



**SDCOM**

SUBSECRETARIA DE DEFESA COMERCIAL  
E INTERESSE PÚBLICO

2021

**EXTERNAL GUIDELINES**

# GOVERNMENT PRACTICES IN SUPPORTING BRAZILIAN EXPORTERS INVESTIGATED BY OTHER TRADE REMEDIES INVESTIGATING AUTHORITIES

**BASIC CONCEPTS**

**BRAZILIAN SYSTEM OF GOVERNMENT PRACTICE**

**STEP BY STEP, CHARACTERISTICS, DUTIES AND OBLIGATIONS,**

**PARTICIPATION OF THE BRAZILIAN COMPANIES DURING THE INVESTIGATIONS AND AFTER**

**Undersecretariat of Trade Remedies and Public Interest (SDCOM)**

**Foreign Trade Secretariat (SECEX)**

**Ministry of Economy - Brazil**

CONSOLIDATED VERSION  
EXTERNAL GUIDE

SUPPORT TO THE BRAZILIAN EXPORTER INVESTIGATED IN A TRADE  
REMEDIES PROCEEDING ABROAD

BASIC CONCEPTS

SUPPORT SYSTEM TO THE BRAZILIAN EXPORTER OF THE FOREIGN  
INVESTIGATION: PHASES, ESPECIFICITIES, RIGHTS, AND DUTIES OF THE  
PARTIES, PARTICIPATION OF THE BRAZILIAN COMPANIES DURING AND  
AFTER THE PROCEEDING

UNDERSECRETARIAT OF TRADE REMEDIES AND PUBLIC INTEREST  
(SDCOM)

SECRETARY OF FOREIGN TRADE (SECEX)

SPECIAL SECRETARY OF FOREIGN TRADE AND INTERNATIONAL AFFAIRS  
(SECINT)

MINISTRY OF ECONOMY

## Technical Information

### Authorities

Roberto Fendt

(Special Secretary of Foreign Trade and International Affairs – SECINT)

Yana Dumaresq Sobral

(Deputy Special Secretary of Foreign Trade and International Affairs – SECINT)

Lucas Pedreira Ferraz

(Secretary of Foreign Trade– SECEX)

### Overall Coordination

Amanda Athayde Linhares Martins Rivera

(Undersecretary of Trade Remedies and Public Interest – SDCOM)

**CONSOLIDATED VERSION (November 2020)**

**Draft of the consolidated version**

Amanda da Silva Fonseca Serra  
Cássia de Lima Pierobon  
Luciana Mota Barbosa  
Victor de Oliveira Leite

**Consolidated Version Review**

Adriano Macedo Ramos  
Amanda Athayde Linhares Martins Rivera  
Amanda da Silva Fonseca Serra  
Cássia de Lima Pierobon  
Fabio Pucci Martins  
Luciana Mota Barbosa  
Victor de Oliveira Leite

**2nd Edition (Consolidated Version). November 2020.**

**Translated English Version Review (December 2021)<sup>1</sup>**

Translation carried out by the Solution Group, contracted by SECEX through the  
SEI-ME 19972.101207/2021-74.

---

<sup>1</sup> Tradução realizada pela empresa X, contratada pela SECEX por meio do processo XXX.

**PRELIMINARY VERSION (February 2020)**

**Draft of the preliminary version**

Fabio Pucci Martins  
Felipe Bragança Itaborahy  
Frank Henrique Pedrosa Carvalho  
Marília Oliveira Barbosa Lima  
Victor de Oliveira Leite  
Zahra Faheina Gadelha

**Preliminary Version Review**

Adriano Macedo Ramos  
Amanda Athayde Linhares Martins Rivera  
Amanda da Silva Fonseca Serra  
Fabio Pucci Martins  
Felipe Augusto Machado  
Mariana Piccoli Lins Cavalcante  
Victor de Oliveira Leite

## Table of Contents

1. INTRODUCTION.....	9
2. BASIC CONCEPTS ON TRADE REMEDIES: INSTRUMENTS, APPLICABLE LAW AND FOREIGN INVESTIGATING AUTHORITIES .....	11
2.1. What is a Trade Remedies?.....	11
2.2. Is there an applicable international law on Trade Remedies?.....	12
2.3. What is an anti-dumping measure? .....	13
2.4. What is a countervailing measure? .....	14
2.5. What is a safeguard? .....	16
2.6. What is a bilateral safeguard? .....	18
2.7. What are the analyses of public interest on Trade Remedies measures? .....	20
2.8. What are the most active investigating authorities of Trade Remedies in the world? .....	21
3. THE SUPPORT SYSTEM TO THE BRAZILIAN EXPORTER INVESTIGATED IN TRADE REMEDIES PROCEEDINGS ABROAD: AGENCIES AND ACTIVITIES .....	25
3.1. What are the Brazilian government agencies involved to support the Brazilian exporter investigated in Trade Remedies proceedings abroad? .....	25
3.2. What are the main activities developed by the Brazilian government agencies involved to support the Brazilian exporter investigated in Trade Remedies proceedings abroad? .....	27
3.3. What are the main activities specifically developed by SDCOM to support the Brazilian exporter investigated abroad?.....	30
3.4. Which type of actions shall make the Brazilian exporters without waiting for any the Brazilian government agencies involved to support the Brazilian exporter investigated abroad? .....	32
3.5. What are the outcomes already achieved by the Brazilian government agencies involved to support to the Brazilian exporter investigated abroad?.....	32
4. THE FOREIGN INVESTIGATION CONDUCTED BY THE INVESTIGATING AUTHORITIES OF TRADE REMEDIES ABROAD: PHASES, ESPECIFICITIES, RIGHTS, AND DUTIES OF THE INTERESTED PARTIES .....	33
4.1. Does the application of the Trade Remedies measures by a foreign Trade Remedies authority require a previous investigation? .....	33
4.2. What are the main phases of a Trade Remedies investigation? .....	34
4.3. Are there features in an anti-dumping investigation?.....	37
4.4. Are there features in a subsidy investigation?.....	38
4.5. Are there features in a safeguard investigation? .....	38
4.6. What are the rights of the Brazilian exporting company in an investigation of an investigating authority of foreign Trade Remedies?.....	39
4.7. What are the duties of the Brazilian exporting company in an investigation of an investigating authority of foreign Trade Remedies?.....	40
4.8. When the “best information available” is applicable?.....	41

5.	ASPECTS RELATED TO THE PARTICIPATION OF THE BRAZILIAN EXPORTERS DURING THE INVESTIGATION OF THE INVESTIGATING AUTHORITY OF THE FOREIGN TRADE REMEDIES .....	43
5.1.	How could a Brazilian exporting company be aware if an investigating authority of foreign Trade Remedies initiated an investigation? .....	43
5.2.	How could a Brazilian exporting company be aware if an investigation initiated by an investigating authority of foreign trade desense could affect its trade transactions? . .....	43
5.3.	How could a Brazilian exporting company take part of an of the investigation of an investigating authority of foreign Trade Remedies? .....	45
5.4.	Are there repercussions for a Brazilian exporting company if it has related parties in Brazil or abroad involved in the production chains and/or commercialization of the product? .....	46
5.5.	Does the Brazilian exporting company taking part of an investigation of an investigating authority of foreign Trade Remedies is obligated to allow the on-the-spot investigation?.....	46
5.6.	Does the Brazilian exporting company is subject to penalties if it does not take part of the investigation of an investigating authority of foreign Trade Remedies?.....	47
5.7.	What do the advantages of the Brazilian exporting company take part of an investigation of na investigating authority of foreign Trade Remedies? .....	47
5.8.	Which is the “ <i>lesser duty</i> ” rule, and how it could benefit the Brazilian exporting company?.....	48
5.9.	What are the counterpoints to the Brazilian exporting company attend an investigation of an investigating authority of foreign Trade Remedies? .....	49
5.10.	What are the consequences to the Brazilian exporting company if it does not cooperate with an investigating authority of foreign Trade Remedies? .....	49
5.11.	Could the Brazilian exporting company request price commitment to the investigating authority of foreign Trade Remedies?.....	50
6.	ASPECTS RELATED TO THE ACTION OF THE BRAZILIAN EXPORTERS AFTER THE CONCLUSION OF THE INVESTIGATION OF THE INVESTIGATING AUTHORITY OF FOREIGN TRADE REMEDIES.....	51
6.1.	Could the Brazilian exporting company question the application of the measures by the investigating authority of foreign Trade Remedies? .....	51
6.2.	What if the Brazilian company did not export during the investigated period, but it want to do it now? What is possible to do to avoid that Trade Remedies measures are applicable on it?.....	52
6.3.	Could the Trade Remedies measures applied by the investigating authority of foreign Trade Remedies be extended?.....	52
6.4.	How could the anti-circumvention reviews impact on the Brazilian producer/exporter?.....	53
6.5.	Is it possible that Brazilian producer/exporter companies are collected retroactively by a duty applied by a foreign authority? .....	54
6.6.	Is it possible that Brazilian producer/exporter request reimbursement for duties provisionary applied, and subsequently they have not been confirmed by the investigating authority abroad? .....	55
6.7.	Is it possible that Brazilian producers/exporters request reimbursement for definitive duties?.....	55

**6.8. Could Brazilian producers/exporters request to the investigating authority to review the case upon changed circumstances? .....56**



## 1. INTRODUCTION

The Undersecretariat of Trade Remedies and Public Interest (SDCOM)<sup>2</sup> of the Foreign Trade Secretariat (Secex) of the Special Secretary of the Foreign Trade and International Affairs (Secint) of the Ministry of Economy (ME) and the Section of Trade Remedies and Safeguards (DDF) of the Ministry of Foreign Affairs (MRE) are the competent public authorities to follow-up the Trade Remedies investigations opened by third countries against the Brazilian exports and provide assistance to the defense of the exporter, jointly with other agencies and public and private entities, under art. 96, XII, of Annex I of Decree No. 9,745, of April 8, 2019, and article 113 of MRE Ordinance No. 212, of April 30, 2008. Among the Trade Remedies measures encompassed they are anti-dumping measures, countervailing, and safeguard measures.

This Support Guide to the Brazilian Exporter investigated in Trade Remedies proceedings abroad was elaborated according to the Brazilian law and multilateral agreements of the World Trade Organization (WTO), on law of some the main countries that act with the mechanisms of Trade Remedies, as well as in the shared experience with the Ministry of Foreign Affairs providing support to the Brazilian exporters affected by investigations or Trade Remedies measures applied by other countries.

This Guide is destined to the Brazilian exporters and entities to which the Brazilian exporters are connected, especially those exporters whose products are being investigated or they are subject to Trade Remedies measures, and the purpose is to disseminate knowledge on the effective or potential application of the Trade Remedies measures by foreign investigating authorities against the Brazilian exports to the external public, however, without the intention to exhaust the matter in full. In this sense, the parameters disclosed in this Guide are merely indicative guidance, which do not attach SDCOM in the conduction of the support activities to the exporter or its competence.

The Preliminary Support Guide to the Brazilian Exporter investigated in Trade Remedies proceedings abroad was published in February 2020, and was submitted to the public consultation up to April 12, 2020. SDCOM received comments of the following entities: Brazilian Institute of Research for Competition, Consumption, and Foreign Trade — Ibrac and Federation of the Industry of the State of São Paulo – FIESP. All contributions

---

<sup>2</sup> Trade Remedies Undersecretariat of Trade Remedies and Public Interest (SDCOM) is the new name of the Department of Trade Remedies and Public Interest (Decom), as Exhibit I to Decree No. 9,745 of April 8, 2019, published in the Federal Official Gazette of April 9, 2019.

of the civil society are consolidated and available to the public in the following electronic address: <https://www.gov.br/produktividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/consultas-publicas-1/consultas-publicas-encerradas>.

Based on the above, the Support Guide to the Brazilian Exporter investigated in Trade Remedies proceedings abroad is divided in six (6) sections, including this introduction. We will present in Section 2 the main concepts related to the instruments of Trade Remedies. Section 3, we will present information related to the Brazilian support system to the exporter. Section 4, we will present information related to the investigations conducted by authorities of Trade Remedies. Section 5, we show information related to the participation of the Brazilian exporters during the investigation of the investigating authority of foreign Trade Remedies, and in Section 6, we will present aspects related to the action of the exporters after the application of a Trade Remedies measure.

In this consolidated version of the Guide, we made clarifications on the questions 2.2., 2.4., 2.5., 2.8., 4.2., 4.6., 4.7., 4.8., 6.1., 6.2., and 6.3., besides we added questions and answers 2.6., 5.4., 5.8., 6.4., 6.5., 6.6., 6.7. and 6.8. We made clarifications on the differences among investigations of subsidies, anti-dumping, and global safeguards, the phase of presentation of questionnaires by the Brazilian exporters before the investigating authorities of foreign Trade Remedies, the treatment of confidentiality of the information submitted by the Brazilian companies and the use of the “*best information available*” (BIA), the possibility to answer Trade Remedies measures applied by authorities of Trade Remedies abroad in the scope of the Dispute Settlement Body of the WTO, and also on the review for new Brazilian exporters that did not export during the investigated period. In addition, we added new questions and answers on the bilateral safeguards, the repercussions to the Brazilian exporting company if it has related parties in Brazil or abroad involved in the production chain and/or trade of the product, the rule of the lesser duty, and how it could benefit the Brazilian exporting company, the anti-circumvention reviews, the retroactive collections for a duty applied by a foreign authority, the reimbursement of provisional and definitive duties, and review of changed circumstances.

