

Trade & Customs

Contributing editor
Gary N Horlick



2019

GETTING THE
DEAL THROUGH 

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Gary N Horlick

Law Offices of Gary N Horlick

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Preface

Trade & Customs 2019

Seventh edition

Getting the Deal Through is delighted to publish the seventh edition of *Trade & Customs*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Colombia and a new article on the World Trade Organization dispute against Russia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Gary N Horlick of Law Offices of Gary N Horlick, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
July 2018

Colombia

Olga Lucía Salamanca, Luis Ricardo López, Yenny Palacios and Julián Serrano

Araújo Ibarra International Trade Consultants

Overview

1 What is the main domestic legislation as regards trade remedies?

The main Colombian trade remedies laws and regulations are:

- Law 07/199 – General Law of Foreign Trade, which provides protective measures against unfair practices in favour of domestic production. This sets the requirements, procedures and criteria for the imposition of duties;
- Law 170/1994, which promulgates the Final Act of the Uruguay Round and incorporates the results of the Multilateral Trade Negotiations of the General Agreement on Tariffs and Trade;
- Decree 1750/2015, which details the administrative procedures of the investigation and application of anti-dumping measures;
- Decree 299/1995, which details the administrative procedures of the investigation and application of countervailing measures;
- Decree 152/1998, which details the administrative procedures of the investigation and application of safeguard measures;
- Decree 1407/1998, which details the administrative procedures of the investigation and application of safeguard measures with those countries where no free trade agreements (FTAs) have been established;
- Decree 1820/2010, which details the administrative procedures of the investigation and application of bilateral safeguards;
- Decision 456/1999, which details the administrative procedures of the investigation and application of anti-dumping measures within the framework of the Andean Community of Nations (CAN);
- Decision 457/1999, which details the administrative procedures of the investigation and application of countervailing measures within the framework of the CAN; and
- Decision 452/1999, which details the administrative procedures of the investigation and application of safeguard measures within the framework of the CAN.

Colombian trade remedies legislation may be accessed on the Ministry of Commerce, Industry and Tourism (MCIT) website at www.mincit.gov.co/mincomercioexterior/publicaciones/39163/defensa_comercial.

2 In general terms what is your country's attitude to international trade?

Colombia's trade policy has been continuously oriented towards a further opening to other nations by seeking closer integration with countries in the region and also with the rest of the world through the negotiation of preferential agreements in order to increase foreign trade and investment flow. In this regard, Colombia has taken part in various negotiations to strengthen existing bilateral and regional agreements, and has signed and negotiated new agreements to ensure preferential access to strategic markets. The latter does not disregard the particular importance granted to Colombia's participation in the WTO within its trade policy strategy. Therefore, for Colombia, maintaining an open trade regime within a transparent multilateral system, complemented by regional and bilateral efforts, is of great importance.

Colombia has a fundamentally open trade regime with average tariffs that have been decreasing throughout the years. Although its general orientation has been guided towards greater openness and reduction of international trade barriers, some non-tariff restrictions

still persist, mainly related to technical requirements and sanitary and phytosanitary (SPS) measures. The country's trade regime also shows certain complexities due to the amount of existing legal regulation.

Trade defence investigations

3 Which authority or authorities conduct trade defence investigations and impose trade remedies in your jurisdiction?

The MCIT, and specifically the Directorate of Foreign Trade through the Subdirectorate of Commercial Practices (SPC), is in charge of investigating the existence of unfair trade practices and injuries to the domestic industry, as well as determining and imposing the corresponding remedies, such as safeguard measures and anti-dumping and countervailing duties.

The Directorate of National Taxes and Customs (DIAN) is in charge of the collection of the applicable anti-dumping and countervailing duties.

For more information see <http://www.mincit.gov.co/mincomercioexterior/loader.php?lServicio=Publicaciones&id=39163>.

4 What is the procedure for domestic industry to start a trade remedies case in your jurisdiction? Can the regulator start an investigation ex officio?

To initiate dumping, countervailing or safeguard investigations, the interested party must request it on behalf of the affected domestic industry. It is necessary for the request to be supported by producers of a similar product or like product who represent more than 50 per cent of the affected domestic industry.

