

Trade & Customs 2021

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Trade & Customs 2021

Contributing editor**Gary N Horlick**

Law Offices of Gary N Horlick

Lexology Getting The Deal Through is delighted to publish the ninth edition of *Trade & Customs*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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.

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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.

Lexology 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.

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LEGAL FRAMEWORK

Domestic legislation

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

The main Colombian trade remedies laws and regulations are:

- Law 07/1991 – 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 enacts 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 established the administrative procedures for the investigation and application of anti-dumping measures;
- Decree 299/1995, which established the administrative procedures for the investigation and application of countervailing measures;
- Decree 152/1998, which established the administrative procedures for the investigation and application of safeguard measures;
- Decree 1407/1998, which established the administrative procedures for the investigation and application of safeguard measures with countries where no free trade agreements have been signed;
- Decree 1820/2010, which established the administrative procedures for the investigation and application of bilateral safeguards;
- Decision 456/1999, which established the administrative procedures for the investigation and application of anti-dumping measures within the framework of the Andean Community of Nations (CAN);
- Decision 457/1999, which established the administrative procedures for the investigation and application of countervailing measures within the framework of the CAN; and
- Decision 452/1999, which established the administrative procedures for the investigation and application of safeguard measures within the framework of the CAN.

Colombian trade remedies legislation may be consulted on the Ministry of Commerce, Industry and Tourism website.

International agreements

2 | In general terms what is your country's attitude to international trade? Has it raised tariffs in the last year?

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

TRADE DEFENCE INVESTIGATIONS (OUTSIDE THE WTO DISPUTE SETTLEMENT SYSTEM)

Government authorities

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

The Ministry of Commerce, Industry and Tourism (MCIT), and specifically the Directorate of Foreign Trade through the Subdirectorate of Commercial Practices (SCP), 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 to safeguard measures and anti-dumping and countervailing duties.

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

Complaint filing procedure

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 using 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 to reflect legal concepts regarding unfair practices, injury and threat of material injury. A considerable amount of this information and documentation may be confidential.

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

- merit assessment to open the investigation: the Directorate of Foreign Trade, through the SCP, 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 to 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 through a resolution published in the Official Journal;
- preliminary determination: the investigating authority will decide on the preliminary results of the investigation through a motivated decision, 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 three months, counted from the day following the publication date of the preliminary determination, the SCP 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 SCP will send a document to the interested parties with the essential facts on which the decision to impose or not 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 to assess them and present a final recommendation to the Directorate of Foreign Trade to impose or not definitive duties; and
- investigation conclusion: the Directorate of Foreign Trade will decide on the matter through a motivated resolution within 10 days following the recommendation submitted by the Trade Practices Committee. This resolution will be published in the Official Journal.

During this process, the following administrative procedures are carried out:

- evidence: the investigating authority will examine the necessary evidence ex officio or at the request of an interested party. The period to examine evidence expires after one month following the publication date of the preliminary determination. The investigating authority may accept ex officio evidence from the beginning of the investigation to the final recommendation of the Trade Practices Committee, without limiting the foregoing procedure;
- arguments: interested parties have the opportunity, within 15 days after the expiration of the period, to examine the evidence, present their arguments or opinions regarding the investigation and 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 accepted.

Unlike anti-dumping and countervailing duties procedures, 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. Then 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 procedures cannot exceed five years, 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.

Contesting trade remedies

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 investigation requirement and the questionnaires are sent to interested parties and diplomatic or consular representatives of the countries under investigation. 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 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.

WTO rules

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

Colombia has been a member of the World Trade Organization (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 cases and under the conditions established in such domestic legislation.

Additionally, WTO legal provisions are considered 'international treaties' and thus are 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.

Appeal

- 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 right to appeal against a decision imposing unfavourable measures by the MCIT's Directorate of Foreign Trade. 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 proven that its decision is manifestly 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.

Review of duties/quotas

- 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 SCP 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 to determine whether there have been changes in the circumstances leading to its imposition.

This process shall be conducted when a producer or exporter 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 the total paid amount as provisional duties will be ordered. There is no clear procedure on such reimbursement of provisional duties.

Compliance strategies

- 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 using alternative suppliers of goods subject to dumping duties. Likewise, they have requested the authorities to verify the origin and customs value of these kinds of goods imported into the country.

CUSTOMS DUTIES

Normal rates and notification requirements

- 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 legally binding system of information for applied tariffs or similar in place? Are there prior notification requirements for imports?

Custom duty rates upon import and export of goods are outlined in 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. Also, in the latest tax reform, contained in Law 1943 of 2018, it is expressly informed that these jurisdictions are also exempt from value added tax.

The rates were set by Decree 2153/2016.

There is an obligation to submit an anticipated import declaration for some products deemed sensitive, such as garments, footwear, steel and aluminium.

Special rates and preferential treatment

- 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 Directorate of National Taxes and Customs website.

A list of trade agreements subscribed to by Colombia can be consulted at the Ministry of Commerce, Industry and Tourism (MCIT) website.

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

Colombia does not grant special treatment under the Generalised System of Preferences (GSP). Colombia is considered to be a developing country that is working towards reaching a sustainable economy and improving the country's international trade. Thus, preferential treatment is only granted based on the product and its origin, following trade agreements to which Colombia is a party.

