



Brazilian Secretariat of Foreign Trade gathers contributions on proposed reform of proceeding for the assessment of public interest within trade defense investigations (by Francisco Negrão, Andrea Cruz, and Bruno Almeida Silva, attorneys at Trench Rossi Watanabe)

In Brazil, the Antidumping and Subsidies Decrees (Decrees No. 8,058/2013 and No. 10,839/2021) authorizes, under extraordinary circumstances, the suspension or amendment of definitive antidumping and countervailing measures, and the non-imposition of such measures on a provisional basis, for public interest reasons.

Today, an intervention based on public interest is preceded by an administrative proceeding (the so-called "public interest assessment" or "**PIA**"), which, as a rule, runs in parallel to original trade defense investigations and sunset reviews.

The regulation of such proceeding is within the purview of the Brazilian Secretariat of Foreign Trade ("**SECEX**"), which has recently launched a public consultation to gather contributions regarding a draft ordinance that proposes comprehensive changes in both the PIA legal institute, and its current procedural framework (the "**New Ordinance**"). Contributions from the civil society will be accepted until June 15. If adopted, the draft ordinance will fully revoke the current SECEX Ordinance No. 13/2020 (amended by SECEX Ordinance No. 237/2023) on the subject.

As explained in the introductory summary of the public consultation ("**Summary**"), the proposed reform aims at simplifying and streamlining the PIA, better allocating public resources, and ensuring more foreseeability and legal certainty in the Brazilian regime.

Substantive aspects. The New Ordinance proposes to eliminate the existing definition of "public interest". SECEX Ordinance No. 13/2020 currently establishes that "*[t]he public interest is present (...) when the overall impact of the imposition of the anti-dumping and countervailing duties on economic agents proves to be potentially more harmful when compared to the positive effects of the imposition of such trade defense measure*".

SECEX clarifies that it purposefully avoided adopting any hermetic conceptual definition of "public interest". The underlying rationale is to widen the analysis beyond competition and economic assessments, to encompass other relevant factors, such as bilateral and multilateral relations between countries, industrialization, positioning in the global economy, employment, environment, governance, and social issues.

The New Ordinance innovates by defining three possible approaches of the PIA, namely:

- (i) PIA focused on *socio-economic factors*, focused on the examination of positive and negative effects of the trade defense measure over the economic agents of the production chain in question, either upstream or downstream in relation to the domestic industry.
- (ii) PIA focused on *shortage issues* arising from a change in market conditions that result in abrupt interruption, total or partial, permanent or temporary, of the manufacturing and supply of the domestic similar product;
- (iii) PIA focused on *political-strategic factors*, oriented to the verification of the suitability of the trade defense measure in view of the strategies and goals of the Brazilian government.

The regulatory scope of the New Ordinance is limited to the PIAs focused on socio-economic factors and shortage issues. However, this does not prevent political-strategic factors from being evaluated directly by the Brazilian Chamber of Foreign Trade ("**CAMEX**"). In this case, as the procedures set forth in the draft do not apply, there would be no guarantee of adversarial procedure.

Another novelty is that requests for the opening of PIAs relating to industries that have been qualified as fragmented in the previous trade defense investigation shall not be accepted. This is

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because, according to the authority, fragmented markets comprise an elevated number of domestic producers and, therefore, are characterized by elevated rivalry among its players. The current regulation has no similar caveat.

Procedural aspects. Since the enactment of SECEX Ordinance No. 237/2023, the PIA is an optional proceeding in Brazil, either in original trade defense investigations and in sunset reviews (before that, PIAs were mandatory in every original investigation). This remains unchanged in the New Ordinance.

The main proposed change in terms of procedural framework is that the PIA would no longer be conducted in parallel to the trade defense investigation. According to the New Ordinance, PIAs focused on socio-economic factors must be requested, and will be conducted after the trade defense investigation is concluded. The request must be submitted within 30 (thirty) days of the publication of the imposition of the trade remedies in the Official Gazette. PIAs relating to shortage issues, in turn, may be requested at any time while the shortage conditions persist.

Today, any party that may potentially be affected by the trade defense measure is considered a legitimate party to request the opening of a proceeding for the assessment of public interest – the only caveat is that a PIA will not be opened exclusively on the basis of a request submitted by producers or exporters of the investigated product.

The New Ordinance is more specific and more restrictive in this regard. Legitimate parties are: (i) national interested parties that participated in the last trade defense investigation concerning the product in question; (ii) national industrial sectors that are users of the product subject to the measure; (iii) national consumers that are negatively affected by the trade defense measure; and (iv) members of the Executive Committee of the Brazilian Chamber of Foreign Trade (“**GECEX**”). Note that the participation of foreign companies or governments is not to be allowed, while Brazilian governmental entities may provide information throughout discovery.

The minimum contents of the initial request vary depending on the approach of the analysis. To request the opening of a PIA focused on socio-economic factors, the party is required to file a petition following the Form for the Submission of a PIA Petition, contained in Annex I, provided that impacts on welfare must be estimated on the basis of the Partial Equilibrium Model to be described in Annex II. This differs from the current regime, where the petitioner is free to define the most suitable economic model to subsidize its claim, although the Brazilian Trade Defense Department (“**DECOM**”) does frequently appreciate the Partial Equilibrium Model.

Such annexes have not yet been released, and thus are not included in the ongoing public consultation. According to the Summary, however, Annex I will be subject to future public consultation. The initial requests for PIAs relating to shortage issues are expected to contain evidence of the shortage situation.

In terms of timing, the proposal is that the PIA becomes a fairly brief proceeding in comparison to the existing one. In the case of a PIA focused on socio-economic factors, the initial request must be filed within the non-extendable 30-day deadline, counted as of the imposition of the trade defense measure. The discovery phase ranges from a minimum of approx. 125 days to a maximum of approx. 190 days, in socio-economic PIAs, and from a minimum of approx. 55 days to a maximum of approx. 95 days, in PIAs concerning shortage issues. In both cases, DECOM issues its opinion at the end of the discovery phase and, after that, the case is submitted to GECEX, the competent body to issue the final decision on the case. In contrast, nowadays, the PIA may last for as long as the trade defense investigation in question, that is, up to 18 months.

As a final remark, one important aspect that is not contemplated in the New Ordinance (nor in the current regulation) relates to the competent body within DECOM to conduct the PIA. In practice, under the prior administration, two different departments within DECOM were responsible for conducting the trade defense and the public interest investigations, and issuing separate recommendations: one relating to the fulfilment of the legal requirements for the application of a trade defense measure and another regarding the existence of public interest factors that would justify the suspension, alteration or non-application of the corresponding trade

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defense measure. The final decision was then issued by GECEX, after reviewing both DECOM's opinions.

The public consultation does not indicate who will carry out the public interest analysis. The new administration has recently mentioned in a public event that DECOM will no longer have a department specialized in public interest matters, and that the same body will likely be in charge both investigations.

Brazil integrates a selected group of pioneering countries, including Canada, New Zealand and the United Kingdom, that regulates the PIA proceeding. Enhancements to the existing regulatory framework are always important, and the active participation of as many stakeholders as possible in the process of public consultation will certainly be valuable for the improvement of the procedure.

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