The affected domestic industry in whose name the request is submitted should be identified by means of a list containing all known domestic producers or the producer associations of the similar product. A description of the volume and value of the like product's domestic production must also be submitted.

Some substantive conditions must be certified to justify or support the implementation of measures of a nature that will require the collection and consolidation of sensitive information from the petitioners, as is the case when demonstrating the similarity or competitive relation between the domestic product and the imported product.

In general, most of the documents and information are of an economic and countable nature, and thus must be duly analysed and prepared in order to reflect legal concepts regarding unfair practices, injury and threat of material injury.

It should also be noted that a considerable amount of this information and documentation may be confidential.

Once the request is formally filed, the SPC will proceed as follows:

- merit assessment to open the investigation: the Directorate of Foreign Trade, through the SPC, will have a period of 20 business days, counted from the day following the date of submission of the request, to make this assessment. If the investigating authority finds it necessary to request missing information for this assessment, such information will be requested from the petitioner. This requirement will interrupt the 20-day period, which will start again when the petitioner duly provides the requested information. This period may only be extended once for up to 10 additional days. If, when assessing the request, the investigating authority deems

there is merit in opening the investigation, it must do so by means of a resolution published in the Official Journal;

- preliminary determination: through a reasoned decision, the investigating authority will decide on the preliminary results of the investigation and, if necessary, order the imposition of provisional duties. The investigating authority has two months, counted from the day following the publication date of the opening resolution, for this stage of the investigation. This period may be extended ex officio or at the request of an interested party by up to 20 days;
- final report presentation: within a period of three months, counted from the day following the publication date of the preliminary determination, the SPC will summon the Trade Practices Committee to present the final results of the investigation and to provide its opinion of the matter. This period may be extended by up to 15 days when special circumstances justify it.
- essential facts: three days after the Trade Practices Committee provides its opinion on the results of the investigation, the SPC will send a document to the interested parties relating the essential facts on which the decision to impose or not impose definitive measures is based. The parties have 10 days to express their comments to the investigating authority. On the other hand, the investigating authority has 10 days to submit these comments to the Trade Practices Committee in order for it to assess them and present a final recommendation to the Directorate of Foreign Trade for it to impose or not definitive duties; and
- investigation conclusion: the Directorate of Foreign Trade will decide on the matter through a reasoned resolution within 10 days following the recommendation submitted by the Trade Practices Committee. This resolution will be published in the Official Journal.

During these kinds of proceedings, the following administrative procedures are carried out:

- evidence: the investigating authority will examine, ex officio or at the request of an interested party, the evidence that is considered necessary. The period to examine evidence expires after one month following the publication date of the preliminary determination. Without limiting the foregoing, the investigating authority may accept ex officio evidence from the beginning of the investigation to the final recommendation of the Trade Practices Committee;
- arguments: interested parties have the opportunity, within 15 days after the expiration of the period, to examine evidence, to present their arguments or opinions regarding the investigation and to contest provided and accepted evidence; and
- hearings: within 10 days following the publication date of the preliminary determination, interested parties to the investigation may request a hearing to present and refute arguments. This hearing will be conducted within 15 days from the day it is convened.

Unlike anti-dumping and countervailing, in the case of safeguards, the authority must issue a compliance receipt within five business days from the day following the filing of the request and must check whether it complies with all requirements established in legal regulations. Next, it will proceed to assess the case's merit for the opening of the investigation.

The authority in charge of providing a concept on the relevance of the imposition of a safeguard measure is the Customs, Tariffs, and Foreign Trade Committee. Subsequently, the Superior Council of Foreign Trade finally decides whether or not to impose the measure.

Duration of the measures

Anti-dumping and countervailing duties cannot exceed five years, which are counted from the resolution's date of publication in the Official Journal. Anti-dumping duties may be less than the dumping margin if a lower amount is sufficient to eliminate the inflicted injury on the affected domestic industry.