## 2. BASIC CONCEPTS ON TRADE REMEDIES: INSTRUMENTS, APPLICABLE LAW, AND FOREIGN INVESTIGATING AUTHORITIES

### 2.1. What are Trade Remedies?

“Trade Remedies” means the set of instruments provided for in the rules of the World Trade Organization (WTO) to neutralize the harmful effects arising from unfair practices of trade or sudden outbreak of importation. There are three types of instruments of Trade Remedies: anti-dumping measures (see question 2.3.), countervailing measures (see question 2.4.), and safeguards (see question 2.5.).

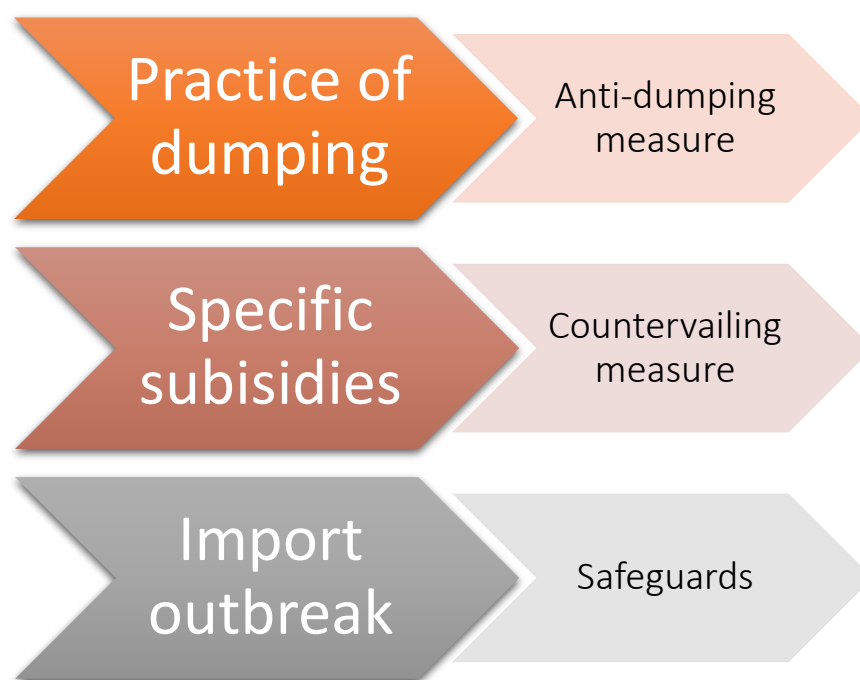
In general terms, anti-dumping measures and countervailing measures refer to unfair practices of trade, where the imports occur in conditions that under the rules of international trade are susceptible to be questioned. In turn, the purpose of safeguards is to give time to the domestic industry of a country before a sudden outbreak of imports that cause or could cause serious losses to the domestic industry of the country.

Therefore, in situations where the producers of determined good present indications of:

- Or its foreign competitors are performing dumping in their exports to the importing country, in a way to cause or threat to cause injury to the domestic industry of this country (susceptible of investigation for the application of the anti-dumping measure);
- Or its foreign competitors receive specific subsidies of their national or subnational governments in a way to cause or threat to cause injury to the domestic industry of the importing country (susceptible of investigation for the application of the countervailing measure); or
- Or there was an increase of importation of like goods or directly competitors in a way to cause or threat to cause serious injury to the domestic industry of the importing country (susceptible of investigation for the application of the safeguards),

which could be submitted in the application to the respective national authority of Trade Remedies to request the beginning of investigations to assess the necessary conditions for application of a Trade Remedies measure.

FIGURE 1: KEY ELEMENTS OF THE INSTRUMENTS OF TRADE REMEDIES



Source: Ministry of Economy/SDCOM

## 2.2. Is there an applicable international law on Trade Remedies?

Yes. Under WTO, there are three multilateral agreements that are applicable to all members, namely: Anti-dumping Agreement<sup>3</sup> (AAD), Agreement on Subsidies and Countervailing Measures<sup>4</sup> (ASMC), and Agreement on Safeguards<sup>5</sup> (AS).

Each country Member of WTO has, also, its own internal regulation, whose specificities shall be aligned to the rules multilaterally agreed. It is worth emphasizing that non-Member countries of the WTO are not obligated to follow the rules of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Notwithstanding, in general, their laws of Trade Remedies are inspired by the principles of the WTO, and the rules of these countries tend to not present great differences from the practices adopted by the country Members of the WTO.

It is worth emphasizing that countries, both Members and non-Members of the WTO, could negotiate specific additional clauses on the application of the instruments of Trade Remedies in their bilateral or bioregional trade agreements. Thus, it is always important to verify if there is a trade agreement between the country investigating of Trade Remedies

<sup>3</sup> Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](https://www.wto.org/english/docs_e/legal_e/19-adp.pdf)

<sup>4</sup> Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](https://www.wto.org/english/docs_e/legal_e/24-scm.pdf)

<sup>5</sup> Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/25-safeg.pdf](https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf)

and the investigated country, to verify if the specific rules that shall apply to such investigation. Besides, it is common that trade agreements predict mechanisms of bilateral safeguards, whose rules for application are established in the context of each one of these agreements, which are not provided for, therefore, in multilateral agreements.

### 2.3. What is an anti-dumping measure?

There are three key elements for the application of the anti-dumping measure, namely: *dumping*, injury, and causal link.

FIGURE 3: THE THREE KEY ELEMENTS FOR THE APPLICATION OF THE ANTI-DUMPING MEASURE:



Source: Ministry of Economy/SDCOM

Thus, the practice of dumping is not sufficient to determine the imposition of an anti-dumping measure on the imports of certain product. It is also necessary to show that imports at dumping price significantly contributed to the injury suffered by the domestic industry. That is, it shall be demonstrated that there is damage and there is a causal link between imports at dumping price and the injury to the domestic industry.

Under art. 7 of Decree No. 8,058 of 2013, “it is considered as a practice of dumping the introduction of a product in the Brazilian domestic market, including under modalities of **drawback**, at an export price lower than its normal value.”

Hence, there is a practice of dumping, in accordance with the Brazilian law, when a company exports to Brazil a product at price (export price) lower than that is practiced to the like product in sales to its internal market (normal value).

FIGURE 3: NORMAL VALUE, EXPORT PRICE, AND MARGIN OF DUMPING:

Normal Value US\$ 100.00	Export Price US\$ 80.00	Margin of dumping US\$ 20.00
<ul style="list-style-type: none"> <li>• Selling price of the product in the country of origin of the exports</li> <li>• Articles 8 to 17 of Decree No. 8,058 of 2013</li> </ul>	<ul style="list-style-type: none"> <li>• Export price of the product to Brazil</li> <li>• Articles 18 to 21 of Decree No. 8,058 of 2013</li> </ul>	<ul style="list-style-type: none"> <li>• Difference between the normal value and the export price</li> <li>• Articles 25 to 28 of Decree No. 8,058 of 2013</li> </ul>

Source: Ministry of Economy/SDCOM

If these three key elements are evidenced, an anti-dumping duty could be applied under the form of a specific tariff (that is, fixed per unit of measurement of the subject product) or, alternatively, *ad valorem* (that is, a percentage under the export price). Also, it is possible to observe the application of duties representing combinations of these two formats.

The value to be collected has as limitation the margin of dumping identified (see Figure 3), and it could be lower to the margin of dumping calculated if such lower value is sufficient to eliminate the injury to the domestic industry (art. 9.1 of AAD). To ensure the fair comparison between the normal value and the export price, identical products or with closely characteristics are compared, and eventually adjustments are necessary to equalize elements affecting the comparison of price, such as trade levels, payment conditions, and others, under art. 2.4 of AAD.

For more information on anti-dumping investigations, we recommend the Reading of the Guide of Anti-Dumping Investigations, edited by SDCOM and available for consultation in the following electronic address: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/guias>

#### 2.4. What is a countervailing measure?

There are three key elements for the application of the countervailing measure, namely: subsidies, injury, and causal link.

FIGURE 4: THE THREE KEY ELEMENTS FOR THE APPLICATION OF THE  
COUNTERVAILING MEASURE:



Source: Ministry of Economy/SDCOM

Thus, it is not sufficient the existence of subsidies granted by national or subnational governments or any of its bodies or agencies benefiting the products exported by the country. In order that a countervailing measure is imposed to the imports of determined product, it is also necessary to demonstrate that the imports subsidized by the government of the exporting country significantly contributed to the injury suffered by the domestic industry of the importing country. That is, it shall be demonstrated that there is an injury or injury threat and there is a causal link between the imports subsidized by the government of the exporting country and injury to the domestic industry.

Under the Agreement on Subsidies and Countervailing Measures of the WTC, subsidy means the financial contribution by a government in the territory of a member or the maintenance of the price/income granting a benefit to the producer or exporter. Such contributions could assume several forms, as for example, warranties of purchase of the production, loans with lower taxes below the market, exemptions of taxes, or even the supply of productive inputs in most favorable conditions that offered to the market. A subsidy is considered specific When it is limited to a company or a group of companies, or branch(es) of production, or geographic region(s) in special.

Therefore, differently of the practice of dumping which is the practice of the own producer/exporter, subsidies are a government practice benefiting, as consequence, the producer/exporter. In the proceedings related to the practice of subsidies, in this sense, both the government as grantor of the alleged benefit and the producer/exporter receiving it, as a rule, are the investigated parties and shall cooperate with the foreign authority.

If these three key elements are proved, a countervailing measure could be applied under the form of a specific tariff (that is, fixed per unit of measurement of the subject product) or, alternatively, *ad valorem* (that is, a percentage under the export price). Also, it is possible to observe the application of measures representing combinations of these two

formats. The assessment of the value to be collected is determined by margin (or amount) of the subsidy identified in the formation of the price of the exported good.

According to the Brazilian law, the calculation shall be made as follows:

FIGURE 5: CALCULATION OF THE AMOUNT OF THE ACTIONABLE SUBSIDY:

<b>Programs of actionable subsidies</b> <b>US\$ 1,000.00</b>	<b>Quantity exported to Brazil</b> <b>5,000 kg</b>	<b>Total amount of actionable subsidies</b> <b>US\$ 0.20/kg</b>
<ul style="list-style-type: none"> <li>• Benefit arising from programs of actionable subsidies</li> <li>• Articles 4 to 13 of Decree No. 1,751, of 1995</li> </ul>	<ul style="list-style-type: none"> <li>• Volume exported to Brazil, in units, benefited by the actionable subsidies received</li> </ul>	<ul style="list-style-type: none"> <li>• Calculated in terms of benefit per unit</li> <li>• Articles 14 to 20 of Decree No. 1,751 of 1995</li> </ul>

Source: Ministry of Economy/SDCOM

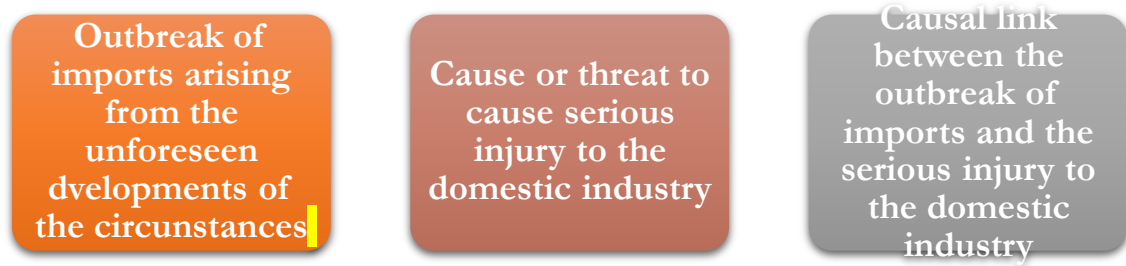
To ensure the fair comparison between the price of the non-subsidized product and the price of the subsidized product, identical or closely products are compared and eventually adjustment is necessary to equalize the elements affecting the comparison of the price, such as trade levels and others, under art. 6.5 of ASCM.

### 2.5. What is a safeguard?

There are three key elements for the application of the safeguard measure defined under art. XIX of GATT 1994, namely: import outbreaks, severe injury, and causal link. These safeguard measures are, sometimes, called as “general safeguards” or “global safeguards”, because They are applicable to all trading partners indistinctively (*erga omnes* effect), opposed to the bilateral safeguards, which arising from the commitments executed through trade agreements signed between countries and/or specific blocks, in a way that its scope of application is defined by the corresponding bilateral or regional agreement (see question 2.6.).



FIGURE 6: THE THREE KEY ELEMENTS FOR THE APPLICATION OF THE SAFEGUARD MEASURE:



Source: Ministry of Economy/SDCOM

To apply a safeguard measure is necessary to have an outbreak of imports, arising from the unforeseen development of the circumstances and granting made in the scope of the GATT. That is, the imports of certain product in the territory of a member of the WTC shall increase in a sharp, sudden, and unexpected way causing or threatening to cause severe injury to the domestic industry.

