

Oil Regulation

Contributing editor
Bob Palmer



2018

GETTING THE
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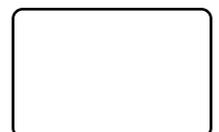


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Ecuador

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General

1 Describe, in general terms, the key commercial aspects of the oil sector in your country.

Ecuador produces approximately 550,000 barrels of crude oil a day. It is estimated that the country has approximately 8 billion barrels of reserves. Crude oil has been Ecuador's primary export the past four decades and it is likely to continue that way in coming years. All of Ecuador's oil is produced in the northern section of the Ecuadorian Amazon basin. There are two main pipelines running from the Amazon basin to the Pacific coast, the Trans-Ecuadorian Oil Pipeline (SOTE), which is owned by the government and the OCP, which is owned by private enterprise. Simply, there are two qualities of oil produced in Ecuador, ORIENTE, at approximately 24 American Petroleum Institute (API) degrees and NAPO, approximately 18 API degrees. Through the state oil company, Petroecuador, Ecuador owns a refinery located in the coastal area that produces petrol and diesel for local consumption, and also has two smaller refineries in the Amazon basin and the coast; all of which are owned by the government. Domestic gas, petrol and diesel for local consumption are subsidised by the government. Currently, most oil is produced by Petroamazonas, a company wholly owned by the Ecuadorian state, and a substantially smaller portion by certain private companies, for example, CNPC, Repsol, ENI and others that are under service contracts whereby the contracting company assumes all risks, investments and costs in exchange for a fixed tariff the government pays for each produced barrel. There is also some offshore gas production in the Gulf of Guayaquil used for electricity generation.

The government has announced production sharing contracts for new exploration areas. Under this type of contract, producing companies can sell the oil they produce and benefit from a percentage of produced oil. It is not yet clear when is this going to happen.

2 What percentage of your country's energy needs is covered, directly or indirectly, by oil or gas as opposed to nuclear or non-conventional sources? What percentage of the petroleum product needs of your country is supplied with domestic production?

Approximately 85 per cent of energy comes from hydroelectric generation. Thermoelectric generation may still account for approximately 10 per cent of energy consumed in Ecuador.

One hundred percent of liquid petroleum gas (LPG), which is the main source for domestic household consumption, is imported and subsidised by the Ecuadorian government.

3 Does your country have an overarching policy regarding oil-related activities or a general energy policy?

The main principle is that all hydrocarbons and minerals belong to the Ecuadorian state. State-owned companies have the privilege to explore, produce, transport, refine and commercialise hydrocarbons, while private companies may participate as an 'exception'. In the case of private companies involved in hydrocarbons exploration and exploitation, the government's profit, which includes all taxes, as well as its share in production and any other type of economic benefit for the government, must be higher than the profit for the company.

4 Is there an official, publicly available register for licences and licensees? Is there a register setting out oilfield ownership or operatorship, etc?

Oil exploration and production is performed under contracts. The law does not require anything, such as a licence, to explore and produce hydrocarbons. The register of the Hydrocarbons Secretariat is for recording all oil contracts and oil contract areas. A petition to the Hydrocarbons Secretary must be filed to get information about any specific area of interest.

From time to time, Petroamazonas or the Hydrocarbons Secretariat will hold public bidding rounds inviting private companies interested in executing upstream contracts to bid.

5 Describe the general legal system in your country.

Ecuador follows a civil-law system. The law prevails over the contract. The main issue has been the possibility of the Ministry of Hydrocarbons unilaterally declaring the termination of an oil contract when the contracting company breaches any of the provisions of the law that contemplate the possibility of unilateral termination. Several foreign investors have used bilateral treaties for the protection of foreign investment as a mechanism to have their discrepancies with the Ecuadorian state solved by an independent arbitration tribunal outside the country. Ministry decisions can also be appealed at local courts; however, at least with respect to the unilateral termination of a contract, an appeal does not suspend the effects of the ministry's decision and is basically a claim for damages.