Safeguard measures shall only be imposed for the period that is necessary to prevent or remedy the inflicted injury or the serious threat of it and facilitate a readjustment of the affected domestic industry. This period shall not exceed four years, including the time during which a provisional measure was in effect.

Ex officio initiation of the investigation by the Directorate of Foreign Trade will only take place in exceptional cases when special circumstances justify it. In practice, ex officio initiation is very rare.

5 What is the procedure for foreign exporters to defend a trade remedies case in your jurisdiction?

Within five business days after the publication date of the resolution opening the investigation, a copy of the same and the questionnaires are sent to interested parties and to diplomatic or consular representatives of the country or countries of origin or where the export origins from. Other interested parties are summoned during the same period by published notice in the Official Journal, for them to express their opinions or to request the examination of relevant evidence.

Finally, within the period mentioned above, the investigating authority will make available to foreign producers, exporters, authorities of the exporting country and other interested parties that request it the text of the submitted request, taking into account reservation of confidential information.

Exporters may take part as an interested party in all stages throughout the process, as explained previously.

6 Are the WTO rules on trade remedies applied in national law?

Colombia has been a member of the WTO since 1995.

WTO rules on trade remedies are applied in domestic law. Colombian trade remedy legislation references WTO legislation and makes it applicable in the cases and under the conditions established in such domestic legislation.

Additionally, WTO legal provisions are considered 'international treaties' and thus are considered hierarchically superior to domestic law.

Colombia has not recognised China as a market economy and uses the concept of 'Meaningful State Intervention', as established in 2017.

7 What is the appeal procedure for an unfavourable trade remedies decision? Is appeal available for all decisions? How likely is an appeal to succeed?

There is no appeal against a decision imposing unfavourable measures by the Directorate of Foreign Trade of the MCIT. An appeal can be made before the administrative courts, filing for the restoration of rights and nullity action.

The interested party has a period of four months, counted from the decision's notification, to present the claim. The judicial decision is impartial and will depend on what has been examined and proven in the process.

However, the Directorate of Foreign Trade has the power to revoke the adopted decision before the claim is admitted in court if, ex officio or at the request of a party, it is demonstrated that its decision is demonstrably against the constitution or the law, or it causes an unjustified grievance to a person and is contrary to the public or social interest.

The success rate of revocation processes and their claims before the courts is low.

8 How and when can an affected party seek a review of the duty or quota? What is the procedure and time frame for obtaining a refund of overcharged duties? Can interest be claimed?

The SPC is in charge of reviewing, ex officio or at the request of an interested party, duties or quotas, provided that at least one year has elapsed since their imposition. A review process may be initiated in order to determine whether there have been changes in the circumstances leading to its imposition.

This process shall be conducted when a producer or exporter that is subject to a definitive duty reduces the export price in a way that annuls the imposed corrective duty.

In any case, the interested party requesting the review must prove whether there has been a change in the circumstances that justifies its request.

However, the authority may also initiate a review ex officio, no later than two months before the fifth year of the imposition of a definitive duty, or at the request of the affected domestic industry at least four months before the expiration of the definitive duty.

In cases where provisional duties are imposed, importers may, upon submitting their import declaration, opt to cancel the duties or provide a guarantee before DIAN to secure their payment.

There will be a refund of paid provisional duties, cancellation or reduced charge of the provided guarantee for such purposes, when the definitive duties are lower than the provisional duties that have been effectively paid or guaranteed in an amount equivalent to the difference

between them. If definitive duties are not imposed, the cancellation and return of the guarantee or of the total paid amount as provisional duties will be ordered. There is no clear procedure on such reimbursement of provisional duties.

9 What are the practical strategies for complying with an anti-dumping/countervailing/safeguard duty or quota?

In Colombia, no reviews or refunds are provided for in legal regulation.

There have been cases where domestic manufacturers have promoted circumvention proceedings against jurisdictions used as alternative suppliers of goods subject to dumping duties. Likewise, they have requested authorities to verify the origin and customs value of these kinds of goods imported into the country.

Customs duties

10 Where are normal customs duty rates for your jurisdiction listed? Is there an exemption for low-value shipments? If so, at what level? Is there a binding tariff information system or similar in place? Are there prior notification requirements for imports?