The safeguard measure achieves all universe of imports, and it is applied to all trading partners, indistinctively, without difference by the origin of the imports (unless expressly provided for in the act to apply the safeguard measure). Thus, when the anti-dumping and countervailing measures against specific countries (that is, limited to the investigated exporting countries), including to have differentiated duties for each producer/exporter, depending on its degree of cooperation and its practices, the safeguards are applied to the imported product regardless its origin.

FIGURE 7: FEATURES OF THE SAFEGUARDS COMPARABLE TO THE OTHER INSTRUMENTS OF TRADE REMEDIES:



Source: Ministry of Economy/SDCOM

## 2.6. What is a bilateral safeguard<sup>6</sup>?

As mentioned in the previous question, differently of a general safeguard, bilateral safeguards are governed by trade agreements negotiated between countries and/or specific blocks, and its application is restricted to the parties of each agreement. Thus, Brazil could apply them or against Brazilian exports only the bilateral safeguards provided for in trade agreements executed by Brazil or Mercosur.

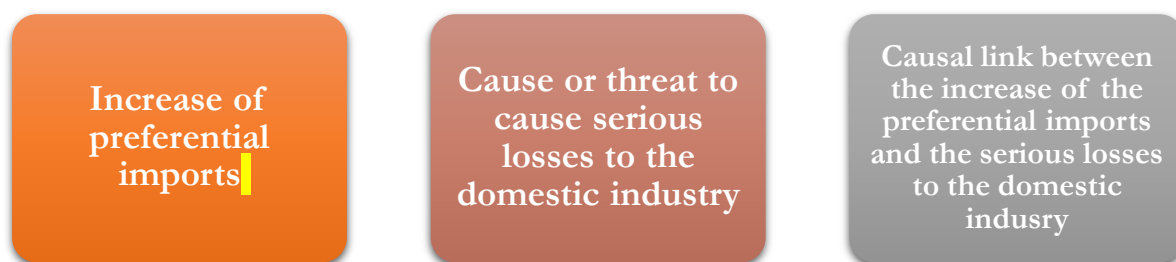
Although they are not a mandatory clauses, it is common that free trade agreements negotiated by Brazil or Mercosur foreseen the creation of a mechanism of bilateral safeguard, whose purpose is to allow an adjustment to the rhythm of the tariff revocation agreed between the contracting parties, if necessary and since that complied with determined requirements. In this sense, each agreement has own provisions, only applicable in the scope that agreement and between the contracting parties.

In general, the bilateral safeguards adopt as background the need to protect the domestic industry when there is an increase of preferential imports that cause or threat to cause serious losses to the domestic industry of the importing country.

---

<sup>6</sup> The information contained in this question is based on the chapters of bilateral safeguards commonly negotiated by Mercosur, since each country/block is free to negotiate the provisions of its trade agreements.

FIGURE 8: THE THREE KEY ELEMENTS FOR THE APPLICATION OF THE BILATERAL SAFEGUARD MEASURE:



Source: Ministry of Economy/SDCOM

Differently of the general safeguards, bilateral safeguards usually foresee provisions of transitory application (“transition period”), related to some measure to the schedule of the tariff revocation, in a way that the use of the instrument is limited in time. After the deadline provided for in the provisions of each agreement, the contracting parties could not conduct new bilateral safeguard investigations based on such agreement and eventual measures in force are automatically extinct.

It is worth emphasizing that the bilateral safeguard measures only could limit the preferential benefits granted to the country due to the bilateral or regional agreement. This means that, as an extreme measure, the Brazilian exports shall cease to obtain, in whole or in part, preferential access to the market of the applicant country of the measure, and it could be subject to the rules of most favorable nation for a determined period. Thus, it is not possible the increase of the tariff over the level of the tariff of the most favorable nation in force in the moment of the application of the measure, neither the imposition of quantitative restrictions.

FIGURE 9: FEATURES OF THE BILATERAL SAFEGUARDS COMPARATIVELY TO THE OTHER INSTRUMENTS OF TRADE REMEDIES:



Source: Ministry of Economy/SDCOM

As a rule, it is emphasizing that the contracting parties protect the possibility to perform the rights arising from the commitments multilaterally assumed, including the possibility of use of the general safeguards. In these cases, the parties shall observe the requirements established in the corresponding multilateral agreements.

Examples of agreements executed by Brazil and/or Mercosur foresee a mechanism of bilateral safeguards are Mercosur - Israel, Mercosur - Egypt, Mercosur - India, Mercosur - SACU, Mercosur - Palestine, ACE-2 (Brazil - Uruguay), ACE-35 (Mercosur - Chile), ACE-36 (Mercosur - Bolivia), ACE-54 (Mercosur - Mexico), ACE-59 (Mercosur - Colombia - Ecuador – Venezuela), ACE-69 (Brazil – Venezuela), and ACE-72 (Mercosur - Colombia).

The tenor of the trade agreements which Brazil is a part could be seen at: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/negociacoes-internacionais/acordos-dos-quals-o-brasil-e-parte> .

## 2.7. What are the analyses of public interest on Trade Remedies measures?

After an anti-dumping or subsidy investigation, some countries could foresee, in its legal rules, which they will only apply the measures of Trade Remedies after an additional analysis showing that such application does not be against the public interest of the society of that territory. However, there is not a multilateral rule of the WTC applicable to the analyses of public interest in measures of Trade Remedies.

For general safeguards, the own AS of the WTC provides that, as art. 3.1, the authority responsible for the analysis consider the arguments of public interest presented by the interest parties in their decisions. This provision arises from the comprehension that the safeguard does not seek to correct an unfair practice of trade, but an unexpected outbreak of imports, in a way that the application of any restrictive measure shall be analyzed under aspects of general policy.

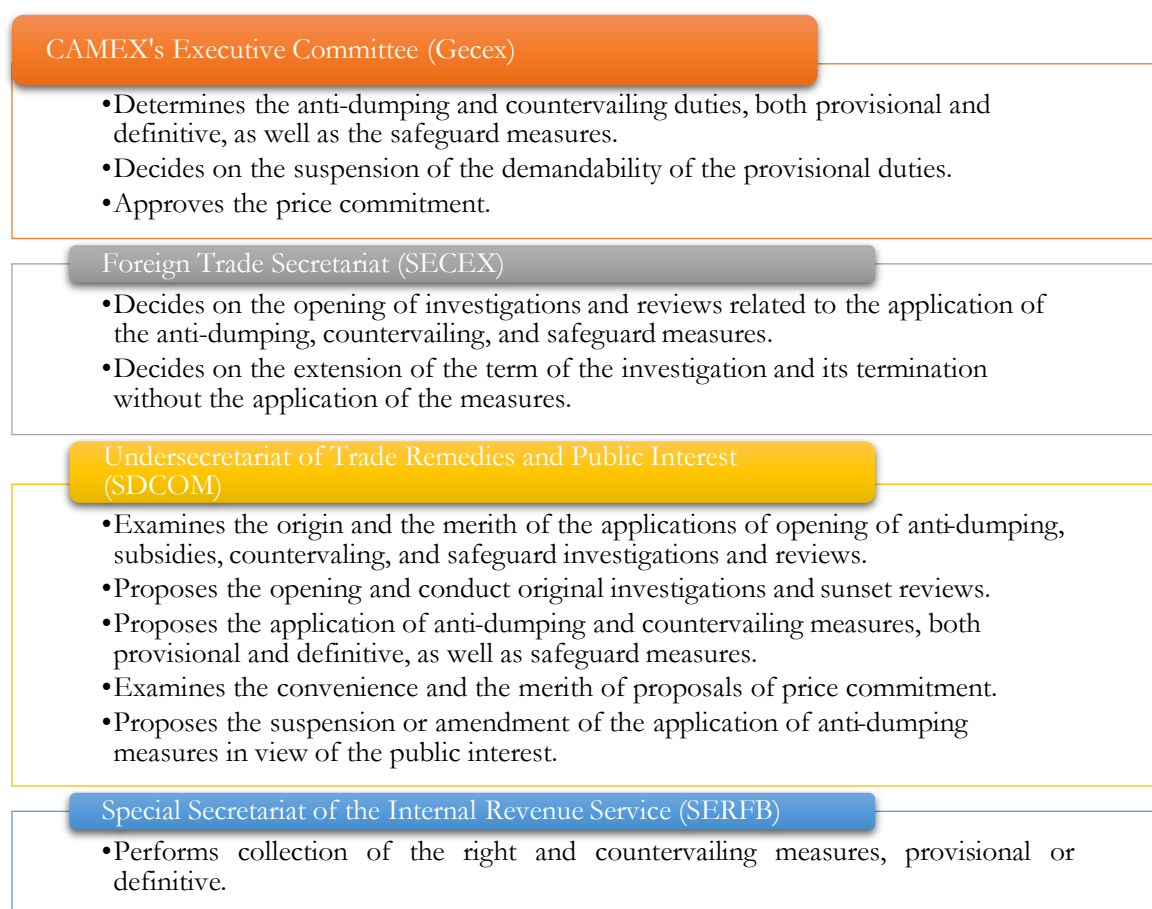
In the international experience, the investigative authorities of the European Union and Canada are those with higher emphasis in analysis of public interest. Regarding the United States of America, for instance, there is no specific provision in its law about the matter. For more information on measures of public interest, besides a specific on the Brazilian practice, we suggest the reading of the Guides of Evaluation of Public Interest, edited by SDCOM, and available for consultation in the following electronic address: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/arquivos/guias/guia-processual-e-material-de-interesse-publico.pdf>.

## **2.8. What are the most active investigating authorities of Trade Remedies in the world?**

In Brazil, the Undersecretariat of Trade Remedies and Public Interest (SDCOM) of the Foreign Trade Secretariat (Secex) of the Special Secretary of Foreign Trade and International Affairs (Secint) of the Ministry of Economy (ME) is the competent public authority to conduct investigations of Trade Remedies in Brazil. The Brazilian authority is responsible for anti-dumping investigations, countervailing and safeguard measures, as well as for the assessment of public interest related to the Trade Remedies.

Under Decree No. 9,745 of April 8, 2019, and 10,044 of October 4, 2019, the process of application of an anti-dumping measure involves four main authorities:

FIGURE 10: MAIN AUTHORITIES OF TRADE REMEDIES IN BRAZIL



Source: Ministry of Economy/SDCOM

Around the world, there are several distinct models of division of competencies related to the instruments of Trade Remedies. In some countries, as Brazil, the same authority could be responsible for the investigations of dumping, subsidies, and safeguards. In other countries, it could be that types of investigations (dumping, subsidies, and safeguards) are divided among different authorities. Also, it may occur that parts of a determined type of investigation (example: analysis of the existence of injury and analysis of the existence of practice of dumping) are made by different authorities in the same country. See below a list of electronic addresses of the competent authorities to the investigation and application of duties of the main user countries of the Trade Remedies measures.

CHART 1: NON-EXHAUSTIVE LIST OF THE AUTHORITIES OF TRADE REMEDIES OF THE  
COUNTRY MEMBERS OF THE WTC

Country	Electronic Address
Argentina	Dirección de Competencia Desleal (dumping and subsidies) <a href="http://www.cnce.gov.br">http://www.cnce.gov.br</a> (injury and safeguards)
South Africa	<a href="http://www.dti.gov.za">http://www.dti.gov.za</a> (dumping, subsidies, and safeguards)
Australia	<a href="http://www.customs.gov.au/site/page4227.asp">http://www.customs.gov.au/site/page4227.asp</a> (dumping and subsidies) <a href="http://www.pc.gov.au">http://www.pc.gov.au</a> (safeguards)
Canada	<a href="https://www.cbsa-asfc.gc.ca/sima-lmsi/mif-mev/menu-eng.html">https://www.cbsa-asfc.gc.ca/sima-lmsi/mif-mev/menu-eng.html</a> (dumping and subsidies) <a href="http://www.citt.gc.ca">http://www.citt.gc.ca</a> (injury of dumping, subsidies, and safeguards)
China	<a href="http://english.mofcom.gov.cn/">http:// english.mofcom.gov.cn/</a> (dumping, subsidies, and safeguards)
USA	<a href="http://www.trade.gov/ia">http://www.trade.gov/ia</a> - USDOC (dumping and subsidies) <a href="http://www.usitc.gov">http://www.usitc.gov</a> – USITC (injury of dumping, subsidies, and safeguards)
India	<a href="http://commerce.nic.in/index.asp">http://commerce.nic.in/index.asp</a> (dumping and subsidies) <a href="http://dgsafeguards.gov.in">http://dgsafeguards.gov.in</a> (safeguards)
Israel	<a href="http://www.moital.gov.il">http://www.moital.gov.il</a> (dumping, subsidies, and safeguards)
Mexico	<a href="http://www.economia.gob.mx">http://www.economia.gob.mx</a> (dumping, subsidies, and safeguards)
Russia	<a href="http://www.minprom.gov.ru">http://www.minprom.gov.ru</a> (dumping, subsidies, and safeguards)
Turkey	<a href="http://www.dtm.gov.tr">http://www.dtm.gov.tr</a> (dumping, subsidies, and safeguards)
Ukraine	<a href="http://www.me.gov.ua">http://www.me.gov.ua</a> (dumping, subsidies, and safeguards)
European Union	<a href="http://ec.europa.eu/trade">http://ec.europa.eu/trade</a> (dumping, subsidies, and safeguards)

Among the main active authorities, some of them make available very comprehensive information on their practices, investigations, and laws, as well as information on other authorities of other countries. The website of the US Department of Commerce (USDOC), for instance, provides measures and laws of anti-dumping and countervailing measures<sup>7</sup>, list of investigating authorities of other countries and agencies involved in Trade Remedies<sup>8</sup>, and

<sup>7</sup> Available at: <http://enforcement.trade.gov/trcs/foreignadcvd/index.html>

<sup>8</sup> Available at: [http://enforcement.trade.gov/trcs/listings/gov\\_res\\_a-e.html](http://enforcement.trade.gov/trcs/listings/gov_res_a-e.html)

laws and safeguard measures<sup>9</sup>. The website of the European Commission<sup>10</sup> of the European Union also is quite complete, with tables of investigations, reports of procedures, and information on practices and laws of some other investigating authorities.

