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When Anti-dumping Meets Antitrust: Brazil's Innovative Experience Analyzing Public Interest in Commercial Defense Investigations

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Abstract

This article discusses the issue of applying trade defense measures in oligopolized or monopolized markets, addressing the recent integration of the trade defense investigation body with the public interest area in Brazil. By analyzing two recent cases of plasterboard and grinding bodies, I raise the possibility of complementing antitrust analysis with trade defense. I conclude that it is necessary to have greater convergence between investigations of unfair trade practices and concerns about maintaining a competitively healthy market. I also argue for the importance of institutional restructuring of the new system of trade defense and public interest by separating damage investigation and causal link analysis, thus creating an exempt court that allows further discussion regarding antitrust and anti-dumping cases.

Keywords: antitrust, trade defense, competition law

1. Introduction

On April 15, 2019, the Brazilian Government published an update on procedures for examining public interest requests in the context of trade defense

investigations. The measure marks a new era in the analysis of dumping accusations – pricing of imports below normal value causing harm to the domestic industry – and safeguard claims – measures to protect the local industry from damage caused by excess imports from a particular country.

Innovation is taking place on three fronts: first, the new structure created at the Ministry of Economy has removed from the collegiate body – the Foreign Trade Chamber (CAMEX) – decisions on whether or not to apply trade defense measures or to suspend current trade defense measures due to public interest. The previous decisions, discussed technically in the technical groups created – Trade Defense Technical Group (GTDC) and Public Interest Analysis Technical Group (GTIP) – and deliberated by the Council of Ministers, are now subject to a single body, the Secretariat of Foreign Trade (SECEX), with deliberation of the Special Secretary for Foreign Trade and International Affairs (SECINT). This innovation changes a practice of more than 15 years of collegiate decision making among the interests of various existing ministries.

The second innovation results from the unification of the procedures for examining applications in anti-dumping or trade defense measures, which now include the assessment of relative public interest from when the investigations begin. The measure, justified by the necessary rationalization of efforts in cases of application or non-application of trade defense measures, seeks to offer clarity for the participating entities, especially in the private sector, where the trade defense measures could now be applied, minimizing the problem of legal uncertainty, especially in recent years with the current entry of surcharges on imports resulting from unfair trade practices and their consequent withdrawal for reasons of public interest.

The third innovation stems from the publication of a material guide with select criteria to give transparency to participants of the trade defense system about what is considered relevant when analyzing public interest to elucidate the extent to which collective interest becomes more important than any possible unfair trade practices. It is about this particular aspect that this paper aims to analyze: the extent to which criteria listed in antitrust analysis, such as the existence of monopoly, barriers to entry, rivalry between markets, become necessary matters for analyzing and deciding on the application of trade defense measures.

To this end, this article raises the existing problem of the application of surcharges on imports in oligopolized or monopolized markets, such as increasing the likelihood of the exercise of market power and/or the existence of tacit or illicit cartels. As economic theory points out, both market structures burden consumers and generate losses of social welfare due to price increase caused by producers in the event of reduced

competition. Although dumping is considered to be a trade threat because it intends to eliminate the local market, also potentially leading to decreased local competition, it is necessary to consider, from the beginning of an investigation on dumping or excess imports, the market structure being investigated.

To further illustrate the possibility of combining antitrust analysis with trade defense analysis, this paper is divided into four parts, along with this introduction: in the second part, the problem above is examined through trade defense and antitrust law. In the third part, I present two recent cases in which antitrust defense criteria was applied to trade defense analysis in cases of public interest analysis: the case of anti-dumping duty on plasterboard imports from Mexico and the anti-dumping duty on imports of grinding bodies (used in refining ore) of Indian origin. The final conclusions will be presented in section four, with the aim of assessing whether, based on the case studies presented, the antitrust defense concerns have been addressed in trade defense applications.

Although the recent material guide for public interest analysis goes in the right direction for competition defense, in line with current economic freedom laws, this paper concludes that further convergence is needed between investigations of unfair trade practices and concerns about the maintenance of a competitively healthy market. For example, allegations of unfair trade practices originating from national monopoly companies need to have a higher level of evidence than investigations of unfair practices petitioned by business associations or representatives of industrial sectors with a degree of concentration. Another important conclusion is that the relationship between imports and the damage caused to local industry needs to be materially strong, because imported volume is essential to a general or partial equilibrium analysis to be classified as being damaging to society or industry.