Regulation overview

6 Describe the key laws and regulations that make up the principal legal framework regulating oil and gas activities.

The main principles stem from the Ecuadorian Constitution. Some examples are that hydrocarbons belong to the Ecuadorian government; Ecuadorian state-owned companies have privilege over private companies and the profit for the Ecuadorian government must be higher than the profit for the contracting company. The hydrocarbons law contains most of the contracting principles and general provisions. It is also important to consider the procurement rules for Petroamazonas and Petroecuador, the Internal Tax Regime Code, and labour and environmental laws.

7 Are there any legislative provisions that allow for expropriation of a licensee's interest and, if so, under what conditions?

Articles 74 and 79 of the Hydrocarbons Law establish several causes for which the government may declare the unilateral termination of a contract, which under the law is called the 'caducity of the contract'. Among other reasons, caducity may be declared for uncompleted committed activities, failure to deliver the government's share and transfer of rights without prior approval, as well as for environmental matters. For the ministry to declare the caducity of a contract, it must follow a procedure where the company can defend itself or cure the cause for termination. The effects of caducity are the immediate return of all assets and all production to the government and the collection of guarantees.

8 May the government revoke or amend a licensee's interest?

The government of Ecuador may terminate a contract (see question 7) and on certain occasions has also passed laws ordering the contracting companies to amend their contracts, migrating from one type of contract to another (ie, change from a production sharing contract to a service contract). It can also increase taxes by amending the law.

9 Identify and describe the government regulatory and oversight bodies principally responsible for regulating oil exploration and production activities in your country. What sanctions for breach may be imposed by the regulatory and oversight bodies?

The hydrocarbons sector in Ecuador is subject to oversight by the Ministry of Hydrocarbons, the Hydrocarbons Secretariat (SHE) and the Hydrocarbons Regulation and Oversight Agency (ARCH). The government operating entities are Petroecuador for transport, refining and commercialisation of hydrocarbons and Petroamazonas for exploration and production of hydrocarbons.

10 What government body maintains oil production, export and import statistics?

Statistics are maintained by the Ministry of Hydrocarbons, SHE and ARCH, as well as by Petroamazonas and Petroecuador for their own activities.

Natural resources**11 Who holds title over oil reservoirs? To what extent are mineral rights on private and public lands involved? Is there a legal distinction between surface rights and subsurface mineral rights? At what stage does title to extracted oil transfer to the licensee, lessee or contractor?**

All oil reservoirs belong to the Ecuadorian state, irrespective of the ownership of surface rights, which can pertain to private persons or the Ecuadorian government. The surface owner is entitled only to compensation for land usage. However, a community referendum is required under the law.

Depending on the type of contract, title to extracted oil will or will not pass to the contractor. For example, under current service contracts, title never passes to the contractor; it remains with the Ecuadorian state. The contractor receives a fixed tariff per produced barrel and the Ecuadorian government transports and sells all the produced oil. However, the contractor is responsible for damage, for example oil spills occurring anywhere up to the measurement and delivery point, which is established in the contract and is usually where the oil enters the state-owned pipeline system.

12 What is the general character of oil exploration and production activity conducted in your country? Are areas off-limits to exploration and production?

Most oil exploration and production are onshore and originate from the Ecuadorian Amazon basin. There is still exploration to be done in the south of the Amazon basin and offshore in the Gulf of Guayaquil. Exploration and production are not allowed in protected environmental areas or areas within city boundaries. Oil exploration and production on farmlands is possible.

13 How are rights to explore and produce granted? What is the procedure for applying to the government for such rights? To what extent are the terms of licences or contracts negotiable?

The only way to explore and produce oil is for the contracting company to enter into a contract with the Hydrocarbons Secretariat or Petroamazonas, the state oil company. From time to time, those entities organise bidding rounds setting the fields and contract terms. Only in exceptional cases, which strictly involve companies owned by a foreign country or pre-financed services, can the government grant a contract outside of a bidding process.

The Hydrocarbons Secretariat can award contracts for exploration areas and it can do so in the form of service contracts or production sharing contracts. Petroamazonas can award contracts for fields that are already producing, and it can only do so in the case of specific services contracts.