In Brazil, information on the activity of support to the exporter and lists of measures in force and investigations in course against the Brazilian exports are available at <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/apoio-ao-exportador-brasileiro-investigado-por-defesa-comercial-em-outras-jurisdicoes/apoio-ao-exportador-brasileiro-investigado-em-defesa-comercial> .

---

<sup>9</sup> Available at: <http://enforcement.trade.gov/trcs/foreignsg/sgcasetable.html>

<sup>10</sup> Available at: <https://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-exports-from-the-eu/>



### 3. THE SUPPORT SYSTEM TO THE BRAZILIAN EXPORTER INVESTIGATED IN TRADE REMEDIES PROCEEDINGS ABROAD: AGENCIES AND ACTIVITIES

#### **3.1. What are the Brazilian government agencies involved to support the Brazilian exporter investigated in Trade Remedies proceedings abroad?**

In Brazil, the follow-up of the Trade Remedies investigations initiated by third countries is made by the three main agents:

- the Undersecretariat of Trade Remedies and Public Interest of the Ministry of Economy (SDCOM), through the General Coordination of Anti-dumping, Safeguards, and Support to the Exporter (CGSA);
- the Division of Trade Remedies and Safeguards (DDF), of the Ministry of Foreign Affairs (MRE), headquartered in Brasilia; and
- the embassies and other Brazilian diplomatic missions abroad, also subordinated to the MRE, located in countries of the foreign investigating authorities.

SDCOM is the Brazilian investigating authority and has statutory competence, as item XII of art. 96 of Annex I of Decree No. 9,745 of 2019, to follow-up the investigations of the Trade Remedies initiated by third countries against the Brazilian exports and aid the defense of the exporter, jointly with other agencies and public and private entities. The SDCOM's action in defense of the Brazilian exporter investigated abroad is eminently technical and includes, among other activities, the elaboration of manifestation about the decisions of the foreign Trade Remedies authorities.

DDF/MRE has competence, under MRE Ordinance No. 212 of April 30, 2008, to follow-up investigations regarding Trade Remedies and safeguards initiated by foreign authorities against Brazilian exporters and provide the necessary support to the Brazilian exporters, jointly with the Brazilian investigating authority. Furthermore, MRE is also responsible, through the Division of Trade Litigations (DCCOM), for acting when there is a suspicion of infringement to the rules in the scope of the Agreements of the WTC and there is any negotiated solution. In these cases, DCCOM has the prerogative to conduct litigations in the Settlement Dispute Body of WTC, with the technical cooperation of SDCOM. In addition, DDF/MRE centralizes and shares communications with the Brazilian embassies that are following-up the cases of Trade Remedies.

Finally, the Brazilian embassies also act in the monitoring of the investigations, receive and broadcast authorities' official communications, take part of the public hearings representing the Brazilian government and make direct managements jointly with the foreign Trade Remedies authorities. It is the vital importance the role of the embassies in the sense of follow-up the actions of the foreign Trade Remedies authorities and to notify DDF/MRE and SDCOM as soon as possible. This is because, in view of the terms of the investigations provided for in the Agreements and local regulations of each investigating authority, the fluid and expeditious communication among the actors involved help in the sense that the Brazilian exports are not precluded by the loss of legal terms and procedures.

FIGURE 11: THE MAIN AGENCIES INVOLVED IN THE SUPPORT SYSTEM TO THE BRAZILIAN EXPORTER INVESTIGATED IN TRADE REMEDIES PROCEDURES ABROAD

SDCOM	DDF/MRE	Embassies
<ul style="list-style-type: none"> <li>• Follows-up, in coordination with MRE, investigations initiated against Brazilian exports</li> <li>• Notifies the Brazilian exporters and provides assistance to the defense of the exporter</li> <li>• Elaborates, jointly with MRE, technical statements on decisions of the foreign authorities</li> <li>• Coordinates the collection of the information and consolidates the answers in cases of actionable subsidy investigations</li> </ul>	<ul style="list-style-type: none"> <li>• Follows-up, in coordination with SDCOM, investigations initiated against Brazilian exports</li> <li>• Centralizes and shares with SDCOM the communications with Brazilian embassies about decisions in the scope of Trade Remedies procedures</li> <li>• Coordinates eventual bilateral managements in political level on measures affecting Brazil</li> <li>• Coordinates statements in plenaries of the Rule Committes of the WTC</li> <li>• Directs to DCCOM/MRE the eventual performance of litigations in the WTC in cases of infringement of the rules of the Agreements of the Organization</li> </ul>	<ul style="list-style-type: none"> <li>• Monitoring the investigation of the foreign trade desense authorities</li> <li>• Receive and broadcast all official communication of the foreign authorities related to cases against Brazilian exporters</li> <li>• Attend to public hearings and make direct managements jointly with the authorities of foreign Trade Remedies</li> </ul>

Source: Ministry of Economy/SDCOM

The coordination among SDCOM, DDF/MRE, and embassies offer support to the Brazilian exporters potentially involved in dumping, subsidies, and safeguard investigations made by investigating authority of foreign Trade Remedies or that are subjects to the measures of Trade Remedies arising from these investigations. Among the main activities of these entities are, among others:

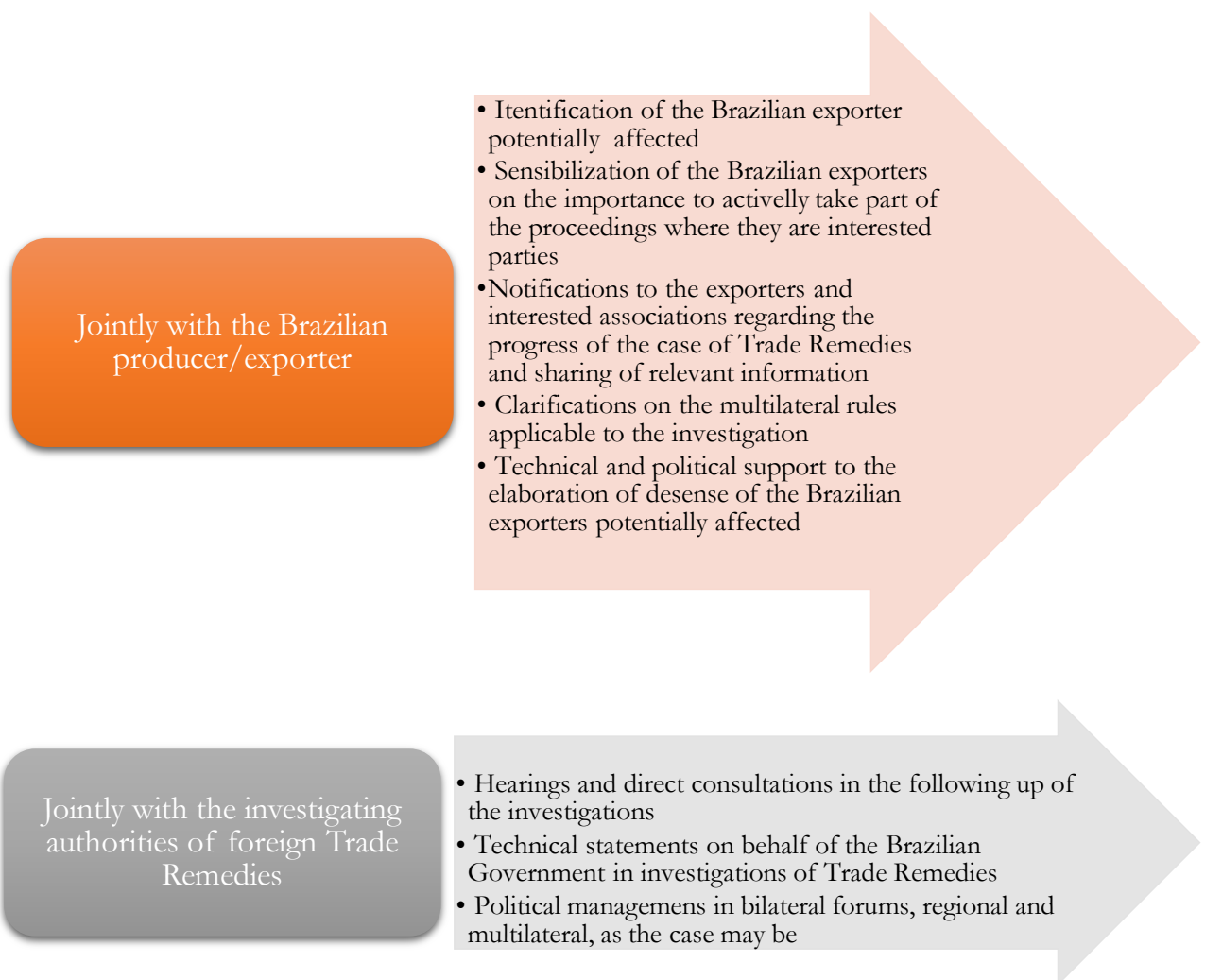
### **3.2. What are the main activities developed by the Brazilian government agencies involved to support the Brazilian exporter investigated in Trade Remedies proceedings abroad?**

- the prompt sharing, from DDF/MRE to SDCOM, of the information received of the Brazil's embassies abroad on the investigations in course against Brazilian exports;
- the accreditation, by the Brazilian embassies abroad, of the Brazilian government as an interested party in the procedures of investigation against Brazilian exports;
- the identification, by SDCOM, of the Brazilian exporters potentially affected by the investigation;
- the contact, by SDCOM, with the Brazilian exporters potentially affected by the investigation (by letter, email and/or call), with the initial notice on the terms and main phases of the procedure of the investigation initiated, as well as the provision of clarifying on the multilateral rules applicable to the investigation;
- the sensibilization, by SDCOM, of the Brazilian exporters on the importance of actively taking part of the procedures where they are interested parties, submitting answers to the questionnaires, and sending other information requested by the government of the importing country;
- the provision, by SDCOM, of the agenda for the hearings with interested parties interested to clarify doubts;
- the jointly elaboration, by SDCOM and DDF/MRE, of technical statements to be submitted with documentation to the investigating authority of foreign Trade Remedies, on behalf of the Brazilian government. The statements are restricted to the aspects related to the legality and compliance with the multilateral agreements;
- the coordination of the collection of information and consolidation of the answers of the governmental programs and Brazilian public policies, in cases of investigation of actionable subsidies by foreign authorities;
- the presential attendance, by SDCOM and/or DDF/MRE and/or the embassy, in hearings of investigations conducted by the authority of foreign Trade Remedies, as well as the on-the-spot investigations in the Brazilian exporters, when requested by such companies;

- the execution, by SDCOM and/or DDF/MRE and/or embassy, of direct consultations with the foreign Trade Remedies authority in the follow-up of the investigation;
- the execution, by DDF/MRE and/or embassy, of political managements in bilateral, regional, and multilateral summits, as appropriate; and
- the execution, by SDCOM and/or DDF/MRE and/or embassy, of presential or virtual technical bilateral meetings with the authority of foreign Trade Remedies.

Thus, the coordination among SDCOM, DDF/MRE, and embassies results in activities in two main fronts, as shown in the figure below.

FIGURE 12: MAIN ACTIVITIES DEVELOPED BY THE AGENCIES INVOLVED IN THE SUPPORT SYSTEM TO THE BRAZILIAN EXPORTER INVESTIGATED IN TRADE REMEDIES PROCEEDINGS ABROAD



Source: Ministry of Economy/SDCOM

**In the case of dumping investigation**, the action is conditioned to the interest of the Brazilian producers/exporters to take part or not of the investigation. If they show interest to take part of the investigation conducted by the investigating authority of the foreign Trade Remedies and answer to the questionnaire or, also, they present evidence allowing the questioning of the procedures and conclusions presented by the investigating authority of foreign Trade Remedies, SDCOM and DDF/MRE will start to follow-up the case, preparing technical statements to be presented on behalf of the Brazilian Government, where appropriate. Otherwise, that is, if the producers/exporters do not show interest to take part of the investigation conducted by the investigating authority of foreign Trade Remedies, SDCOM and DDF/MRE will only monitor the phases of the proceeding and results of the determinations, always notifying the producers/exporters and interest associations. It is worth emphasizing that the Brazilian Government presents its statements with technical arguments regarding the compliance or non-compliance with the multilateral agreements ruling the subject, not encompassing specific arguments of the investigated companies, which could/should be directly presented by the producers/exporters and Brazilian associations interested in the investigations conducted by other countries (see question 3.4).