Lastly, this article also points to the importance of an institutional restructuring of the new system of commercial and public interest defense system, which requires the strengthening of its technical staff, besides the formation of a specialized collegiate, with an independent mandate that can make technical-political decisions on trade defense measures and their non-enforcement due to public interest and which may represent Brazil in possible WTO disputes and trade agreement negotiations.

2. Problem

A competition defense policy aims to ensure the existence of competitive conditions, preserving and/or stimulating the formation of competitive environments to induce, if possible, greater economic efficiency as a result of market functionality. In Brazil (as in

many countries) there is a legal system specifically designed for this purpose called the "competition defense law" (or antitrust law) – currently, Law 12.529 / 11 (Melo, 2001).

The antitrust policy seeks to limit the exercise of market power because, in principle, firms with this power are capable of harming the competitive process, generating inefficiencies as a result of their exercise.[1] It is important to note, however, that antitrust law does not make market power – nor monopolies – illegal, but merely attempts to control the form in which that power is acquired and maintained. Thus the law seeks to repress the abusive exercise of market power, not the power itself; it is not unlawful when it results from a natural process arising from an agent's greater efficiency relative to its competitors[2].

This is where trade defense measures tend to become worrying: the effects on competitive conditions in the importing country's market are significant (Prusa, 2003; 2005; 2016; Zanardi, 2005; Tavares, 2002; Besedes and Prusa, 2013) and are related to efficiency losses and barriers to domestic productivity gains. In a pioneering work, Oliveira (2014) investigates the objective economic motivations for an industry to claim protection against dumping practices. Based on data from 93 sectors of the manufacturing industry between 1996 and 2007, the author concludes that the structure of foreign trade (volume of imports and tariffs) and the economic performance (productivity and investments) of the sector influence the likelihood of anti-dumping, with some qualifications explained by motivations of political economy such as the sector's capacity for political mobilization.

Intriguingly, the author also observes the fact that possible anti-dumping measures are being applied not exclusively to labour intensive sectors, potentially generating backlash against unfair imports due to possible "below market" costs. Although China is the country with the highest percentage of positive determinations in the sample provided by the author (25.68% of the total), affected Chinese products would not be labour intensive. Chinese imports hit by AD also included various chemicals and metal products, such as glyphosate, magnesium and industrial parts – products with high production scales and intensive in capital.

Kannebley et al. (2017) present empirical evidence that these measures have impaired the productivity of protected sectors and increased market concentration, ultimately impacting consumers. The authors conclude that there is an average decline in the productivity of industrial firms benefiting from the anti-dumping measure of around 8.5% over the entire period, and the range of results vary between -3.6% and -25%. For *markup*, a variable that measures market concentration, the authors observed an average increase of around 2.4%, with a range of variation between 1.6% and 3.0%.

In this context, the public interest analysis appears as a counterpoint to the pressures to apply trade defense measures. As Naidin (2019) points out, the object of public interest assessment is to identify factors that, after applying measures, generate negative net effects on the economy. However, the author notes that the Brazilian experience, since the creation of the GTIP, has been confusing, without clear and forceful criteria that could provide legal certainty to complainants about which factors would prevail in the then Camex decision. The author suggests developing analytical tools based on economic indicators of general application to support the decision making process regarding the direct and indirect effects of the applied measures.

The recent publication of the Material Guide for Public Interest Analysis provided an answer to this problem. I seek to observe, in the analysis of the following two cases, the criteria used, encompassing the competitive aspects considered.

3. Development: Two Recent Cases of Public Interest Analysis

3.1 Plasterboards

In September 2018, Camex decided to apply anti-dumping measures on Mexican plasterboard imports. These are sheets, boards or panels of plaster or plaster-based compositions, widely used in construction, used in systems of walls, ceilings and internal cladding, popularly known as dry-wall.