14 Does the government have any right to participate in a licence? If so, is there a maximum participating interest it can obtain and are there any mandatory carry requirements for its interest? What cost-recovery mechanism is in place to recover such carry? Does the government have any right to participate in the operatorship of a licence?

Petroamazonas, the state oil company, has the constitutional right to explore and produce oil in any part of Ecuadorian territory. Private companies that are awarded a contract after a public bidding can develop only those fields or exploration areas where Petroamazonas does not have the technical and economic capacity to explore and produce. Nonetheless, the proceeds from the sale of the oil produced by Petroamazonas do not flow to Petroamazonas but rather to the central government, which in turn assigns a portion of the revenue to Petroamazonas, depending on its needs, and especially considering the central government's economic possibilities. The oil produced under service contracts entered by Petroamazonas and private companies is regarded as having been produced by Petroamazonas. The specific services contract, even though not limited to services companies, has basically attracted service companies (ie Schlumberger).

Although Petroamazonas may enter into joint ventures with other companies, this practice is not widespread.

15 If royalties are paid, what are the royalty rates? Are they fixed? Do they differ between onshore and offshore production? Aside from tax, are there any other payments due to the government? Are there any tax stabilisation measures in place?

The current service contract system does not contemplate royalties. The profit for the contracting company is a fixed tariff that the government pays monthly for each produced barrel. The production sharing contract that may enter into effect for new exploration projects does not stipulate royalties either.

All contracts provide for a minimum investment commitment, which is the basis for calculating the tariff in service contracts. Contracts usually provide for the possibility of agreeing on a new tariff when substantial additional investments are to be made or if the tax regime changes.

16 What is the customary duration of oil leases, concessions or licences?

The hydrocarbons law requires exploration to be completed in four years, though the exploration period may be extended for an additional two years, and the production period is for 20 years. However, the law also sets forth that the government may extend the 20-year period if additional exploration investments are committed. There are several contracts that have been extended for more than 20 years.

17 For offshore production, how far seaward does the regulatory regime extend?

There is only one case of gas production offshore, which is in the Gulf of Guayaquil. The regulatory regime extends 200 hundred nautical miles from the continental shelf.

18 Is there a difference between the onshore and offshore regimes? Is there a difference between the regimes governing rights to explore for or produce different hydrocarbons?

The regime for onshore and offshore hydrocarbons is the same. However, economic terms may vary depending on the risk involved in the project. There are certain benefits for heavy crude oil production. It is important to note that oil exploration and production contracts do not allow for gas production. Nonetheless if, when exploring for oil, the contracting company discovers gas, it has the privilege to execute a contract for gas.

19 Which entities may perform exploration and production activities? Describe any registration requirements. What criteria and procedures apply in selecting such entities?

Whether for acquiring rights in an existing oil exploration and production contract or for participating in a bidding process, the company, whether national or foreign, must demonstrate that it has sufficient technical experience and financial ability to handle the required

minimum investment commitments for each field. This is determined on a case-by-case basis.

A branch of the foreign company or a local subsidiary must be created to enter into a contract. Although the procedure is not complicated, all the steps must be completed. It may take four to eight weeks to complete the entire procedure. It is not necessary that the branch or the subsidiary be set up in Ecuador during the bidding process, but advisable once the contract has been awarded. The costs for setting up a branch and incorporating a company will not exceed US\$5,000, plus legal fees.

A parental guarantee is usually required for newly created subsidiaries. The parental guarantee usually provides for the parent's joint liability with the subsidiary of the latter's obligations.

20 What controls does the regulatory body have over operators? Can operatorship be revoked?

ARCH, the oversight entity, has the capacity to oversee all operations, including compliance with all technical regulations, for example, the percentage of water in pipelines, equipment quality, risks and investment, as well as costs. ARCH audits investments each year and usually costs determinations by ARCH are the basis for Inland Revenue Service (IRS) tax audits. Only expenses relating to exploration and production activities for each specific contract are allowed as a tax deduction. A ring-fence structure for each contract applies in Ecuador; therefore, it is not possible to offset losses from one contract with profits from another contract.

