019, lit. B. Emphasis added.

¹⁶ *Ibid.*, lit., E, parrs. 13 y 14.

10. In this sense, it was necessary to look back and evaluate Resolution No. 019-2019, by means of which the Foreign Trade Committee (hereinafter "COMEX")¹⁷ reformed the Tariff of Ecuador and granted a tariff benefit to specialized footwear and implements for sports.¹⁸ To access such *benefit*, importers must obtain the Certificate through the Ministry's system.¹⁹

3. Regulatory Barrier Evaluation

11. However, the analysis was conducted under the principle of *regulatory improvement*, which includes the existence of a quality legal framework that offers adequate incentives to stimulate economic activity, simplify processes and reduce administrative burdens, in order to ensure the adequacy of the measure to the principles of good regulation within the framework of an impact analysis.²⁰

12. In this sense, under the Methodology for the identification, review and elimination of regulatory barriers (hereinafter "Methodology") issued by the SCE in 2020, the report addressed an analysis that includes the verification of *legality* and *proportionality* of the regulation, in order to identify the existence of a possible barrier to the entry,²¹ permanence and/or exit of economic operators from the market, that has been handled from an approach of free competition and concurrence of the actors of the economic segment in which the regulation affects, in "[...] permanent search for an intelligent, modern and efficient regulation [...]".²²

4. Results of the legality analysis

13. In this context, the first sub-level of *legality* was addressed. It corresponds to evaluate two sub-levels: a) the existence of powers or competences of an entity to issue a rule; and, b) to determine whether such rule contravenes the legal system.²³

¹⁷ "The body that will approve national public policies on trade policy will be a collegiate body of a public intersectorial nature, responsible for the regulation of all matters and processes related to this matter, which will be called the Foreign Trade Committee (COMEX) [...]".

Ecuador *Organic Code of Production, Commerce and Investments*, Official Gazette No. 351, Supplement, December 29th, 2010, art. 71.

¹⁸ Ecuador COMEX, *Resolution No. 019-2019*, Official Gazette No. 15, Supplement, August 12, 2019, art. 1.

¹⁹ Ecuador Secretariat of Sport, *Ministerial Agreement No. 586*, December 3, 2020, arts. 3 and 4.

²⁰ Juan Contreras Delgado, "Ten years of the transposition of the Services Directive (2009-2019): The CNMC's contribution to better regulation in Spain," *Competition Yearbook 2018*, (2019): p. 1.

²¹ Ecuador Superintendence of Economic Competition, *Resolution No. SCPM-DS-2021-03 "Instructive for the Identification and Review of Regulatory Barriers"*, art. 7.

²² Ecuador Superintendence of Economic Competition, *Methodology for the identification, review and elimination of regulatory barriers* - Guide No. SCPM - INAC -DNPC - 001, October 26, 2020, p. 6.

²³ Ecuador Superintendence of Economic Competition, *Resolution No. SCPM-DS-2021-03 "Instructive for the Identification and Review of Regulatory Barriers"*, art. 8.

14. The analysis showed that COMEX issued Resolution No. 019-2019 under the powers granted in the current regulations.²⁴ On the other hand, the Ministry of Sports would have exceeded its competences by issuing Resolution No. 0586 without observing the provisions of the Resolution itself, which indicated that in order to operationalize the obtaining of the Certificate, it should abide by the provisions of Executive Decree No. 312 (hereinafter "Decree No. 312"), and that in a term no longer than six (6) months it had to execute the procedure through the Ecuadorian Single Window (hereinafter "VUE")²⁵; however, it did it digitally and in a term longer than the mentioned, therefore *it did not pass the first sublevel of legality*.

15. For the second sublevel, it was evaluated whether the legal regulations were contravened, and it was observed that the procedure generated to obtain the Certificate was issued under the necessary competences, and therefore it did not contravene the applicable regulations for such purpose. On the contrary, Agreement No. 0586 did not comply with Decree No. 312, which provides that it is the obligation of public entities related to foreign trade transactions, among others, to issue all formal documentation through the VUE.²⁶

16. Likewise, when looking at the IAD application, it is evident that the requirement is more than enough to access the Certificate (and therefore, the tariff benefit); therefore, the temporary requirement would not become indispensable, and in this way it would expressly contradict the provisions of Article 8 paragraph 2 of the Law for the Optimization and Efficiency of Administrative Procedures (hereinafter "Law for the Optimization of Procedures"), which establishes that the entities must be oriented to: "[...] [t]he reduction of requirements and demands to [...] the administered parties, leaving only and exclusively those that are indispensable to fulfill the purpose of the formalities or to exercise control in an adequate manner [...]"²⁷.