Custom duty rates upon import and export of goods are set forth within the executive decree that contains the Colombian Harmonised Tariff Schedule. If the shipments are equal to or less than US\$200, they are exempt from customs duties.

The rates were set by Decree 2153/2016, which can be consulted on the website at <https://importacionescarga.dian.gov.co/WebArancel/DefMenuConsultas.faces>

There is an obligation to submit an Anticipated Import Declaration for some products deemed sensitive, such as garments, footwear, steel and aluminium.

11 Where are special tariff rates, such as under free trade agreements or preferential tariffs, and countries that are given preference listed?

Special tariff rates and countries that may be given preference can be accessed through the DIAN website: <https://muisca.dian.gov.co/WebArancel/DefMenuConsultas.faces>.

A list of trade agreements subscribed to by Colombia can be consulted at www.tlc.gov.co.

12 How can GSP treatment for a product be obtained or removed?

There is no generalised system of preferences. Preferential treatment is granted based on the product and its origin, following trade agreements to which Colombia is a party.

13 Is there a duty suspension regime in place? How can duty suspension be obtained?

There is a duty suspension regime in place called Temporal Import for Re-Exportation in Current State, which is applied to capital goods, merchandise destined for sport events, for technical tests, for participation in fairs and exhibits etc.

These imports are authorised for six months, which can be extended for six additional months. They are guaranteed through an insurance policy of 150 per cent of import duties.

There are also mechanisms such as free trade zones, which are geographically enclosed extra-territorial areas for import-export duties. While those foreign goods stay in the free trade zones, import duties are suspended. Such duties will only be generated when they exit the free zone into the rest of the country.

Other systems are applied, such as the Special Import-Export System, which allows the importation of raw materials with the respective import duties suspended as long as all of these materials are used to produce exportable goods. This mechanism is authorised and managed by the MCIT, which grants a number of annual import quotas to producers and exporters.

14 Where can customs decisions be challenged in your jurisdiction? What are the procedures?

There is an array of legal remedies that can be presented to different Customs Authority units besides that which adopts the initial decision.

Update and trends

Current emerging trends in trade and customs law include the inclusion and application of risk management systems to focus control activities on high-risk goods and businesses or persons. On the other hand, the same system provides for faster proceedings and permits for low-risk goods.

For the same purpose, new institutions have been introduced, such as the AEO, trusted users and risk qualification for logistic and supply brokers.

Currently, Colombia has not used its negotiated and ratified trade agreements to their full extent. Regarding its relationship with Asia, the country has negotiated and ratified an FTA with South Korea which was signed on 21 February 2013; in 2014, negotiations started for an agreement with Japan.

On 6 June 2012 the Pacific Alliance agreement was signed between Mexico, Colombia, Chile and Peru. This alliance is considered as a swivel mechanism for political and economic integration and cooperation in order to promote higher growth and competitiveness within the four economies comprising the alliance.

Likewise, the Pacific Alliance was born from a clear intention to consolidate trade relations with the Asia-Pacific region. Without a doubt, this agreement will allow Colombia to engage in these markets through global value chains.

Colombia is the only Pacific Alliance member that is not a part of the TPP.

Although there are dynamic trade relations with the UK, this country is not considered to be a main trading partner. Nonetheless, Colombia holds an FTA with the EU that, following the UK's exit from it, should be reconsidered in order to maintain current preferences.

This is what is called the 'administrative route'. Generally, the challenge is filed within 15 days after the initial decision is notified.

The final decision of the Customs Authority can be contested before the contentious administrative jurisdiction. Generally, the interested party has four months to present the claim. Depending on the case's magnitude, the judicial decision can also be appealed, being in the last judicial instance the Council of State.

Trade barriers

15 What government office handles complaints from domestic exporters against foreign trade barriers at the WTO or under other agreements?

The Permanent Mission representing the Colombian government at the WTO and the MCIT: www.mincit.gov.co/mincomercioexterior/loader.php?lServicio=Publicaciones&id=15660.