**In the case of subsidy investigations**, SDCOM and DDF/MRE coordinate the different governmental agencies involved in the investigation and collect information to be provided for the answer to the government's questionnaire, besides to elaborate the technical statements of the Brazilian Government regarding the determining aspects to the application of the countervailing measures. Again, it is emphasizing that the Brazilian Government present its statements with technical arguments regarding the compliance or non-compliance with the multilateral agreements, not encompassing specific arguments of the investigated companies, which could/should be directly presented by the producers/exporters and Brazilian associations interested in the investigation conducted in other country (see question 3.4). Thus, the action of the agencies involved in the support system to the Brazilian exporter investigated in proceedings of Trade Remedies abroad aims to defend the legitimacy and adequacy of the governmental programs and public policies of the Brazilian Government in view of the investigations of actionable subsidies conducted by authorities of other countries.

**In the case of investigation for application of general safeguards**, SDCOM and DDF/MRE follow-up the procedure of the investigating authority of foreign Trade Remedies and verify if the principles for its application are being followed, prepare technical statements on behalf of the Brazilian Government, and verify if the Brazilian exports are able

to be excluded of eventual measure according to the rules of the WTC, as, for instance, the possibility of exclusion of the reach of the measures for the exports of developing countries, provided for in art. 9.1 of AS. This duty exists when the percentage of the exports of each one of these countries into the universe of the exports of determined product does not exceed 3%, since the total volume of the original exports of all developing countries do not achieve 9% of the total imports of the investigated product. Currently, Brazil is considered into the list of developing countries in the scope of the WTC and, therefore, it could be encompassed by this provision. Also, it is worth emphasizing that the Brazilian government presents its statements with technical arguments on the compliance or non-compliance with the multilateral agreements, and encompassing specific arguments of the investigated companies, which could/should be directly presented by the producers/exporters and Brazilian associations interested in the investigations conducted by other countries (see question 3.4.).

**In the case of investigation for application of bilateral safeguards**, SDCOM and DDF/MRE follow-up the procedure of the investigating authority of foreign Trade Remedies and verify if the principles for its application are being followed, elaborating technical statements on behalf of the Government, considering the rules in the corresponding trade agreement.

### **3.3. What are the main activities especially developed by SDCOM to support the Brazilian exporter investigated abroad?**

SDCOM monitors in a daily basis both the WTC's website and the pages of the main investigating authorities of foreign Trade Remedies, the beginning of new investigations of Trade Remedies, as well as the disclosing of the main determinations in each case in course.

After the identification of the beginning of a new investigation or review of the measure in force, both by this monitoring or upon receiving of information from DDF/MRE through embassies (see question 3.1.), SDCOM requests to the Undersecretary of Intelligence and Statistics of Foreign Trade (Sitec), of Secex, the exporting data (volume and amount) of Brazil to the investigating country, referring to the period of analysis of the injury/serious loss appointed in the initial notice, to identify the Brazilian exporters potentially affected.

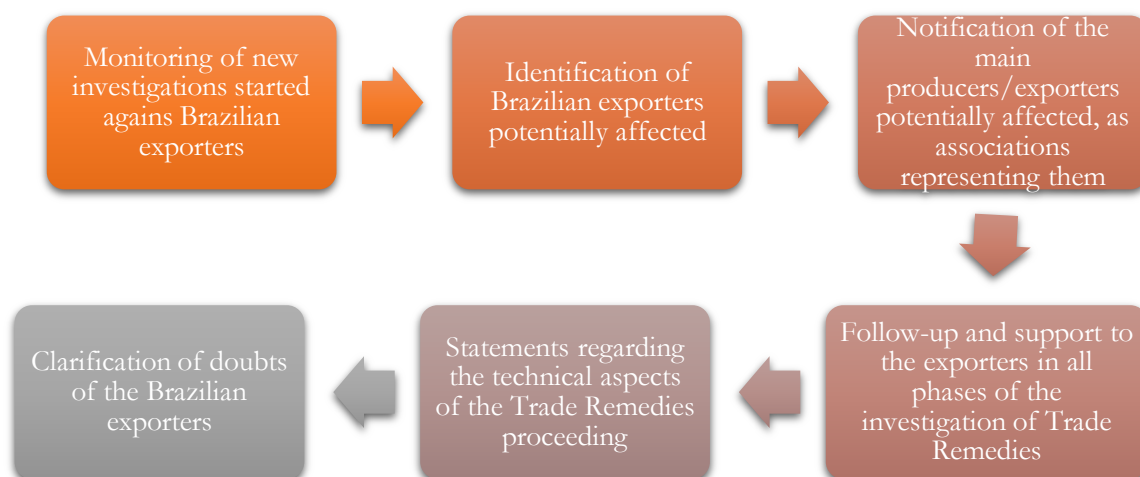
With this information, the main producers/exporters potentially affected (as identified in data from Sitec) are contacted by phone or e-mail, as well as through the association or class entities representing their interests. As from this contact, SDCOM could

provide additional explanations on the cases and measure the interest of the Brazilian producers/exporters in the market of the country conducting the investigation. In cases of subsidies, the pertinent governmental agencies also are timely contacted.

From then on, SDCOM follows-up the development of the cases and, in each important event (preliminary determination, hearings, disclosing of essential facts, final determination, etc.), the identified parties are informed and oriented regarding the importance to take actively part of the investigation. In the case of the execution of the on-the-spot investigations by the investigating authorities of foreign Trade Remedies before the Brazilian producers/exporters, SDCOM's technicians could follow-up the procedures in person.

During the evidentiary stage, SDCOM shall identify in coordination with DDF/MRE, the convenience and opportunity of the Brazilian Government to present statements in the case records, attend the hearings, and make bilateral technical consultations. In addition, it may put it at disposal of the Brazilian producers/exporters to make meetings and clarification of doubts. It is worth emphasizing that the coordination between the Government and private sector is essential to the effective defense of the Brazilian interests in the investigations of Trade Remedies conducted by foreign authorities.

FIGURE 13: MAIN ACTIVITIES SPECIFICALLY DEVELOPED BY SDCOM IN THE SUPPORT TO THE BRAZILIAN EXPORTER INVESTIGATED IN A TRADE REMEDIES



Source: Ministry of Economy/SDCOM

### **3.4. Which type of action shall make the Brazilian exporters without waiting for the Brazilian government agencies involved to support the Brazilian exporter investigated abroad?**

It is worth emphasizing that the members of the Brazilian government involved in the support system to the Brazilian exporter investigated in proceedings of Trade Remedies abroad do not have the role to act as technical consultants or to substitute the eventual need of the Brazilian producer/exporter to account on attorneys, experts, and representatives assisting in their actions related to the investigation process to which they are subject.

For instance, when the interventions of the Brazilian government are concerning, in the most of time, to questions of legitimacy and adhesion to the multilateral agreements related to Trade Remedies, the investigated companies should present their own statements on the same aspects and, especially, on the specific elements and specifics of each company, as well as data (many times of accounting matter), and other pieces of evidence that could be used to substantiate the decisions of the foreign authority during the procedure. Thus, the producers/exporters are exclusively responsible for actions, for instance, as to answer questionnaires, provide their data and information requested by the investigating authority, qualify themselves to act in the procedures, agree with the execution of the on-the-spot investigations, and attend to hearings (see Sections 5 and 6).

### **3.5. What are the outcomes already achieved by the Brazilian government agencies involved to support the Brazilian exporter investigated abroad?**

The jointly action of the agencies of the Brazilian Government involved in the support to the Brazilian exporter investigated abroad could have, as a positive outcome, the non-application of the Trade Remedies measure, the application of the measure in a lesser charge way or the acceptance of the price commitment (see question 5.11.).

SDCOM makes available the main results achieved in the support area to the exporter in the following address: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/apoio-ao-exportador-brasileiro-investigado-por-defesa-comercial-em-outras-jurisdicoes/apoio-ao-exportador-brasileiro-investigado-em-defesa-comercial> .



#### 4. THE FOREIGN INVESTIGATION CONDUCTED BY THE INVESTIGATING AUTHORITIES OF TRADE REMEDIES ABROAD: PHASES, ESPECIFICITIES, RIGHTS, AND DUTIES OF THE INTERESTED PARTIES

##### 4.1. Does the application of Trade Remedies measures by a foreign Trade Remedies authority require a previous investigation?

Yes. Under Art. 1 of AAD, of Art. 10 of ASCM, and Art. 3 of AS, the application of a Trade Remedies measure requires that a competent investigating authority of foreign Trade Remedies performs a previous investigation. As a result of this investigation, the minimum requirements for the application of each type of measure shall be proved (see questions 2.3., 2.4., 2.5. e 2.6).

The competent Trade Remedies authorities shall comply with some requirements to conduct the investigation provided for in the Agreements of the WTC, and in other bilateral or regional agreements in force, such as:

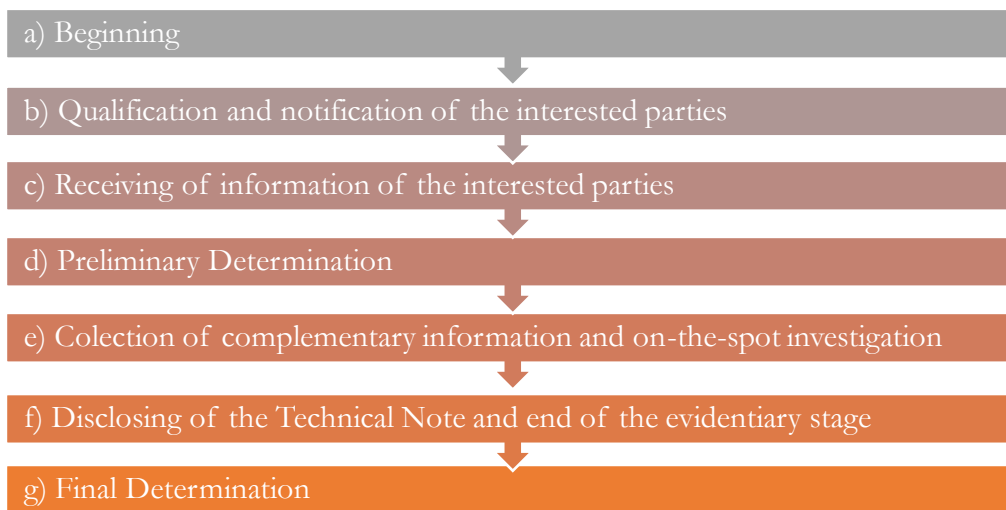
- beginning of the *ex officio* investigation or upon a petition written by the domestic industry presenting arguments and sufficient evidence;
- publication by the investigating authority of foreign Trade Remedies of a note of the beginning of the investigation in an official public means of communication;
- in investigations of subsidies, as soon as possible, after the acceptance of the petition, and always, in any case, before the beginning of an investigation, the governments of the Members whose products could be subject of such investigations shall be invited for consultations with the purpose to clarify the situation, and the achievement of mutually satisfactory solutions;
- in anti-dumping investigations involving the trade partners of the Mercosur, the investigating country shall invite the investigated country for previous consultations;
- notification of the interested parties in the main phases of the procedures;
- opportunity to the interested parties to access the pieces of evidence into the non-confidential case records;
- full opportunity to present information and relevant aspects to the defense of the parties' interests;
- opportunity to the performance of hearings among the parties;
- guarantee of the adversarial procedure during the case; and

- reasonable and fair attitude of the investigating authority of foreign Trade Remedies during the procedures.

#### 4.2. What are the main phases of a Trade Remedies investigation?

A Trade Remedies investigation follows seven (7) phases up to its conclusion. They are:

FIGURE 14: MAIN PHASES OF A TRADE REMEDIES INVESTIGATION



Source: Ministry of Economy/SDCOM

**In the first phase of the beginning of an investigation (a)**, an investigating authority of foreign Trade Remedies, as of the information and evidence received from one or more applicants or *ex officio*, decides that there are indications that the elements for the application of the Trade Remedies measure are present. Thus, it initiates the investigation with the publication in the official national gazette or equivalent means. This publication also determines, in general, the more important deadlines of the investigation. In addition, the investigating authority of foreign Trade Remedies notifies the beginning of the investigation to all known interested parties, under Art. 12.1 of AAD and of Art. 22.1 of ASMC. It is worth emphasizing that in the cases of safeguard investigations, the investigating authorities do not have the obligation to notify the interested parties, but only the Safeguard Committee of the WTC, under Art. 12.1 of AS.

In all cases, the producer/exporter is considered as an interested party and it could take part of proceedings through the presentation of the questionnaire and other data, information, and statements and could be subject to the on-the-spot investigations by the

investigating authority of foreign Trade Remedies. Besides, the government of the exporting country is, usually, also considered as an interested party<sup>11</sup>, and its participation in the procedure occurs through the diplomatic representation before the Member country conducting the investigation.