21 What is the legal regime for joint ventures?

Joint ventures between private companies that want to jointly participate in a bidding process or for a new partner to come are allowed and customary in Ecuador. A joint venture may be incorporated whereby the partners set up a new company in which they own shares or may be non-incorporated in which the rights and obligations stemming from the contract are divided among all partners depending on their agreed percentages. As the main principle, each partner is liable to the Ecuadorian government for the full extent of the contract. However, severability and inter-partner responsibilities can be agreed.

22 How does reservoir unitisation apply to domestic and cross-border reservoirs?

The Hydrocarbons Law provides that when a reservoir extends beyond the boundaries of the contract area, the contractors of the two blocks must execute a contract for joint unitised operations of the field. There has been no cross-border case with a neighbouring country.

23 Is there any limit on a party's liability under a licence, contract or concession?

There is no limit on a party's liability, especially when environmental matters are involved. The concept of consequential damages has never been applied. All partners are liable for the full amount claimed. The government can choose whom it will act against, usually this is the operating partner.

24 Are parental guarantees or other forms of economic support common practice or a regulatory requirement? Are security deposits required in respect of any work commitment or otherwise?

Parental guarantees are always required, especially in the case of newly created subsidiaries. The guarantee must come from the ultimate parent; however, the government may accept a guarantee from a subsidiary with enough resources to support the activities in Ecuador.

For production-sharing contracts and service contracts to be executed with the Hydrocarbons Secretariat, a bank bond for 20 per cent of the committed investments is required immediately after the contract is executed.

Local content requirements

25 Must companies operating in your country prefer, or use a minimum amount of, locally sourced goods, services, capital or personnel?

The main provision of the law is that when price and quality are the same as those of a foreign provider, Ecuadorian subcontractors will have preference. However, Ecuador has a good offer of goods and services for the hydrocarbons industry. Services can be provided by the usual multinationals or smaller companies.

The law provides for a certain limit regarding foreign employees; that is, 5 per cent of general employees, 10 per cent of administrative employees and 25 per cent of technical employees.

There are plenty of qualified local people and the minimums are usually not an issue. ARCH strictly oversees this point.

All companies must accept trainees and assign an amount for education, depending on the contract.

26 Describe any social programme payment obligations that must be made by a licensee, lessee or contractor.

The law does not provide for any special obligation, except for local hiring. It is good practice to hire as many local residents as possible for the activities required by the company.

Transfers to third parties

27 Is government consent required for a company to transfer its interest in a licence, concession or production sharing agreement? Does a change of control require similar approval? What is the process for obtaining approval? Are there any pre-emptive rights reserved for the government?

Government consent is required for transferring a company's interest in any type of contract. Change of ownership of shares, whether or not implying a change or control, also requires government consent.

The law stipulates that the ministry must qualify the transferee as a suitable contractor and a fee of US\$10,000 will apply for each 1 per cent transferred. Therefore, if the entire contract is transferred, US\$1 million must be paid. If the contract is already in the production stage, however, the above referenced fee would be US\$5,000 plus 0.1 per cent of the preceding year's net profits for every 1 per cent transferred.

This procedure may not be applicable for certain contracts executed with Petroamazonas.

In addition, a 25 per cent capital gains tax is paid when a share is transferred.

The procedure may take two to six months.

28 Is government consent required for a change of operator?

Yes. It is required but the premiums mentioned above are not applicable when there is no change of ownership.

29 Are there any specific fees or taxes levied by the government on a transfer or change of control?

Yes. As described above and, additionally, the government may request the renegotiation of the contract to add extra government benefits (eg, a lower tariff for a service contract or a bigger government share in a production-sharing contract).

Title to facilities and equipment

30 Who holds title to facilities and equipment used for oil exploration, development and transportation activities during the term and on termination of a licence, PSC or service contract?

The contracting company holds title to all facilities and equipment used for oil exploration, development and transportation activities during the term of the contract, except in the case of rented equipment.

The contracting company can amortise the facilities and equipment for income tax payment purposes but needs approval from the government to sell or in any way dispose of the facilities or equipment.

In the case of contract termination for any reason, all facilities and equipment owned by the contracting company will revert to the government without cost.