Furthermore, according to the United Nations Conference on Trade and Development's List of GSP Beneficiaries of 2018, Colombia is still a GSP beneficiary of Australia, Belarus, Japan, Kazakhstan, New Zealand, Russia and Turkey.

- 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-Export in Current State, which is applied to capital goods, merchandise destined for sports events, technical tests, 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 the 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 several annual import quotas to producers and exporters.

14 | Has your country applied tariffs for 'national security' reasons?

No, Colombia has never applied tariffs for 'national security' reasons under article XXI of the General Agreement on Tariffs and Trade 1947.

Challenge

15 | 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. 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 before the last judicial instance, the Council of State.

TRADE BARRIERS

Government authorities

16 | 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 World Trade Organization (WTO) and the Ministry of Commerce, Industry and Tourism.

Complaint filing procedure

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

There is no formal investigation process for such complaints.

Grounds for investigation

18 | 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.

Measures against foreign trade barriers

19 | What measures outside the WTO may the authority unilaterally take against a foreign trade barrier? Are any such measures currently in force?

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

Private-sector support

20 | 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 evidence to support the complaint.

Notable non-tariff barriers

21 | 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 sanitary and phytosanitary reasons. Exceptionally, some goods require prior licensing, such as goods that are used in the production of narcotics. The goods do not need to be deposited in a warehouse before carrying out the import process, but importers can do this if they wish while they obtain all the documents for importation.

EXPORT CONTROLS

General controls

22 | 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 sanitary and phytosanitary reasons. For all other goods, the invoice, commercial supporting documents and transportation documents are required.

Government authorities

23 | Which authorities handle the controls?

The Directorate of National Taxes and Customs authorises and controls exports of goods from Colombia. Other authorities (eg, the National Food and Drug Surveillance Institute, the Colombian Agricultural Institute, Anti-Narcotics Police and ministries) may intervene in controls when the product requires prior approval for export.

Special controls

24 | Are separate controls imposed on specific products? Is a licence required to export such products? Give details.

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 arms industry. Dual-use goods are also included in 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).

Supply chain security

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

Colombia is part of the World Customs Organization's SAFE Framework of Standards to Secure and Facilitate Global Trade. Currently, exporters,

importers and customs authorities are allowed to be Authorised Economic Operators (AEOs). Additionally, the Colombian customs authority is preparing new regulations so that other actors such as ports can also be AEOs.

Applicable countries

26 | 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 (Unique Regulatory Decree 1625/16).

Named persons and institutions

27 | Does your jurisdiction have a scheme restricting or banning exports to named persons and institutions abroad? Give details.

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

Penalties

28 | 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

Government authorities

29 | What government offices impose sanctions and embargoes?

The Directorate of National Taxes and Customs is the legally authorised entity to impose sanctions and confiscate merchandise regarding the import and export of goods.

Applicable countries

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

There are no countries subject to sanctions or embargoes.

Specific individuals and companies

31 | Are individuals or specific companies subject to financial sanctions?

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

OTHER RELEVANT ISSUES

Other trade remedies and controls

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

Not applicable.



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UPDATE AND TRENDS

Recent developments

33 | Are there any emerging trends or hot topics in trade and customs law and policy in your jurisdiction?

Currently, Colombia's Ministry of Commerce, Industry and Tourism (MCIT) is focused on protecting the national industry from the effects of the covid-19 pandemic. So far, the government has taken several measures to ensure the internal supply of goods necessary to combat the public health emergency and to avoid the shortage of essential goods such as food products. Decree 462 of 2020, issued by the MCIT, banned the export of medical and other essential products, such as facemasks and certain drugs, necessary to face the health emergency.

The MCIT also issued Decree 520 of 2020 that suspended the application of the Andean Price Band System for yellow maize (subheading 1005.90), sorghum (subheading 1007.90), soybeans (subheading 1201.90) and oilcake (subheading 2304.00), to prevent a shortage of any of these staples.

Also, the MCIT issued Decree 527 of 2020 that bans ethanol imports for two months, only allowing necessary imports to supply shortages in the local demand. This measure was applied to protect the local production against imports, due to the decrease in ethanol demands. The MCIT will probably continue to apply measures to protect the national industry from the effects of the health emergency.

Regarding the multilateral trade system, given the United States' blocking of the World Trade Organization's Appellate Body, Colombia became a part of the Multiparty Interim Appeal Arbitration Agreement, which became effective on 30 April 2020.

Also, the Colombian customs authority is working on the implementation and improvement of its risk control systems, as well as on the evaluation of the provisions applicable to e-commerce to issue legislation that facilitates these operations.

Concerning Brexit, the Colombian government entered into negotiations with the United Kingdom to create a free trade agreement (FTA)

in 2019, to maintain economic and international trade conditions with the United Kingdom when its departure from the European Union is formalised.

At the time of writing, the FTA's final text of the FTA is awaiting approval in Congress, forecast before 31 December 2020, which is when the UK's transitional period with the European Union will end.

The negotiations with the United Kingdom were initially based on the trade conditions of the current FTA with the European Union. Minimal changes were made in adjusting it to international trade between Colombia and the UK. Assuming that the United Kingdom and the European Union will establish a withdrawal agreement with a transitional period, the United Kingdom will still be a beneficiary of EU FTAs, which means that international trade between Colombia and the United Kingdom will not be jeopardised by Brexit.

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