In the second phase, the qualification and notification of the interested parties (b), all interested parties that have effective interest in take part of the investigation shall be qualified before the investigating authority of foreign Trade Remedies, presenting the documents of the pertinent qualification, and receiving the appropriate questionnaires to present their relevant information to the investigation, under Art. 6 of AAD and Art. 12 of ASMC. It is worth emphasizing that a feature of the safeguard investigations, referring to the fact that there is no foresee in AS of the sending of questionnaires. However, depending on the practice of each investigating authority, the questionnaire could be sent both to the exporters and the government of the exporting country.

Regarding the third phase, receiving of information of the interested parties (c), firstly, it is worth emphasizing that the interested parties may take part of the investigation during all the evidentiary stage. However, the principal duty of cooperation requested to the interested parties substantiates in the answer to the questionnaire. It is emphasizing that the investigating authorities may select the producers/exporters to answer the questionnaire (see question 5.6.), such selection could be object of interested parties' statements.

Investigations are fast procedures, and the investigating authority usually gives the single opportunity to the submission of the questionnaire, which means the main instrument of defense to the exporters. Without the answer to the questionnaire, the action of the exporter will be limited to the general elements of the procedure, but it could not discuss the margin of dumping or the amount of received subsidies. The Brazilian Government provides a more effective support when the exporter is considered cooperative, because the absence of effective cooperation allows to the foreign authority to use the "best information available," which may imply lesser favorable results to the exporter (see question 4.8.).

The fourth phase, preliminary determination (d), represents the document where the foreign authority will issue its preliminary conclusions regarding the required elements to the application of each type of measure (see questions 2.3., 2.4., and 2.5.).

---

<sup>11</sup> Art. 6.11 of AAD: "For the purposes of this Agreement, "interested parties" shall include: (...) ii) the government of the exporting Member."

In this phase is possible the application of provisional measures in the scope of the Trade Remedies investigations if the investigating authority of foreign Trade Remedies has sufficient indications to justify its imposition before the end of the investigation. The provisional measures intend to prevent the continuation of the injury or loss caused by imports while the investigations or in circumstances of injury of challenging repair to the domestic industry upon the delay of an eventual application of definitive measures of Trade Remedies. However, such measures shall respect a minimum term of 60 days – for dumping and subsidy investigations, under Art. 7.3 of AAD and Art. 17.3 of ASMC – before to be implemented. It is worth emphasizing that provisional measures are only one option/prerogative of the investigating authorities and not always they are applied. To safeguard investigations, according to the reading of Art. 6 of AS, which deals with the preliminary safeguard measures, there no is minimum term for application of the preliminary Trade Remedies measure, and it could inclusive be determined in the moment of the beginning of the investigation.

It is also stressed the maximum terms of duration of the provisional measures, provided for as general rule in the multilateral agreements in the scope of the WTC, namely:

- six (6) months for anti-dumping investigations (art. 7.4 of AAD)
- four (4) months for subsidy investigations (art. 17.4 of ASCM)
- two hundred (200) days for safeguard investigations (art. 6 of AS)

In the **fifth phase, collection of complementary information and execution of on-the-spot investigations (e)**, we have that, after the analysis of the answered questionnaires by the producers/exporters, the investigating authority of foreign Trade Remedies may request new information and required the execution of visits of investigation in the exporters' premises to confirm the accuracy of the evidence provided, under Art. 6.7 of AAD, and Art. 12.6 of ASMC. In these visits, the inspectors could observe the real conditions of production and accounting records arising from the trade activities of the industries. The on-the-spot investigations may occur before or after the imposition of provisional measures. AS does not provide on-the-spot investigations in the exporters, but some countries adopt similar proceedings to those that are common in dumping/subsidy investigations. In the case of subsidy investigations, investigations in the Government of the exporting country are made too, in order that the foreign authorities know the programs that allegedly would create specific subsidies.

In the **sixth phase, disclosing of Technical Note and end of evidentiary stage (f)**, the investigating authority issues a document with the essential facts under trial. In this moment, the interested parties shall know the facts on which the authority will form its convincing and they could present the end statement with the purpose to influence in the authority's trial. With the presentation of the end statements, it is concluded the evidentiary stage of the procedure. AS does not provide the issuance of Technical Note.

Finally, **in the seventh phase, final determination (g)**, the investigation could be concluded with the imposition or not of definitive Trade Remedies measures. Before the implementation of the measures, the investigating authority of foreign Trade Remedies shall make available its conclusions, as well as all evidence available and enable the interested parties' statements, under Art. 6.8 of AAD and Art. 12.8 of ASMC. Except for special circumstances, a Trade Remedies investigation shall be concluded up to 12 months, extendable for more 6 months (that is, a total of 18 months), under Art. 5.10 of AAD and of Art. 11.1 of ASCM. There is no projection in AS for the duration of the procedure, which shall be terminated through a final determination with a detailed analysis of the case which are being object of investigation, as well as a demonstration of the relevance of the exanimated factors (Art. 4.2 (c) do AS).

The anti-dumping, countervailing, and safeguard measures have specific duration and allow the extension in determined circumstances (see question 6.3.).

#### **4.3. Are there features in an anti-dumping investigation?**

The anti-dumping investigation could be started at request of the domestic industry or **ex officio** by the investigating authority of foreign Trade Remedies.

The anti-dumping duties, as a rule, are individually calculated for the main producers/exporters identified that cooperate with the investigation. The non-attendance of the producer/exporter companies could give raise to the assessment of the margin of dumping according to the called "best information available", which, in general, results in the application of higher elevated measures.

Finally, it is worth emphasizing that the practice of dumping is considered an unfair practice of trade in the scope of the WTC, and it does not be confuses with conducts provided for in terms of competition law.

#### 4.4. Are there features in a subsidy investigation?

Due to deal with a governmental practice, a subsidy investigation involves not only the producers/exporters of the investigated product, but also the government of the exporting country, jointly with it is investigated the granting of subsidies in all levels (municipal, state, district and/or federal). Thus, it requires the coordination between the government, in federal, state, district, and municipal levels since it may involve governmental programs of several federate entities. It is worth emphasizing that subsidies attached to the exporting performance or that discriminate the use of imported goods are considered as prohibited, in terms of multilateral agreement.

Producers/exporters and its respective governments could be required to answer questionnaires with the necessary information to the determination of the existence, of the amount of the subsidies, of specificities, and could state during the investigation. In the investigations of countervailing measures, the answer to the questionnaire of the Brazilian government is also subject to the inspections. In this case, on-the-spot investigations could occur in the Brazilian government agencies, with similar procedure to the companies. All timely information submitted by the qualified interested parties shall be considered in the determinations of the foreign investigating authority.



#### 4.5. Are there features in a safeguard investigation?

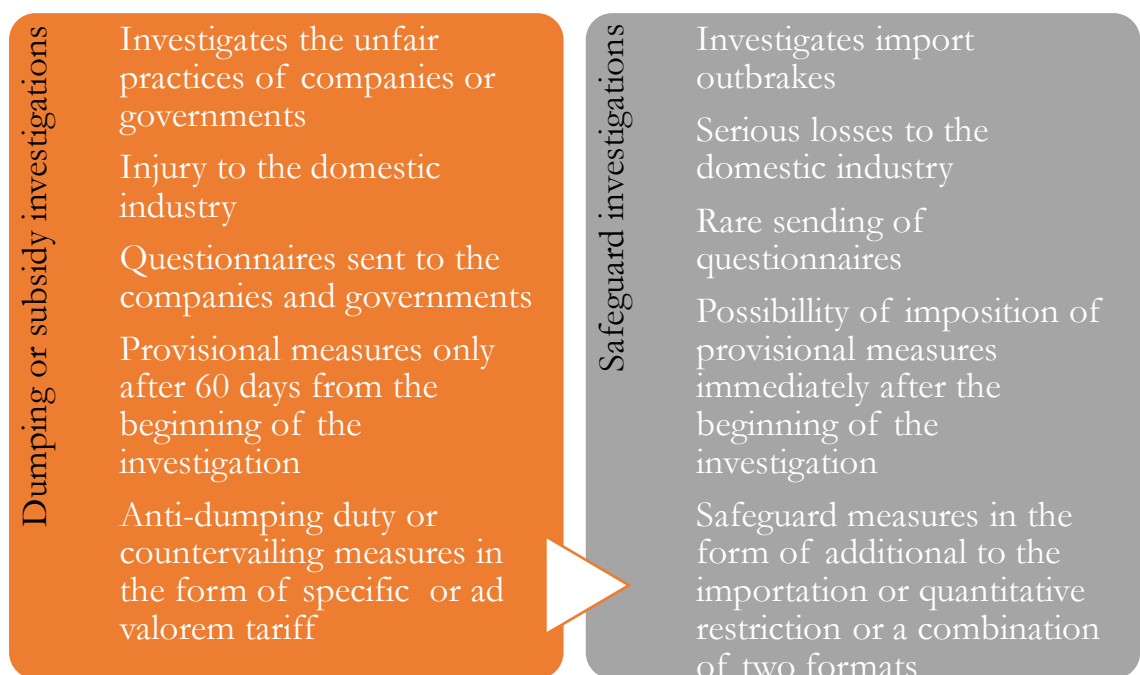
Differently of the anti-dumping and subsidy investigations, particular practices of companies or governments considered unfair are not in analyses in safeguard investigations. It deals with a procedure that investigates the existence of an outbreak, sudden and intense, of imports, regardless of the country of origin. It is precisely to not involve unfair practices under scope of the WTC, the analysis of performance of the domestic industry seeks to set the existence of a serious loss or threat of serious loss arising from the import outbreak.

In this context, differently of the dumping and subsidy investigations, not always specific information is demanded to the exporter, because the resulting measures are

indistinctly applied on all exporters, regardless of the country of origin. Thus, even also is important, the cooperation of the Brazilian exporters will not result in the calculation of specific individual rights. However, uncommon, their points of view and arguments could influence the preliminary and final decisions regarding the application of the eventual measures.

Other important feature of the safeguard investigation refers to the possible application of provisional Trade Remedies measures in an immediate and simultaneous way to the beginning of the investigation, which could impact, of an unexpected and suddenly form, to the scheduled exports of one producer/exporter.

In addition, the safeguard measures are commonly applied in the form of an accretion to the import tax, but also have the possibility to be applied in the form of a quantitative restriction (quota), or a combination between these (tariff quota).



#### 4.6. What are the rights of the Brazilian exporting company in an investigation of an investigating authority of foreign Trade Remedies?

The interested party that qualifies its representatives in the scope of an investigation, respecting the applicable procedural deadlines, could take part of the investigation procedure, with right of comprehensive defense and to the adversary procedure during all evidentiary stage, also respecting the stipulated deadlines by the law of the foreign investigating authority.

All information timely provided by the parties shall be considered in the determinations of the investigating authority that, in turn, has the prerogative to confirm this information through on-the-spot investigation.

When submit their data and information, the interested parties could classify them as confidential or non-confidential. As a rule, always that an information is classified as confidential, only the Trade Remedies authority<sup>12</sup> could have access to it. It is a legal obligation of the investigating authorities to protect the secrecy of the confidential information submitted by the parties. It is worth emphasizing that, however, for an information is accepted in a confidential basis, the interested party that submitted it shall necessarily present a justification for the request of confidentiality, as well as a non-confidential abstract of the submitted information, to allow the comprehension of the information by the other interested parties and to ensure the transparency and the adversary procedure.

The treatment of confidentiality of the information varies according to the treatment granted by the rules of internal law of each jurisdiction, but include information related to industrial and trade secrets, whose disclosing could constitute an inappropriate advantage to the competitors of the producer/exporter. The interested parties shall carefully observe the rules in force on the confidentiality in the internal law of each country.

Other right of the interested parties in the procedure is that to be listen in private hearings or, when called by the investigating authority, in open hearings to the other parties, promoting the debate between distinct positions.

#### **4.7. What are the duties of the Brazilian exporting company in an investigation of an investigating authority of foreign Trade Remedies?**

The interested party that qualifies its representatives in the investigation procedure has the obligation to strictly respect all deadlines established to the phases of the investigation. In this sense, the main duty of the producer/exporter company is to present the answer to the questionnaires issued by the foreign investigating authority. The absence of the answer to the questionnaire implies in the use by the foreign authority of the “best information available”, which could imply in lesser beneficial results to the exporter (see question 4.8).

---

<sup>12</sup> Some authorities of Trade Remedies, as for instance of the United States of America and Canada, give access to the confidential case records of the procedure also to the attorneys of the parties. These attorneys, however, are legally obligated to preserve the secrecy of the information.



In general, the deadlines of the investigation are established in the initial notice published by the foreign investigating authority. Normally, justified requests of extension of deadline that timely occur are granted by the authorities, respecting the limitations of the national rules. However, there is no guarantee that the extension requested will be granted, and the interested party shall ideally get to send its information within the deadline initially established. If the party does not get to send its information in the stipulated deadline, it could be considered a non-cooperative party (see question 5.7.).

One other obligation is to respect the official language of the country where the investigation occurs. Thus, all documents attached by the interested party in the case records of the procedure shall be previously translated by an entity officially acknowledged if the original is in a foreign language to the local authority.