Decommissioning and abandonment

- 31 What laws or regulations govern abandonment and decommissioning of oil and gas facilities and pipelines? In summary, what is the obligation and liability regime for decommissioning? Are there any other relevant issues concerning decommissioning?**

The contracting company needs to conduct an environmental impact study audit and, if required, remediation as a pre-requirement for the government to accept that there are no further liabilities.

All tax and labour matters arising during the term of the contract as well as all pending obligations with subcontractors are the contracting company's liability.

- 32 Are security deposits required in respect of future decommissioning liabilities? If so, how are such deposits calculated and when does their payment become due?**

Security deposits may be required depending on the case.

Transportation

- 33 How is transportation of crude oil and crude oil products regulated within the country and across national boundaries? Do different government bodies and authorities regulate pipeline, marine vessel and tanker truck transportation?**

Contracting companies must build their own transmission lines and pipelines from the wells to the production facilities and then up to the delivery point agreed in each contract. From the delivery point, oil enters the secondary pipelines owned by Petroecuador and then is transported in one of the two main pipelines crossing the Andes to the Pacific Ocean to reach the port of Balao in Esmeraldas, where crude oil is exported.

In current service contracts, the contracting company receives a pre-agreed fixed tariff per produced barrel delivered at the delivery point agreed in the contract. From that point on, it is the government's responsibility to transport the oil and the government has the right to sell it.

For potential new production sharing contracts, which were customary until 2010, the contracting company will own its share of oil from the delivery point up to the port on the Pacific Ocean and has the right to sell it. Therefore, the company will need to pay a transportation fee to the main pipelines.

Cost recovery

- 34 Where oil exploration and production activities are conducted under a production sharing contract, describe how recoverable costs can be determined and how recovery can be realised.**

Both production sharing contracts and current service contracts have specific cost rules. In short, the main concept consists of a distinction between investments and costs. Investments are amortised (recovered) during the life of the contract and per produced barrel, while costs are fully deductible annually for income tax purposes. All expenditures during the exploration phase are treated as investment.

The primary concept of the Internal Tax Regime Law is that only those investments and expenses related directly to the purpose of the contract (exploration and production in a specific field) are recoverable. Therefore, if costs are not related to the field under the contracting company's management, they are not recoverable.

Ring fence provisions do exist but will depend on each contract. The profits of one contract cannot be offset with the losses of another contract.

Health, safety and environment

- 35 What health, safety and environment requirements apply to upstream oil-related facility operations onshore and offshore? What government body is responsible for this regulation; what enforcement authority does it wield? What kind of record-keeping is required? What are the penalties for non-compliance?**

An environmental licence is required for each activity, for example, seismic, drilling campaign, facilities and pipeline construction, and

Update and trends

The main situation to watch, and that will make Ecuador a far more attractive place to invest, is whether the Hydrocarbons Secretariat will finally decide to move to a production-sharing type of contract by which the company receives a share of produced oil, at least for exploration contracts. Even though permitted by the law, production sharing contracts have not been in effect since 2010, when by legal mandate the government ordered existing contractors to migrate to service contracts. The government's rationale back in 2010 was that, with the high price of oil, it was not fair to maintain production sharing contracts with pre-agreed percentages for the parties. The solution may be production sharing when the percentages of the parties vary depending on the price of oil.

is granted by the Ministry of the Environment after an environmental impact study has been conducted by a qualified company. The environmental impact study approval process includes a referendum for the communities in the project's area of influence. The community's rejection of a project may be grounds for the government to stop it, but the government will ultimately have the final decision. Environmental audits are conducted periodically. Environmental damage may trigger the unilateral termination of the contract by the government unless remediation is timely conducted.

The initial environmental impact study may take up to a year. Subsequent studies could take less time.

The contracting company is ultimately responsible for all environmental damage and impacts on communities in the project's area of influence, even when the damage is caused by subcontractors or third parties. Therefore, it is advisable to impose strict remediation and indemnification clauses for subcontractors, report all third-party activities to the Ministry of the Environment and create a carefully prepared social and environmental baseline of the status of the contract area at the start of operations.