In the same month, Camex itself decided to open a public interest analysis process, considering elements pointed out by the Technical Note of the former Secretariat of International Affairs of the Ministry of Finance (SAIN / MF) as: the fact that the product is included in the Common External Tariff Exception List (Letec); the relevance of the product and the expected impact on the downstream chain, arguing that the measure would generate additional costs for real estate; market structure and competition, justifying that, in the Brazilian market, the domestic industry would be composed of only four producers (Placo, Knauf, Gypsum and Trevo) and these would have a larger market share than the imported one.

As discussed in the introduction, the assignment of public interest analysis became part of the new Ministry of Economy, specifically the Undersecretary of Trade Defense and Public Interest (SDCOM). In this new structure, the cases pending analysis, such as the case in question, were left undefined since the collegiate decision was unnecessary.

Ordinance No. 420 of May 21, 2019 illustrates elements provided in the competitive analysis that were considered by the new structure regarding the decision to terminate

the public interest assessment without suspending the application of the current anti-dumping measure.

The first element concerns the impact on the downstream chain concerning the construction industry. From the point of view of competition, a concentrated industry alone does not cause consumer harm via price increases. Evidence is required to demonstrate that the likelihood of exercising market power is possible and high. According to the annex in the Ordinance, the domestic industry is made up of four producers of the similar product (Placo, Knauf, Gypsum and Clover), which in the last period of the dumping investigation had 94.5% of the national plasterboard market with imports accounting for 5.5%.

One way of demonstrating the impact on the downstream chain by qualitative means would be through consumer involvement and/or downstream representatives, as seen in other countries.[3] Even though the product is widely used by the construction industry, throughout the process there was no participation from parties that informed how much influence plasterboard would have on the total cost of construction. SDCOM itself estimated, through partial equilibrium assessment, that the application of the measure would result in a domestic product price increase between 0.88% and 1.88%, estimating that the total impact on a complete construction project would be low.

The second element aligning with a competitive concern was the availability of substitute products not affected by the anti-dumping measure. The analysis in question resembles one of the main antitrust discussions concerning the definition of the relevant market. Despite not being an object of public interest analysis as deep a discussion as in the merger and acquisition processes of the Administrative Council for Economic Defense (Cade)[4], the analysis presented in the aforementioned ordinance was concerned with assessing the availability of substitute products from sources not affected by the trade defense measure. It considered that there would be limited availability: excluding Mexico, the other origins with a participation greater than 1% in Brazilian imports in 2018 would have been Argentina (13.8%), Spain (4.7%), Denmark (1.2%) and France (1.2%).

The third competitive element presented, for the purpose of assessing the impact on the end consumer, deals with the end consumer price analysis. The annex to the ordinance itself states that “rising consumer prices is one of the negative effects associated with highly concentrated markets”. In addition to the sales prices available in the dumping investigation – with a decrease of 2.2% between the P1 and P5 periods of the investigation – there was a comparison between the variation of the National Construction Cost Index (INCC) and the plaster price change between January 2013 and July 2018. It was seen that, in the period with available data, the change in the

plaster index followed the same trend as the global INCC variation, indicating that the increase in plaster prices also followed the same upward trend as other construction items. As such, SDCOM concludes that there is no evidence of abusive price increases.

The elements of the competitive analysis were therefore of fundamental importance for SDCOM to conclude for the decision to not suspend the current anti-dumping measure on grounds of public interest. Although it was found that the suspension would tend to be beneficial to the market, as expected by economic scholarship, the calculated beneficial effects were of low magnitude, which is why no public interest economic effects were identified to overlap with the expected effects through the trade defense measure. Part of these low results can be explained by the already low share of imports in the domestic market, considering the importance of the imported volume and its relation to the causal link, an analysis that should originally have been done in commercial defense investigations. If it was not possible to observe relevant competitive impacts due to the low share of the import, we have to question how it was possible that this volume damaged the domestic industry.

3.2 Grinding Bodies

On April 27, 2017, the company Magotteaux Brasil Ltda. (Magotteaux) submitted an application to investigate dumping of exports of grinding bodies made of cast iron or chromium-alloyed steel from India to Brazil. The product is commonly known as milling grinding bodies or ball mills, produced from chromium iron (low carbon or high carbon) and can also be produced from scrap. Its main application is in the ore industry, being used in the grinding of various types of ore – iron ore, gold, copper, nickel, phosphate, bauxite. It can also be used in limestone grinding and in the cement industry.