#### **4.8. When the “best information available” is applicable?**

If the Brazilian exporting company denies access to the information requested by the investigating authority, does not provide it in a timely basis and/or creates obstacles to the investigation, the latter could determine the eventual measure to be applied to the exports of the company according to the “*best information available*” (BIA), under Art. 6.8 and Annex II of AAD and Art. 12.7 of ASMC, included those available in the initial petition of the investigation. Normally, this means a higher margin of dumping to the non-cooperative company, since its result is a calculation based on the available elements in the case records, such as those submitted by the applicant of the importing country and producers/exporters that submitted answers to the questionnaires. The higher margin of dumping to the non-cooperators tends to become the foreign market less attractive and decrease competitive advantages regarding other exporters subject to the rights applied in inferior levels. Therefore, it deals with an element to be considered when the decision of the producer/exporter on to cooperate or not with a Trade Remedies proceeding abroad (see question 5.6.).

It is emphasizing that the application of the “best information available” could occur in any moment of the probatory phase of the investigation, since the Trade Remedies authority considers that the Brazilian exporting company does not provide in a timely or suitable basis the information requested in that moment.

An example of application of the best information available is when a foreign producer or exporter does not get to prove, during the procedure of on-the-spot investigation, the costs of production connected to the production of the product under investigation. As

the cost of production is an essential information to the calculation of the normal value, the investigating authority could use as the best information available, for instance, the normal value calculated in the beginning of the investigation.

## 5. ASPECTS RELATED TO THE PARTICIPATION OF THE BRAZILIAN EXPORTERS DURING THE INVESTIGATION OF THE INVESTIGATING AUTHORITY OF FOREIGN TRADE REMEDIES

### **5.1. How could a Brazilian exporting company be aware if an investigating authority of foreign Trade Remedies initiated an investigation?**

As mentioned in question 4.2., when an investigating authority of Trade Remedies initiates an investigation, it shall publish a public notice in the national official gazette or equivalent means of communication and notify the interested parties initially acknowledged, as well as the authorities of the country or countries involved, with emphasis made to the safeguard investigations also into question 4.2.

Furthermore, it is common to the authorities notify the main associations representing the producers of the products under investigation. Other way of common disclosing is through the websites of the own authorities of Trade Remedies or, also, the WTC, through the notices delivered by the Members. Finally, it is not uncommon that specialized offices in the assistance of companies in the Trade Remedies proceedings follow-up the disclosures and directly contact the involved companies.

As mentioned in questions 3.1 and 3.2, the Brazilian embassies, DDF/MRE, and SDCOM proactively act jointly with the known Brazilian producers/exporters, notifying them on the phases of the procedure and sharing relevant information disclosed and/or received from the foreign investigating authority; as well as providing clarifying on the multilateral rules applicable to the investigation; following-up, if requested, on-the-spot investigations made by the foreign Trade Remedies authorities in the Brazilian producers/exporters' premises; making technical management before the foreign Trade Remedies authorities, and managements in political level, making statements in the plenary of the Committees of Rules of WTC; and supporting, generally, the action of the Brazilian exporters in the investigations.

### **5.2. How could a Brazilian exporting company be aware if an investigation initiated by an investigating authority of foreign Trade Remedies could affect its trade transactions?**

A Brazilian exporting company could have its exports affected by an investigation of the investigating authority of foreign Trade Remedies if the product under investigation refers to the product that it exported in the investigated period or intends to export after the eventual application of measures on the product under investigation.

The definition regarding the product under investigation shall be clearly in the notice of beginning published by the authority of Trade Remedies and, as a rule, uses as reference the Harmonized System (SH) of Designation and Codification of Merchandises or domestic or regional equivalents (ex.: NCM – Mercosur Common Nomenclature). In the same way, the investigated period shall be clearly identified in the note of beginning published by the foreign Trade Remedies authority.

It is important to remember that, even the Brazilian exporting company has not been notified, this does not mean that, necessarily, it does not have to concern with the investigation, because, although the research for notices to the exporters made by the investigating authority of foreign Trade Remedies seeks to map all exporters, it does not obligate to notify all to follow with the procedure. In this sense, if the Brazilian exporting company has interest, it could appeal to its qualification as interested party, respecting the deadlines of the investigation provided for in the law of the importing country.

It is emphasizing that the producer/exporter that effectively exported the product under investigation in the period of analysis determined by the investigating authority is, as a rule, considered an interested party in the procedures. However, if the producer/exporter has ceased to export in the investigated period or if has interest to initiate exports of the product under investigation in the future, it is also possible that the authority could accept its participation as an interested person, upon presentation of request by the producer/exporter in question and at sole discretion of the foreign investigating authority.

There are situations where that may have doubts regarding the encompassing of the scope of the definition of the product under investigation presented by the public notice in the beginning of the investigation, it is a situation that the exporter shall immediately contact the Trade Remedies authority responsible for the investigation, to clarify the situation.

The Ministry of Economy has in its website the description of the measures in force and the investigation in progress against the Brazilian exports. The address is: <https://www.gov.br/produktividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/apoio-ao-exportador-brasileiro-investigado-por-defesa-comercial-em-outras-jurisdicoes/apoio-ao-exportador-brasileiro-investigado-em-defesa-comercial> .

## Apoio ao Exportador Brasileiro investigado em Defesa Comercial

Publicado em 27/02/2020 05h06 | Atualizado em 03/07/2020 22h12

Compartilhe: [f](#) [t](#) [e](#)

A SDCOM é uma das autoridades públicas competentes para acompanhar as investigações de defesa comercial abertas por terceiros países contra as exportações brasileiras e prestar assistência à defesa do exportador, em articulação com outros órgãos e entidades públicas e privadas. Dentre as medidas de defesa comercial acompanhadas estão as medidas antidumping, as medidas compensatórias e as salvaguardas. Para saber mais sobre a atuação da SDCOM, consulte os links abaixo:

[Investigações em curso e medidas em vigor contra exportações brasileiras](#)

Also, WTC makes available the **Integrated Trade Intelligence Portal (I-TIP)** that compiles all information of Trade Remedies measures established in the scope of the Organization. The website, which allows customized research, could be found in the following address: [https://www.wto.org/english/res\\_e/statistics\\_e/itip\\_e.htm](https://www.wto.org/english/res_e/statistics_e/itip_e.htm), in English, Spanish, or French.

In case of doubt, please, contact SDCOM by the email ([defesacomercial.cgsa@economia.gov.br](mailto:defesacomercial.cgsa@economia.gov.br)) or by phone (+55 61 2027-7770).

### 5.3. How could a Brazilian exporting company take part of an investigation of an investigating authority of foreign Trade Remedies?

If the Brazilian exporting company has the interest to take part as an interested party, it shall qualify itself, in accordance with the proceedings required by each authority, before the investigating authority, sending in a timely basis all documentation requested for such purpose. The requirements for qualification may vary in each country, depending on the respective laws. The hiring of lawyers, experts, and representatives, despite to not be mandatorily in several jurisdictions, could result in most effective defense of the interest of the Brazilian exporting company.

When qualified, the Brazilian exporting company shall answer the appropriate questionnaire and respect all established terms. The company could, also, submit statements during the procedure and points of view on the available information in the case records, both provided by itself, the investigating authority, and other interested parties.

Subsequently, the Brazilian exporting company could be called to allow the on-the-spot investigation in its premises, with the purpose to confirm the information presented in

the questionnaire and give rise to new pieces of evidence to the investigation. If it does not accept it, it could be considered as non-cooperative party (see question 4.8.).

Besides, if it wants, the company may request a hearing with the Trade Remedies authority to orally state on the elements of its case or, if invited to the hearing with the interested parties called by the authority, debate specific elements determined in the occasion of the invitation with the other actors of the procedure.

**5.4. Are there repercussions for a Brazilian exporting company if it has related parties in Brazil or abroad involved in the production chains and/or commercialization of the product?**

Yes. The relationship between the Brazilian producers/exporters and other companies in Brazil or abroad involved in the production chains and/or trade of the product could affect the calculation of the margin of dumping both the construction of the export price and by the implications in the assessment of the normal value to the Brazilian producer/exporter. For more information about the related parties, we suggest the analysis of the question of the Section on the Conceptual and Methodological Aspects on Dumping of the Anti-dumping Investigation Guide.

For more information on the anti-dumping investigations, we recommend the reading of the Anti-dumping Investigation Guide, published by SDCOM and available for consultation in the following website: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/guias>

**5.5. Does the Brazilian exporting company taking part of an investigation of an investigating authority of foreign Trade Remedies is obligated to allow the on-the-spot investigation?**

No, the Brazilian exporting company is not obligated to allow an on-the-spot investigation. However, if the Brazilian exporting company does not allow the execution of an on-the-spot investigation, the end determinations taken by the authorities shall have as basis the “best information available,” under Art. 6.8 and Annex II of AAD, and 12.7 of ASMC, which tend to be significantly worst to the non-collaborative companies (see question 4.8.).

It is emphasizing that the on-the-spot investigation is one of the phases of investigation allowed in the scope of a Trade Remedies procedure conducted under the multilateral rules of the WTC. In an on-the-spot investigation, the Trade Remedies authority sends a team of experts with the purpose to verify if the information given by the company

or to get additional evidence that the answers of the answered questionnaire by the producer/exporter are completely true to the ground truth. Usually, an on-the-spot investigation encompasses topics as the organizational structure of the company, its installed capacity, volumes of production, sales, and inventory, accounting practices and systems, detailed analyses of the sales (in internal market and exportation to such country, and costs of production, among others.

**5.6. Does the Brazilian exporting company is subject to penalties if it does not take part of the investigation of an investigating authority of foreign Trade Remedies?**

No. No type of measure with punitive aspect could be applied to the exporter or any other interested parties in a Trade Remedies investigation when it chooses to not take part. However, the final determinations taken by authorities shall have as basis the “best information available”, which tend to be significantly more unfavorable to the non-collaborative companies (see question 4.8.).

It is highlighting that, in anti-dumping and subsidy investigations, the investigating authority may select the exporters. In these cases, the absence of answer and cooperation by the selected company could give raise to the use of the available facts. It is worth emphasizing that the non-selected companies could submit the answers in a voluntary aspect, which could eventually result in the assessment of the margin of dumping or the number of subsidies, and individual anti-dumping or countervailing duties, assessed according to their own provided data. If they do not submit answers, non-selected companies will not be subject to the best information available, and they could have its duty assessed according to the average weighted of the margins of the selected companies that were responsive and collaborative.

**5.7. What do the advantages of the Brazilian exporting company take part of an investigation of an investigating authority of foreign Trade Remedies?**

When the Brazilian exporting company takes part of the investigation, it offers all information requested by the investigating authority in the granted term and has its data confirmed, it could acquire its margin of dumping or subsidy assessed according to its primary data. Normally, this individual margin tends to be lower, and, therefore, it could result a lower duty than that calculated according to the best information available to the non-collaborative parties. The answer to the questionnaire allows, therefore, the assessment of the most suitable margin and eventual duty to the reality of the company.

However, the cooperation is not mandatorily and does not necessarily ensure that the margin expected by the company will be adopted at the end of the investigation, neither the methodologies of analysis proposed are accepted. Hence, to cooperate or not with the investigation shall be an individual decision of the Brazilian exporting company.

If the company decides to cooperate, it shall ensure the compliance with all requirements of each phase of the investigation and to answer all questions made by the investigating authority, because the partial cooperation could be considered as non-cooperation, which could also result in less favorable treatment for the purposes of the determination of the margin and eventual duty (see question 4.8.).

### **5.8. Which is the “*lesser duty*” rule, and how it could benefit the Brazilian exporting company?**

The anti-dumping duties could be more reduced when an amount lower than the margin of dumping is sufficient to eliminate the injury to the domestic industry caused by dumped imports. This provision is known as “*lesser duty rule*,” and it consists in a “WTO *Plus*” provision. That is, it deals with an additional commitment to that assumed in the scope of WTC, bearing in mind that art. 9.1 of AAD only recommends that the anti-dumping duty is less than the margin of dumping if it is appropriate to eliminate the injury to the domestic industry.<sup>13</sup>

Differently from Brazil, which adopts this provision as a rule in its recommendations, other jurisdictions have different treatments. The Brazilian exporters investigated abroad shall bear in mind that the lesser duty rule does not constitute a duty to the exporter, even so this had to cooperate in a complete and satisfactory way with the foreign authority, unless such obligation belongs to a domestic rule of the investigating country. Therefore, it deals with a discretionary evaluation of the foreign authority. However, as a rule, the Trade Remedies authorities do not have the habit to grant the benefit of the lesser duty rule to the producers/exporters that did not adopt a collaborative position with the investigation. The lesser duty rule, therefore, serves as a higher incentive to the participation and cooperation of the producers/exporters.

---

<sup>13</sup> Antidumping Agreement, art. 9.1 *The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.*



For more information about lesser *duty*, we suggest the analysis of the Section on the Conceptual and Methodologic Aspects on the Anti-dumping Measures of the Guide of Anti-dumping Investigations.