16 What is the procedure for filing a complaint against a foreign trade barrier?

There is no formal investigation process for such complaints.

17 What will the authority consider when deciding whether to begin an investigation?

The authority addressing a complaint will likely take into consideration the complaint's merits and the evidence presented to support it, the interest of other Colombian importers or exporters, the broader political relationship between Colombia and the country or territory in question, and the available remedies to address the barrier.

18 What measures outside the WTO may the authority unilaterally take against a foreign trade barrier?

Colombia, as a member of the WTO, is obliged to followed its dispute settlement procedure in order to impose any global measure against trade barriers. However, the government is entitled to determine and impose certain measures in the event that international trade causes harm to any sector of the Colombian economy.

19 What support does the government expect from the private sector to bring a WTO case?

In principle, the private sector may not provide support for the specific cost of a WTO case. However, the government will expect domestic

private sector interest in providing relevant economic data and other evidentiary material that will support the complaint.

20 What notable trade barriers other than retaliatory measures does your country impose on imports?

As a general rule, all goods are authorised to be freely imported. Some of them require registration or approval at the time of importation for SPS reasons. Exceptionally, some goods require prior licensing, such as used goods or goods that are used in the production of narcotics. It is not mandatory for the goods to be deposited in a warehouse prior to carrying out the import process, but importers can pursue this deposit if they wish while they obtain all the documents for importation.

Export controls

21 What general controls are imposed on exports?

As a general rule, exports are not subject to tax payments except for gold, emeralds and coffee. Goods are exported through Export Declarations. Prior approvals must be requested when dealing with food, medicines, cosmetics and live animals for SPS reasons. For all other goods, the invoice, commercial supporting documents and transportation documents are required.

22 Which authorities handle the controls?

DIAN authorises and controls exports of goods from Colombia. Other authorities (eg, the National Food and Drug Surveillance Institute, the Colombian Agricultural Institute and ministries) may intervene in controls when the product requires a prior approval for export: www.invima.gov.co/index.php; www.ica.gov.co.

23 Are separate controls imposed on specific products? Is a licence required to export such products?

In Colombia, there are strict regulations and controls for the imports and exports of weapons, munitions, explosives and dual-use goods. This special legal regime is controlled by the Ministry of Defence and the Colombian Military Industry. Dual-use goods are also included within this regime.

Additionally, Colombia imposes export restrictions on wild animals, and goods that are considered of cultural heritage (unless they are destined for exhibitions, in which case a permit from the Culture Ministry is required).

24 Has your jurisdiction implemented the WCO's SAFE Framework of Standards? Does it have an AEO programme or similar?

Colombia is part of the WCO SAFE Standards Framework. An Executive Decree that came into effect in September 2011 incorporates the figure of the AEO into the Colombian legal system. Initially, AEOs were only allowed for exporters, but in 2017 they were also extended to importers.

Currently, Colombian Customs are preparing new regulations for other actors also to be considered AEOs (eg, ports, carriers and customs brokers).

25 Where is information on countries subject to export controls listed?

There is no list of countries subject to export controls.

There is a list of countries considered as tax havens or harmful preferential tax regimes, but only regarding tax purposes (www.minhacienda.gov.co/HomeMinhacienda; Unique Regulatory Decree 1625/16).

26 Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad?

There are no restrictions or bans on exports to persons or institutions abroad.

27 What are the possible penalties for violation of export controls?

Violations of export controls are generally penalised through the imposition of fines. If exports are used to smuggle merchandise, there will be additional criminal penalties and merchandise confiscation.

Financial and other sanctions and trade embargoes

28 What government offices impose sanctions and embargoes?

DIAN is the legally authorised entity to impose sanctions and confiscate merchandise regarding the import and export of goods.

29 What countries are currently the subject of sanctions or embargoes by your country?

There are no countries subject to sanctions or embargoes.

30 Are individuals or specific companies subject to financial sanctions?

There are no individuals or specific companies subject to financial sanctions.

Miscellaneous

31 Describe any trade remedy measures, import or export controls not covered above that are particular to your jurisdiction.

Not applicable.



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