Cassola, Moraes and Albertin (2006), in a technical study aimed at characterizing ball mills to subsidize industrial milling units, state that the consumption of grinding bodies is one of the main costs in ore processing. In the cement industry, high chromium white cast iron ball mills have become the standard for significantly superior performance compared to cast or forged steel balls. In the case of ore grinding, the performance differences between the materials would tend to decrease. The authors conclude that the high chromium white cast iron composite product is superior, with about 150% (2.5 times) longer durability compared to the worst performing material.

CAMEX, through Resolution No. 40/2018, decided to apply the definitive anti-dumping duty for a period of up to 5 (five) years, applying a percentage of 9.8% on imports originating from Indian company AIA Engineering Limited Welcast Steels (AIA) and 37.8% on remaining imports. Following this decision, the Brazilian Mining Institute (Ibram), representing the interests of Vale S.A., Brazil's largest importer of

grinding bodies, submitted a public interest assessment claim, arguing that the maintenance of the definitive anti-dumping measure would negatively impact the Brazilian mining industry which, incurring higher costs, would lose international competitiveness. At the same time, the complainant raised a discussion on competitive trade defense measures by pointing out that the company, Magotteaux, potentially impaired by dumping, would be the sole producer in Brazil and that, with the application of the measure, would act as a monopolist, harming free trade competition.

The possible existence of monopoly sparked a large debate surrounding the structure of this market and its possible impacts on the downstream and upstream chain. While Vale, which was interested in suspending the public interest measure, pointed to the impacts on its products, Maggoteaux presented arguments in favor of the upstream scrap chain that would benefit from strengthening the company's dominant position.

In fact, the Undersecretary of Commercial Defense and Public Interest noted that the market structure of grinding bodies was itself a global duopoly, with India's AIA and Maggoteaux being the two main producers. The domestic industry would be monopolistic because, though Maggoteaux had pointed to another existing company, Sada Siderurgia, it did not present data on its production capacity, making its effective competition questionable.

Sdcom considered that, throughout the investigation period, the market had always operated in a high concentration range, using the Herfindahl-Hirschman Index (HHI), commonly used in market structure analysis as reference. With an annual average of 4,745 points in the HHI index, Sdcom noted that the concentration on P1 was the highest, having decreased over the years, indicating a slight decrease in market concentration due to increased imports. This competitive aspect showed that the consequent loss of the domestic industry’s market share was positive in terms of promoting lower market concentration.

Despite underlying market concentration, a second and important competitive aspect addressed would be the possibility of abuse of dominant position. Qualitatively, it was noted that even with the application of the provisional anti-dumping measure on November 7, 2017, there would have been an increase in imports of the product. In 2017, until November, the growth would have been 14% in grinding body imports. In 2018, when a provisional measure of 24.87% was already applied, a 4% increase in imports was verified. In this scenario, even implementing provisional anti-dumping measures would not have completely eliminated imports of grinding bodies.

Regarding the impacts on consumers, the major controversy in this case was the fact that Vale is a beneficiary of the drawback regime, that is, for each item exported, there would be exemption on the company's imports. As much of Vale's production was

destined to the foreign market, the impact analysis for local consumers was impaired. However, the application of a trade defense measure on exporting companies sparks a debate on tariff exports and hindrance to external competitiveness. If the drawback exemptions existed to encourage exports, how can we justify a public policy that will once more burden one of the largest national exporters?

Finally, to consider the possible harm of the monopoly, it was necessary to evaluate the possible substitutes for the grinding bodies, including producers from other origins. Vale argued that the choice of using high-chrome or low-chrome forged steel grinding cups would be related to the performance of each product on the worked soil and the type of improvement. Based on Vale's explanation, Sdcom concluded that the use of low-forged steel grinding bodies could replace high-chrome grinding bodies, in spite of their loss of performance and cost-effectiveness, thus burdening exports in terms of the operating flow of the company, leading to productive inefficiencies and less competitiveness in exports. Such observation would be in accordance with the technical conclusions of Cassola, Moraes and Albertin (2006), described at the beginning of this section. By looking at imports of grinding bodies outside the scope of anti-dumping and subsidy investigation, Sdcom found a decline in imports from AIA as opposed to Magotteaux's increase, corroborating the fact that products originating from AIA are of superior quality.