For more information on the anti-dumping investigations, we recommend the reading of the Guide of Anti-dumping Investigations, published by SDCOM and available for consultation in the following address: <https://www.gov.br/produktividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/guias>

### **5.9. What are the counterpoints to the Brazilian exporting company attend an investigation of an investigating authority of foreign Trade Remedies?**

Cooperate in a Trade Remedies investigation could mean costs to the exporting company, in financial, time, and involved human resources terms. This is because the requested information requires exercises of complex breakdown, usually requiring the hiring of external consultants to its compliance with. Other cost related that could be significant is the official translation of all submitted documentation. Finally, Trade Remedies authorities could require the mandatorily hiring of a legal representative to the company headquartered in its territory, as well as its action in the required presential procedures.

However, as already mentioned in the question 5.7., the Brazilian exporting company attending and cooperating with the authority could obtain significant advantages at the end of the investigation before the foreign Trade Remedies authority, this is the reason, in general, there are significant incentives to the cooperation with the investigations.

It is worth emphasizing that in cases of safeguard, where there is no application of individual measures, when available, the questionnaires are usually less complexes, demanding less resources to the answer, becoming the participation of the companies in the investigations simpler.

### **5.10. What are the consequences to the Brazilian exporting company if it does not cooperate with an investigating authority of foreign Trade Remedies?**

As mentioned in the question 4.8, if the Brazilian exporting company denies access to the information requested by the investigating authority, not providing it in a timely basis and/or create obstacles to the investigation, this could determine the eventual measure to be applied to the exports of the company according to the “*best information available*” (BIA), under Art. 6.8 and Annex II of AAD, and Art. 12.7 of ASMC.

**5.11. Could the Brazilian exporting company request price commitment to the investigating authority of foreign Trade Remedies?**

In the procedures of investigation for adoption of the anti-dumping measures or countervailing measures, the exporter has the right to offer a price commitment.

With a price commitment, the exporter agrees to export its product under investigation at prices not lesser than defined as limit, which will be accepted, at discretion of the investigating authority, since they represent appropriate levels and sufficient to the elimination of the injured effects of the unfair practice of trade on the domestic industry. Thus, the products are exempted of surcharge that, otherwise, would be applied in face of the positive determination at the end of the investigation.

The producers/exporters that execute the price commitment shall be subject to conditions agreed in the scope of the corresponding commitment, related to the strict monitoring of compliance with the terms of the commitment, such as the regular control of export prices and subject to the proceedings of investigation.

Exports to be willing to offer a price commitment to a foreign investigating authority shall state this intention during the investigation, complying with the national laws applicable both to the terms and conditions that allow such type of proposal. In any case, the event of acceptance of the price commitment depends on the issuance of a preliminary determination on the existence of the practice of dumping or actionable subsidies and injury to the domestic industry.

It is emphasizing that in the case of subsidy investigations, Art. 18.5 of ASMC provides that the commitments could also be suggested by the authorities of the importing Member, but no exporter could be forced to accept such commitments. It is important to emphasize that the fact of governments or exporter do not offer commitments or refuse the invitation to accept them will not preclude the examination of the case.

Finally, it is worth emphasizing that the Brazilian exporters are not obligated to propose and/or accept price commitments to be executed with the investigating authorities of the other countries.

## 6. ASPECTS RELATED TO THE ACTION OF THE BRAZILIAN EXPORTERS AFTER THE CONCLUSION OF THE INVESTIGATION OF THE INVESTIGATING AUTHORITY OF FOREIGN TRADE REMEDIES

### **6.1. Could the Brazilian exporting company make a question the application of the measures by the investigating authority of foreign Trade Remedies?**

The Brazilian exporting company may judicially appeal in the country of the foreign investigating authority, if considers that the national law did not be correctly applied in the case. In some countries is also possible to administratively appeal to the investigating authority of Trade Remedies, but the rules could be different, depending on the national law in each country.

Furthermore, Trade Remedies measures could be disputed in the scope of the Dispute Settlement Body of the WTO if decisions and interpretations of the incumbent Trade Remedies authority of the investigation do not be in accordance with the legislation and case law of the Organization. However, individually, the exporter is not obligated to file a petition for the opening of a case in these spheres, and the Members of the WTC shall only have the incumbency of the representation to initiate a dispute in the scope of that organization, in level of governmental representation. In Brazil, this decision belongs to the Foreign Trade Chamber – Camex, in a work coordinated by MRE (see Section 3).

The Dispute Settlement System is constituted by three phases. Firstly, consultations between the plaintiff country and respondent country are made, with the purpose to the presentation of questionings and corresponding clarifying. Subsequently, if a satisfactory solution to both parties have not been achieved, the plaintiff country may request the establishment of a Panel constituted by experts appointed by the WTC. The Panel's Final Report shall determine if there was or not violations to the agreements in force in the scope of the Organization and shall recommend measures to be adopted by the respondent country. Finally, there is a foresee that both parties could appeal of the Panel's decision, and they shall be conformed to questions of right, as the legal interpretation of the agreements. An appeal could be analyzed by the Appellation Body that, in a collective decision, could maintain, modify, or reverse the Panel's decision.

It is worth emphasizing that it is a usually long procedure, with high costs and demanding to the involved parties. Even that it may not to file a petition to the opening of a case, the Brazilian exporting company tends to act jointly with the governmental bodies during the procedure. Its performance starts since the provision of useful information to the defense of the country's interests, which may extend to the several phases of the procedure,

including, through the attendance at the intragovernmental meetings and even meetings in the scope of the WTC, as those made in the consultation phase.

### **6.2. What if the Brazilian company did not export during the investigated period, but it wants to do it now? What is possible to do to avoid that the Trade Remedies measures are applicable on it?**

If a Brazilian company did not export the product under investigation during the period of analysis established by the investigating authority, this company shall not be identified for such authority and due to this, it will not have the opportunity to provide primary data aiming the assessment of the individual margin of dumping or the number of actionable subsidies. Consequently, if this company decides to export the product under anti-dumping or countervailing measure in the future, it shall be subject to the duty established to Brazil as a whole, equivalent to the applicable to the non-cooperative exporters.

In these events, such new Brazilian exporting company could, as a rule, request to the investigating authority of foreign Trade Remedies the beginning of a “review to new exporters” (in the case of anti-dumping measures) or a “fast review” (in the case of countervailing measures), to obtain the individualized margin in the cases where such classification is possible, under Art. 9.5 of AAD, and Art. 19.3 of ASMC.

### **6.3. Could the Trade Remedies measure applicable by the investigating authority of foreign Trade Remedies be extended?**

Usually, anti-dumping measures and countervailing measures have the duration of five (5) years and they are automatically terminated with the expiration of the term, unless it is initiated a procedure of end period review or “*sunset review*”, and such procedure result in a positive final determination that the measures shall remain in force for an additional period, normally with the same duration to the originally applied, under Art. 11.3 of AAD, and Art. 21.3 of ASMC.

This review could be requested by the domestic industry of the dumped product, through a written and duly reasonable petition, which shall include elements of proof evidencing that the extinction of such measure will probably result in the continuation or recovery of the dumping or distortions of prices caused by subsidies, as well as in the continuation or recovery of the injury caused to the domestic industry by the imports in these conditions.

About the procedures, rights, and duties of the parties in a sunset review are like the existing in an original investigation regarding, among others, the aspects of cooperation, on-the-spot investigations or duty to the adversary procedure and a right to a fair hearing.

Depending on the national legislation, a sunset review could result in the extinction of the Trade Remedies measures, in the continuation of the duties in force at the same level (that is, without amending to the measures already applied), or, also, result in the reduction or surcharge of the duties in force.

It is emphasizing that there is no limit to the renewal of the period of application of anti-dumping and countervailing measures, since the extension of the measure is preceded of a regular proceeding of review to assess if the measure is necessary to arrest against the injury caused to the domestic industry.

It shall be attention that, when reviews are in course, the Trade Remedies measures under review remain in force.

About the safeguard measures, they could be applied up to four (4) years and be extended for other four years, under Art. 7.3 of AS, since that proved by a new investigation that the measures remain to be necessary to remedy the threat of serious loss or serious loss suffered by the domestic industry and since proved that the industry is not adjusting itself.

Finally, it is emphasizing that the special and differentiated treatment granted to the developing countries, which have the right, according to Art. 9.2 of AS, to extent the period of application of a safeguard measure for a term up to two years besides the maximum period established in Art. 7.3 of AS, totalizing a maximum period of ten (10) years.

#### **6.4. How could the anti-circumvention reviews impact on the Brazilian producer/exporters?**

Circumvention is defined by the trade practice whose purpose is to circumvent the occurrence of Trade Remedies measures. Despite the efforts undertaken by some countries during the Uruguay Round, it was not established a normative set that multilaterally determine the hypothesis o circumvention, in a way that each foreign authority has the competency to deal with the matter according to its internal legislation. Consequently, the trade practices defined as circumvention in the domestic legislation of each country may vary.

The anti-circumvention proceedings are usually initiated as a procedural incident to evaluate if the trade practice applied to the exporter has economic background different of the effort to avoid the incidence of the Trade Remedies measure. It is recorded that the

investigating authorities shall adopt a transparent proceeding, where the producer/exporter accused of to practice the circumvention could present its defense in the procedure.

If the authority concludes that the investigated trade practice is fitted among the hypotheses of circumvention provided for in its national legislation and has the purpose to avoid the occurrence of the Trade Remedies measure, the original Trade Remedies measure could be extended to the analyzed products on the incident of circumvention.

#### **6.5. Is it possible that Brazilian producers/exporters are collected retroactively by a duty applied by a foreign authority?**

As a rule, anti-dumping and countervailing measures could only be applied on the goods shipped to the consumption after the entrance in force of the decision to apply such measures. Despite this, art. 10 of AAD and art. 20 of ASMC provide exceptional situations where such measures could be collected in a retroactive way on goods shipped for the consumption up to 90 days before the entrance in force of the anti-dumping or provisional countervailing duties. For this reason, the Brazilian producers/exporters shall be aware of this possibility and the hypotheses that it may give raise of such retroactive charge, under arts. 10.6<sup>14</sup> of AAD and 20.6<sup>15</sup> of ASMC.

It is worth emphasizing that, under art. 10.2 of AAD, the charge will occur, as a rule, on the importer in the national market of the entity that determines the application of the measure. In this sense, there is no record of the situations where the Brazilian producer/exporters have been retroactively charged for duties applied by the foreign authority.

---

<sup>14</sup> AAD, art. 10.6 *A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that: (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and (ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.*

<sup>15</sup> ASMC, art. 20.6 *In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.*

**6.6. Is it possible that Brazilian producer/exporter request reimbursement for duties provisionary applied, and subsequently they have not been confirmed by the investigating authority abroad?**

Arts. 10.3 and 10.5 of AAD, and 20.3 and 20.5 of ASMC provide for the possibility of total or partial reimbursement of the provisional duties in the cases (i) where the collected among as anti-dumping or provisional countervailing duties exceeds the amount of the definitive anti-dumping or countervailing duty applied, or (ii) where the final determination of the dumping or subsidy investigation are negative.

The anti-dumping and countervailing duties are, however, as a rule, collected or paid by the importers of the country applying the measure. If the obligation of the payment incurs on the foreign exporter, the country applying the measure shall ensure the appropriate means for reimbursement of the excess collected duties.

**6.7. Is it possible that Brazilian producers/exporters request reimbursement for definitive duties?**

Some foreign authorities adopt a regime of application of the retrospective measure. In this system, the investigating authority conducts an administrative proceeding where it calculates the margin of dumping and decides for the application of a definitive duty. This duty is collected on the imports to be shipped to the consumption in the territory of the importing country. However, the exporters could request an administrative review of the duty effectively due, through the new calculation of the margin of dumping. If the new assessed margin of dumping is lesser than the duty in force, the authority makes the devolution of the difference between the duty in force and the new calculated margin of dumping. This is the case of the United States of America, for instance, which allow to the exporters request that the authority proceeds the annual administrative reviews with the purpose to calculate a new margin of dumping.

In these systems, there is an incentive for that companies shall adopt trade strategies in accordance with the multilateral rules of the trade, terminating the unfair practice. Since the companies start to trade their products without the practice of dumping, for instance, it could require the reimbursement of the paid definitive duties.

In turn, in the case of countries that adopt a prospective regime of application of measures, in the importers of the product subject to the definitive anti-dumping duty consider that the applied duty is higher than the effective margin of dumping, such importers

could request the reimbursement of the duty paid in an amount higher than the margin of dumping assessed to the analyzed period during the proceeding of reimbursement.

Regardless of the regime of application of measures, the reimbursement of the overpaid amounts shall normally occur up to ninety (90) days after the decision on the necessity of reimbursement, as provided for in arts. 9.3.1 and 9.3.2 of AAD.

**6.8. Could the Brazilian producers/exporters request to the investigating authority to review the case upon changed circumstances?**

Under arts. 11.2 of AAD and 21.2 of ASMC, the interested parties have the right to require that the authorities examining (i) if the maintenance of the anti-dumping or countervailing duty is necessary to compensate the dumping or the actionable subsidy granted and/or (ii) if there is the probability that the injury to the domestic industry continues or recovered if the duty is extinguished or amended. If, because of the review of amendment of the circumstances, the authorities conclude that there is no more reason that justify the maintenance of the anti-dumping or countervailing duty, this shall be extinguished. Each authority, however, could discipline the necessary requirements for that analysis is made.