17. On the other hand, the requirement of a minimum period of two (2) years for the DAI could generate unnecessary restrictions to free competition, since the current importers could be limited from obtaining the Certificate, contrary to the provisions of Article 240 paragraph f) of the Organic Code of Production, Commerce and Investments (hereinafter "COPCI"), which provides that it must "[...] promote regulations that avoid unnecessary burdens and restrictions to innovation and competition in the market [...]"²⁸. In this regard, in accordance with the provisions of the analyzed regulation would contradict both the COPCI and the Law for the Optimization of Procedures and thus, *it did not pass the second sublevel of legality either*.

²⁴ "The duties and powers of the governing body in the area of trade policy are the following: [...] c. **Create, modify or eliminate tariff rates**; [...] f. Issue rules on registrations, **authorizations, prior control documents, licenses and import and export procedures**, other than customs, general and sectoral, including the requirements to be met, other than customs formalities [...]"

Ecuador *Organic Code of Production, Commerce and Investments*, Official Gazette No. 351, Supplement, December 29, 2010, art. 72. Emphasis added.

²⁵ Ecuador COMEX, *Resolution No. 019-2019*, Official Gazette No. 15, Supplement, August 12, 2019, Second Transitory Disposition.

²⁶ Ecuador, *Executive Decree No. 312 - Declaring the Ecuadorian Single Window and the Authorized Economic Operator Program as part of the Foreign Trade Facilitation Policy*, Official Gazette No. 195, Supplement, March 7th, 2018, art. 7, lit. a).

²⁷ Ecuador, *Organic Law for the Optimization and Efficiency of Administrative Procedures*, Official Gazette No. 353, Second Supplement, October 23, 2018, art. 8, num. 2.

²⁸ Ecuador *Organic Code of Production, Commerce and Investments*, art. 240, lit. f).

5. Results of the proportionality analysis

18. Regarding the *proportionality* analysis, three aspects are evaluated: a) *suitability*; b) *necessity*; and, c) *proportionality in the strict sense* of the measure.²⁹ Regarding the latter, it should be noted that due to the findings in the previous sublevels, it was considered that its analysis was no longer relevant.

19. For the evaluation of the *suitability* sub-level, the objective pursued by the entity or body that issued the regulation and the adequacy of the objective to the measure imposed were examined. As a starting point, Technical Report No. 019-CDCAI-2018 issued by the Ministry of Production, Foreign Trade, Investment and Fisheries and the Ministry of Sport was considered, in which several issues were exposed, including: "13. Concern about the use of inappropriate footwear for sports practice [...]; 14. The high cost of footwear, as a result of the tariff tax [...] is one of the limitations for the population of middle and low social stratum to have access to its acquisition."³⁰ Considering this, Resolution No. 019-2019 was issued in order to reform the Tariff of Ecuador (2017), which was operationalized through Agreement No. 0586.

20. Now, Resolution No. 019-2019 of COMEX was made in accordance with the powers of this entity³¹ and its purposes would be supported by Articles 1³² and 4 (literal f)³³ of the COPCI and 66 (numeral 25) of the Constitution of the Republic of Ecuador (hereinafter "CRE")³⁴. On the other side, Agreement No. 0586 is governed by the provisions of the Sports Law, considering the scope and object in Title 1 of this body of

²⁹ Ecuador Superintendence of Economic Competition, Resolution No. SCPM-DS-2021-03 "*Instructive for the Identification and Review of Regulatory Barriers*", art. 9.

³⁰ Ecuador Ministry of Production, Foreign Trade, Investment and Fisheries and Ministry of Sport, *Technical Report No. 019-CDCAI-2018*, July 9th, 2019, lit. E, parr. 13 and 14.

³¹ Ecuador *Organic Code of Production, Commerce and Investments*, art. 72.

³² "**The scope of this regulation [...] shall be governed by the principles that allow a strategic international articulation, through trade policy, including its enforcement instruments and those that facilitate foreign trade**, through a transparent and efficient modern customs regime."

Ibid., art. 1. Emphasis added.

