

The Handbook of Trade Enforcement

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Overview

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Trade law

Brazil has implemented article VI of the GATT by means of Law 9,019/1995, which established the Brazilian system of trade defence. Additionally, Executive Order 1,602/1995 established the administrative procedures concerning dumping investigations and imposition of provisional and definitive duties.

The Agreement on Subsidies and Countervailing Measures has been implemented through Executive Order 1,751/1995, which sets out the procedures concerning imposition and determination of countervailing measures. Executive orders 1,488/1995 and 1,936/1996 have implemented the Agreement on Safeguards, setting out the criteria for defining serious injury to domestic industry as well as the limits concerning the duration and scope of provisional or definitive safeguard measures.

Importantly, in September 2008, Congress amended Law 9,019/1995 in order to allow the expansion of imposed anti-dumping or countervailing duties to reach third parties or components and parts of the relevant products in cases of practices aimed at frustrating the application of duties.

The Brazilian system of trade defence

The Chamber of Foreign Commerce (CAMEX), headed by a council of ministers, including the ministers of foreign relations, finance and agriculture and the minister of development, industry and foreign commerce, is responsible for imposing, reviewing, suspending and ending provisional or definitive anti-dumping, countervailing or safeguard measures, as well as sanctioning price undertakings.

CAMEX's decisions are made following opinions by the Department of Trade Defence (DECOM). The DECOM, functioning under the Secretariat of Foreign Commerce (SECEX) within the Ministry of Development, Industry, and Foreign Commerce (MDIC), is the agency responsible for initiating investigations and conducting administrative proceedings for determining dumping, identifying actionable subsidies, and serious injury to the domestic industry. Furthermore, the DECOM assists

Brazilian exporters by following investigations initiated by trading partners.

The Department for Foreign Commerce Operations (DECEX), which also operates under the SECEX, is the agency responsible for issuing import licences regarding operations in atypical or special regimes.

Trade remedies

As of March 2010, 66 definitive anti-dumping duties have been in force, regarding 43 products from 22 different countries and the EU; however, in 2009, only six new duties were imposed. More than one third of the duties had been imposed on goods from China and the average duration of anti-dumping duties in place is approximately 6.4 years. Additionally, a countervailing measure has been in force concerning plastic films from India and a definitive safeguard measure (quantitative restriction) has been adopted to protect the domestic industry of grated coconut. Moreover, the DECOM has been conducting 18 dumping investigations concerning 14 products from seven different countries.

Judicial review of trade enforcement

In Brazil, all administrative orders and rulings are subject to judicial review pursuant to article 5, XXXV of the Federal Constitution. Thus, federal courts may review both findings of fact and law and, as a result, vacate and remand or overrule decisions by the DECOM, DECEX or the CAMEX.

Federal courts have reviewed more than 30 cases challenging trade enforcement agencies' findings in recent years. Significant decisions were issued. In the first anti-dumping duty determination reviewed by the Supreme Court, a decision by CAMEX's president was set aside on procedural grounds. Following a dumping investigation conducted by the DECOM against Danish company Novo Nordisk AS, a major insulin producer, CAMEX's president had sanctioned the imposition of a tariff of 76.1 per cent on insulin imports. The Supreme Court held, however, that the determination of anti-dumping duties must have been, as a matter of law, previously authorised by the CAMEX's

council of ministers. The case was remanded to the Superior Court of Justice which has granted plaintiffs reimbursement of the duties collected.

In a case concerning imports of metallic cables from China, the Superior Court of Justice (STJ) ruled that the DECEX may lawfully refuse to issue non-automatic import licences based on summary findings of possible dumping. The STJ rejected the importer's contention that a determination of dumping must be preceded by an investigation conducted by the DECOM and that, consequently, DECEX's refusal to issue an import licence had violated due process. The administration argued that the initiation of a dumping investigation requires introduction of the relevant product into internal commerce, which was not verified. Siding with the administration, the court further ruled that pursuant to Brazilian regulations, the DECEX must track export prices and has the power and duty to intervene in order to avoid 'evident unfair trade, posing a serious risk to the national economy.' Although the decision has set a precedent, lower courts have distinguished cases based on fact-pleading, ruling that even though the DECEX may discretionally deny non-automatic import licences, a determination of dumping must be preceded by a formal investigation.

Moreover, courts have reaffirmed the rule according to which anti-dumping duties are not applicable to products shipped from the exporting country before the publication of the administrative order imposing the measures in the official gazette.

The Brazil-US cotton dispute, the 2009 Trade Policy Review and the Doha Round

Authorised by an arbitrator to retaliate against the US for its illegal upland cotton subsidies following

almost eight years of litigation and over four years of continuing non-compliance with the rulings of the Dispute Settlement Body by the United States, Brazil has recently published a list of 102 goods to be subject to additional import tariffs. In addition, Brazil is set to adopt cross-retaliation against US patents in the areas of pharmaceuticals, chemicals, biotechnology, movies and music. Nevertheless, President Lula has repeatedly stated that he still hopes that retaliation can be avoided and the US complies with the decision and halts the subsidies, for the benefit not only of Brazilian producers, but especially cotton producers in underdeveloped African countries.

The fifth Trade Policy Review of Brazil was concluded in 2009 and highlighted that Brazil's recent economic growth has been linked to sound economic policies, expansion and diversification of trade, and continued reform and liberalisation efforts. Brazil received widespread appreciation for setting an example by resisting the protectionist pressures seeking to expand the scope of non-automatic import licences.

President Lula has argued that the Doha Round is part of the solution to the economic slowdown and has pressed trading partners to reach compromises in order to end the impasse. Brazil has agreed to significantly cut almost half of all import tariffs on industrial goods. In exchange, and as one of the leaders of the Group of 20 developing nations, it has demanded a substantial reduction of tariffs, subsidies and export programmes that distort trade on agricultural goods, including ethanol and biodiesel. Brazil's foreign relations minister has voiced President Lula's desire to complete the Doha Round before his second term ends in 31 December 2010.

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Lanna Peixoto Advogados (LP) is a highly specialised firm which provides premier and customised legal services in the areas of Brazilian and international trade law, antitrust law, trademarks and unfair competition, and regulation of network industries. LP has advised leading companies and international law firms in investigations of dumping, actionable subsidies and injury to the Brazilian industry. It has also counselled and represented foreign companies and trade associations in administrative procedures before the Brazilian Department of Trade Defence, the Chamber of Foreign Commerce, the Secretariat of Foreign Commerce, the Department for Foreign Commerce Operations and the Ministry of Development, Industry and Foreign Commerce. LP is highly recognised for its distinguished expertise and experience in both trade and antitrust complex litigation.

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Bruno Peixoto received his Master of Laws (LLM) degree from the University of Chicago Law School and is the head of the antitrust and international trade practice group of Lanna Peixoto Advogados.

Bruno Peixoto has conducted complex actions requesting judicial review of trade enforcement agencies' decisions and has counselled foreign companies and trade associations in administrative procedures before the Brazilian Department of Trade Defence, the Chamber of Foreign Commerce, the Secretariat of Foreign Commerce, the Department for Foreign Commerce Operations, and the Ministry of Development, Industry and Foreign Commerce.

Before founding Lanna Peixoto Advogados, Mr Peixoto was an attorney at the Ministry of Justice.

Bruno Peixoto is also founder and president of the Brazilian Institute for Economic Analysis of Law, a non-profit organisation to advance economic analysis of Brazilian law and issue public policy recommendations. Mr Peixoto is also active in the academic community and has lectured extensively and published articles on international trade law and antitrust law in both Brazilian and international law journals.