Although, in the final conclusion, Sdcom decided not to suspend anti-dumping duty and to maintain the subsidized trade defense measure, one can conclude that the analysis of competitive criteria was crucial for a balanced decision: the maintained duty fell from 9.8% to 2%, considering the double remedy effect of subsidy investigations.

4. Conclusion

The possible interaction between competition policy and trade defense policy is well documented in Brazil (2018): in a collection of articles, several authors with extensive practical knowledge on both subjects point out ways for greater integration between competition concerns and the needs of trade defense measures. In one of the articles, authors Paula Farani and Paula Baqueiro (2018) report on the American episode that gave rise to both legislations that influenced the world in both matters: the creation of the Sherman Act in 1890, the legal framework for antitrust control; and the 1921 Anti-dumping Act, an instrument of protection for American industry against fierce competition from foreign competitors beyond the Sherman Act. The authors argue that the latter had a major influence on the GATT text, serving not only to protect industries but also to prevent protectionist escalations.

In spite of Sdcom's recent effort to integrate competition defense with trade defense, as seen in the two cases exemplified above, I draw attention to the need for greater convergence between investigations of unfair trade practices and concerns about maintaining a competitively healthy market. In the case of grinding bodies, the initial investigation of dumping itself should consider that the plaintiff was the sole domestic producer and should observe its own motivation in the petition. It is necessary to demand better evidence from these investigations than from requests from company associations or representatives of concentrated industrial sectors since the determination of damage and causal link is endogenous to the information brought by the company itself.

This initial convergence is latent in the case of drywall slabs: despite the fact that there is more than one producer, the imported volume would have been so insignificant, to the point of not causing the impact to suspend public interest, explaining the uncertainty of motives behind the conclusion of the existence of harm. Any general or partial equilibrium analysis, however sophisticated, will depend on the amount of imports to estimate impairment/damage to society or industry. As Naidin (2019) points out, the legal basis of the methodologies to determine dumping and damage, as well as the causality between the two phenomena, leaves a wide margin of discretion for implementing authorities in selecting the “appropriate methodology”, which may generate strange results as the example demonstrated.

This convergence can only be fully achieved through an institutional restructuring of the new system of trade defense and public interest, which requires strengthening of its technical staff, in addition to the formation of a specialized collegiate, with independent mandate, which can make technical-political decisions in regards to trade defense measures and their non-enforcement in the public interest and which may represent Brazil in possible WTO disputes and trade agreement negotiations. Considering that the concept of dumping in the WTO Agreement does not reflect the theoretical definition of the phenomenon, leaving little room for discussion, the focus of the debate on reconciling the WTO anti-dumping regime with policies that favour domestic competition can only be balanced when assessed impartially through more than one point of view.

Following Naidin's (2019) suggestion, this institutional restructuring requires the adoption of a bifurcated trade defense institutional model such as in the United States and Canada, where investigations of damage and causal link are conducted in different scopes and are legally independent. In the Canadian model, the Canadian International Trade Court (CITT) is an independent quasi-legal body, which reports to Parliament by referral from the Ministry of Finance and is responsible for investigating damage to

domestic industry, as well as by public interest analysis. There are counselors, appointed by fixed terms, who make decisions as if in a court - much like Cade in Brazil.

Thus, this forked institution could effectively apply – in form and substance – the procedure recommended in paragraph 3.4 of the WTO Agreement, which is: when examining the impact of imports on domestic industry, consideration should be given to all economic factors and indicators that may affect the state of that industry, including antitrust issues such as degree of industry concentration, barriers to entry, and market power of leading firms.

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Endnotes

[1]That is why the existence of market power is a condition for antitrust enforcement.
[2]Brazilian law is clear in this respect (*v.* art. 20, § 1º).

[3]Canada and the European Union are examples of using this methodology.

[4]See Guide for Analyzing Horizontal Concentration Acts, available at <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf/view >.