Labour

- 36 Must a minimum amount of local labour be employed? What are the visa requirements for foreign labour? Are there anti-discrimination requirements? What are the penalties for non-compliance?**

The minimum amounts are that 95 per cent of employees in general, 90 per cent of administrative employees and 25 per cent of technical employees must be Ecuadorian. All contracts must provide for a training fund (ie, US\$50,000).

Foreigners need a working visa, which usually takes three months to process. The Constitution provides for anti-discrimination as well as equal pay for equal work. The contract can be unilaterally terminated if the company does not cure any of the situations described above.

Taxation

- 37 What is the tax regime applicable to oil exploration, production, transportation, and marketing and distribution activities? What government body wields tax authority?**

Article 408 of the Constitution provides that the Ecuadorian state must receive profits higher than the profits received by the contracting company. The contracting company's profit is the net profit it makes, while Ecuador's profit is all the taxes it is able to collect and the revenue from the sale of oil as follows:

- employee profit-sharing (15 per cent of net profits before income tax);
- 25 per cent income tax rate;
- 12 per cent value-added tax;
- 5 per cent money outflow tax, applied to offshore remittances, except when for profit distribution;
- municipal taxes; and
- other fees and contributions charged by petroleum oversight authorities.

Commodity price controls**38 Is there a mandatory price-setting regime for crude oil or crude oil products? If so, what are the requirements and penalties for non-compliance?**

Diesel, petrol and LPG for Ecuadorian consumers are heavily subsidised by the Ecuadorian government. Therefore, the only importer and main distributor of those products is the government itself, through Petroecuador, and its related entity Petrocomercial.

Presently, owing to the service contract regime in place, the only oil exporter is the government through Petroecuador, except for a few service contracts under which the contractor is paid its tariff in oil at the reference price on the date of payment.

There are no restrictions concerning the price at which a private producer can export its oil.

Competition, merger and trade control**39 What government bodies have the authority to prevent or punish anticompetitive practices in connection with the extraction, transportation, refining or marketing of crude oil or crude oil products?**

All anticompetitive practices, as well as mergers and acquisitions, fall under the control of the Market Control Secretariat. There have only been a few cases of services companies that needed authorisation for merger, but never a case involving anticompetitive practices.

40 What is the process for procuring a government determination that a proposed action does not violate any competition laws? How long does the process generally take? What are the penalties?

The Constitution grants a natural oil monopoly to the government. There has never been a case where a proposed action was challenged for violating competition laws.

Data**41 Who holds title to seismic data collected during the term of and on termination of a licence, PSC or service contract? Can the regulator require the data owner to report or release the data?**

The contracting company has the obligation to deliver all data to the Hydrocarbons Secretariat or Petroamazonas and they will become the ultimate owner of it.

International**42 To what extent is regulatory policy or activity affected by international treaties or other multinational agreements?**

The main treaties of relevance were the bilateral investment treaties providing government-to-government protection of investment agreements, guaranteeing fair treatment to investors of the other country and providing for international arbitration. Most of those treaties have been terminated by the Ecuadorian state. Therefore, any claim under a contract must be brought either to an arbitration tribunal, as provided by the contracts on a case-by-case basis, or to local courts.

Ecuador is also a signatory to the International Labour Organization, which bears relevance for community referendums and labour rights.

43 Are there special requirements or limitations on the acquisition of oil-related interests by foreign companies or individuals? Must foreign investors have a local presence?

There are no special limitations, except for the need to demonstrate technical and financial ability to participate in a project. The requirement is that a local subsidiary or branch must execute the exploration and production contract.

44 Do special rules apply to cross-border sales or deliveries of crude oil or crude oil products? Are there any volumetric supply obligations for the local market that prevail over the export rights of the oil producer?

Only in special emergency situations can an oil producer be obliged to sell to the local market, but this has never been the case. In the present situation of service contracts, the Ecuadorian government is the only government exporting oil and using it for its own refineries. There is only a small portion of oil paid to private producers for their services, converted from the amount invoiced to oil at the price on the date exported by private companies, with no restrictions.



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