³³ "[...] **f. Guarantee the exercise of the population's rights to access, use and enjoy goods and services in conditions of equity, optimum quality and in harmony with nature [...]**".

Ibid., art. 4. Emphasis added.

³⁴ "**The right to have access to quality public and private goods and services**, with efficiency, efficacy and good treatment, as well as to receive adequate and truthful information on their content and characteristics. [...]"

Ecuador, *Constitution of the Republic of Ecuador*, art. 66. Emphasis added.

law.³⁵ Thus, the fundamental precepts on which the application of the Sports Law and Agreement No. 0586 is based, is consistent with Articles 24³⁶ and 381³⁷ of the CRE.

21. Therefore, in principle, it was inferred that Resolution No. 019-2019 and Agreement No. 0586 jointly invoke a legitimate public interest provided for and set forth in the CRE, the COPCI, the Sports Law and Executive Decree No. 375.³⁸

22. However, it is important to mention that both Resolution No. 019-2019 and Agreement No. 0586 do not have any express objective typified; therefore, considering that the Agreement was born from the inter-institutional coordination, the objective stated in the CDCAI Technical Report, which expresses the following, was taken as a reference: “8. To facilitate access to specialized footwear and appropriate sports equipment for the **practice of sports or physical activity** of the population through the opening and reduction of import tariffs.”³⁹

23. Through Resolution No. 019-2019, a tariff modification in favor of specialized sports footwear and equipment was established, and for this reason, this would be considered as the basic policy implemented to comply with the aforementioned objective; however, the Ministry of Sports was entrusted with granting the Certificate and for this purpose, the latter, through Agreement No. 0586, established that it should obtain it “[...] through the system 'Importation of specialized sports footwear and equipment'”.⁴⁰ This regulation also stated that in order to access this platform, a series of requirements must be submitted, among which is the IAD with a minimum of two (2) years of validity.⁴¹

³⁵ "Scope: The provisions of this Law **promote, protect and regulate the sports system, physical education and recreation in the national territory**, regulate technically and administratively the sports organizations in general and their leaders, the use of public or private sports venues financed with State resources".

"Purpose: **The provisions of this Law are of public order and social interest** [...]."

Ecuador *Law on Sports, Physical Education and Recreation*, Official Gazette No. 255, Supplement, August 11th, 2010, arts. 1 and 2. Emphasis added.

³⁶ "Persons have the right to recreation and leisure, to the practice of sports and free time."

Ecuador, *Constitution of the Republic of Ecuador*, art. 24.

³⁷ "The State shall protect, promote and coordinate physical culture, which includes sports, physical education and recreation, as activities that contribute to the health, training and integral development of people; it shall encourage mass access to sports and sports activities at the formative, neighborhood and parish levels [...]."

Ibid., art. 381. Emphasis added.

³⁸ "Sport shall be declared a state policy to promote physical and mental health, social and economic development, security, community integration, education and the training of children and young people."

Ecuador, *Executive Decree No. 375*, Official Gazette No. 27, Supplement, March 23, 2022, art. 1.

³⁹ Ecuador Ministry of Production, Foreign Trade, Investment and Fisheries and Ministry of Sport, Technical Report No. 019-CDCAI-2018, July 9th, 2019, lit. B. Emphasis added.

⁴⁰ Ecuador Secretariat of Sport, *Ministerial Agreement No. 586*, December 3, 2020, art. 1.

⁴¹ In order for the importer to qualify its user, whether as a natural or legal person, and be eligible for the tariff benefit established in Resolution No. 019-2019 issued by the Plenary of the Foreign Trade Committee, it must provide, for validation purposes, the following information and requirements:

24. Thus, according to the analyzed, it is identified that the *implemented measure* is the request of the mentioned DAI and its particular required validity of two (2) years. However, from the meetings held and from the information provided by the Ministry of Sport, it is clear that the entity does not have documents that justify the time period required for the IAD.

25. Now, in order to analyze whether the measure implemented is in line with the objective specified in the CDCAI Technical Report,⁴² it was considered, firstly, whether the tariff reduction on imports of this type of footwear generates that the actors in the different links of the value chain can acquire specialized sports footwear at a lower price to facilitate their access.

26. Secondly, that the IAD (regardless of its temporary nature) is a document that is required for any import process. In third place, that the minimum validity of the DAI *could reasonably itself hinder* the ultimate end of price reduction and access to specialized sports footwear, given that between greater be the time of the requested time, the number of economic operators interested in importing, causing likely to be less than this reduction is present in the prices of specialized sports footwear, due to the lack of competition in the market. Additionally, it could strengthen competitive advantage to *incumbent*⁴³ economic operators, causing the recent competitors or potential new competitors, do not meet the requirement, and in addition, refrain from entering the market or enter into the market with a disadvantageous front competitors who themselves can access the *tariff benefit*.

27. Based on the above, it can be deduced that requiring a time period for the IAD to be in force negatively affects the market, since it would limit the potential benefits of the tariff reduction; thus, the measure would not have an appropriate or reasoned relationship with the proposed objectives or with the form, therefore, it did not overcome the sublevel of *suitability*, becoming a regulatory barrier.

28. For the next sub-level of *necessity*, it was examined whether the restriction implied by the regulatory barrier can be considered excessive, or whether it could have been avoided by less restrictive alternative means; for this purpose, the following points were developed:

- (i) Identify the existence of alternatives to the means employed by the regulatory barrier analyzed and be equally suitable.
- (ii) To make a comparison of the intensity of restrictions between the means currently used by the barrier and less restrictive alternatives.⁴⁴

[...] 6. **DAI Import Customs Declaration at least two (2) years prior to the date of application to qualify as a user in the "Import of footwear and specialized sports implements" system.** [...].

Ibíd., art. 2. Emphasis added.

⁴² "To facilitate access to specialized footwear and sports equipment appropriate for the practice of sports or physical activity of the population through the opening and reduction of import tariffs".

Ecuador Ministry of Production, Foreign Trade, Investment and Fisheries and Ministry of Sport, *Technical Report No. 019-CDCAI-2018*, July 9th, 2019, lit. B.

⁴³ *Incumbents* are understood to be those participants that have already competed for some significant or relevant time in the market, as compared to new entrants or new competitors.

⁴⁴ Ecuador Superintendence of Economic Competition, *Methodology for the identification, review and elimination of regulatory barriers*, p. 34.

29. From the meetings held with public administration entities and economic operators, and from the analysis of the documentation provided, it is established that the IAD, being "[...] a form on which the general information relating to the merchandise being imported is recorded"⁴⁵, is not a document that can be used for the purpose of importing goods. It is not a document that can be replaced by another type of form; therefore, any alternative considered must take into account its unrestricted requirement.

30. In accordance with the above, given its nature, it is understood the need to maintain it as one of the requirements for the importation of this type of footwear, because it allows to evidence the line of business of the economic operators; however, not requesting a minimum period of validity would be a measure as much or more suitable and reasonably less restrictive, because it would allow the participation of a greater number of economic operators. Consequently, it is identified that the latter did not surpass the sub-level of *necessity* and therefore it constitutes a regulatory barrier that harms competition in the market.

6. Conclusions

31. Finally, in addition to the fact that it is evident that the analyzed regulation was configured as a regulatory barrier, there were indications that Agreement No. 0586 and Resolution No. 019-2019, in joint application, would not be achieving the objectives set out around the public policy, to promote sports and recreation; and, to access adequate (specialized) sports footwear at a better price; since probably the tariff benefit is not being transferred to the final consumer. In addition, other areas such as competition in the market could be affected. In view of this, the SCE has found it pertinent to prepare a competition opinion that develops this situation in greater depth.⁴⁶

⁴⁵ Ecuador National Customs Service of Ecuador, "*Registration of the Customs Import Declaration*", National Customs Service of Ecuador. Accessed May 12, 2023, [https://www.gob.ec/senae/tramites/registro-declaracion-aduanera-importacion#:~:text=The%20Customs%20Declaration%20of%20Importation%20\(DAI\)%20is%20a%20form%20in, is%20C3%A1%20being%20the%20object%20of%20importation%20of%20importation%20C3%B3n](https://www.gob.ec/senae/tramites/registro-declaracion-aduanera-importacion#:~:text=The%20Customs%20Declaration%20of%20Importation%20(DAI)%20is%20a%20form%20in, is%20C3%A1%20being%20the%20object%20of%20importation%20of%20importation%20C3%B3n).

⁴⁶ Ecuador, *Organic Law for Regulation and Control of Market Power*, art. 38, num. 9.