

LOCAL CUSTOMS

Sidley Austin LLP trade practitioners Scott Andersen, Andrew Shoyer and Claus Zimmermann look at hot spots in Latin American trade



Over the course of the past year, a number of Latin American countries have played key roles in major developments in the realm of international trade. To a certain extent this is due to the fact that two of the largest economies of the region, Argentina and Brazil, while themselves taking a rather protectionist stance, consider trade defence a top priority. In addition, and for a variety of reasons, several other Latin American countries have recently hit the international trade headlines.

Argentina

Argentina's controversial seizure of control in April 2012 of the country's biggest oil firm, YPF a subsidiary of Spain's Repsol (taking over 51 per cent of Repsol's 57 per cent ownership stake in YPF), was met with fierce international criticism and triggered a series of retaliatory measures by Spain and the European Union (EU). Repsol, together with investment firm Yale Texas Capital, sued Argentina in the US District Court in Manhattan, demanding that Argentina actually purchase its stake in YPF and compensate investors for the decline of the share prices of Repsol and YPF that followed the takeover. Spain retaliated strongly by halting its imports of biodiesel from Argentina, which, in the preceding year, had created a revenue of US\$1.2 billion for Argentina. The European Parliament passed a resolution condemning the nationalisation of YPF and called for the European Commission to consider a partial suspension of preferential tariffs that benefit Argentine exports to the EU under the EU's Generalised System of Preferences (GSP). It would not be the first time that the EU excludes a trading partner from its GSP – it has done so most recently with regard to Sri Lanka. Were Argentina to be excluded from the EU's GSP, its exporters could find themselves confronted with higher European tariffs than their Latin American competitors. Such a worsening of the international trading conditions for Argentine exporters would add to the negative effects of the suspension of Argentina's status as a beneficiary country

in the US Generalized System of Preferences for Argentina's failure to pay two investment arbitration awards by the International Centre for the Settlement of Investment Disputes (ICSID) to US companies. On the multilateral level, the European Commission has launched dispute settlement proceedings against Argentina before the World Trade Organization (WTO) by requesting consultations, on 25 May 2012, challenging various declarations required as a condition for the approval of imports into Argentina, several types of licences required for the importation of certain goods, as well as the alleged systematic delay in granting import approval subject to importers undertaking to comply with certain commitments. The European Commission has barely concealed the fact that these claims against what are formally trade policies unrelated to Argentina's seizure of control of YPF are indeed a response to this contested action. On 17 August 2012, Argentina reacted by bringing a WTO dispute itself against the EU and Spain, arguing that the Spanish ministerial order regulating allocation of quantities of biodiesel needed to achieve the mandatory target of renewable energy violated various provisions under the WTO Agreement.

Brazil

Numerous examples of actions made under Brazil's trade policy are well documented, but a less-explored decree is that issued by the Brazilian government on 3 April 2012 on the tendering of biologics. That decree provides for preferential pricing of up to 25 per cent, taking the form of cumulative margins of preferences for products with a biopharmaceutical component on federal tenders to Brazilian manufactured products. This decree has been criticised by the international pharmaceutical industry as creating significant legal uncertainty, notably due to the decree's lack of key definitions such as the criteria under which a product will be considered "Brazilian-manufactured" and the lack of clarity for the bidding process that arises from the decree. Furthermore, although the WTO's plurilateral Government Procurement Agreement does not apply to the decree

at issue as long as Brazil has not become a member of that agreement, provisions contained in the contested decree could still potentially amount to a violation of Brazil's obligations under any of the WTO's multilateral agreements, such as the GATT 1994, if the preferentially treated products were to be commercialised in Brazil in competition to imported products or if they were to be exported.

Bolivia, Colombia, Ecuador, Panama and Peru

Meanwhile, Colombia and Panama made international trade headlines in October 2011 when US President Barack Obama signed into law legislation that approved not only the hard-fought US-Korea Free Trade Agreement (FTA) and the US GSP, but also the US-Colombia and US-Panama FTAs, which are widely regarded as a major step forward towards more bilateral trade between the United States and these two countries. (The US-Korea FTA entered into force in March 2012, and the US-Colombia FTA entered into force in April 2012; the US-Panama FTA is expected to enter into force in October 2012.) Other elements of that same US legislative package brought about major changes for the US Andean Trade Preference Act, which is also known as the Andean Trade Promotion and Drug Eradication Act (ATPDEA). For over two decades, the ATPDEA offered trade benefits to Bolivia, Colombia, Ecuador and Peru to help these countries combat drug production and trafficking through developing and strengthening legitimate industries. Since 15 May 2012, only Ecuador is eligible for such benefits. With Colombia, Peru and (soon) Panama each enjoying benefits under their respective FTAs with the United States, Bolivia's trade disadvantage in the region seems to have been further increased.

Costa Rica

The relationship between Canada and Costa Rica is also advancing. On 11 August 2011, the two countries announced they will begin negotiations to modernise the existing Canada-Costa Rica FTA. By June 2012, the fourth round of negotiations had been completed with significant progress having been made on a number of chapters. The original Canada-Costa Rica FTA, which has been in place since 1 November 2001, together with two parallel accords on environmental and labour cooperation, focuses mainly on trade in goods and does not include substantive provisions in areas such as cross-border trade in services, financial services, investment and government procurement.

Mexico

Mexico has been keen to establish stronger ties to Asia, and in June 2012, the country received a formal invitation to join the negotiations for the Trans-Pacific Partnership (TPP) from the nine countries negotiating (among them, from Latin America, Chile and Peru). This step followed Mexico's expression of interest in November 2011. Mexico's business sector strongly welcomed the initiative. So far, the countries

negotiating the TPP have concluded 13 rounds of negotiations, the most recent one having taken place in early July 2012 in San Diego, California. Also impacting Mexican industry, in June 2012, the Maitland-based Florida Tomato Committee filed documents with the US Department of Commerce and the US International Trade Commission requesting the withdrawal of a 1996 anti-dumping duty petition. The withdrawal of the current suspension agreement, which sets a floor price for Mexican tomatoes exported to the United States, is fiercely opposed by tomato growers across Mexico who consider that the agreement has brought stability to the market for the past 16 years and who believe that a withdrawal of the current suspension agreement would lead to a price war on tomatoes.

Dominican Republic and Honduras

There are other disputes of note concerning Latin American countries. Both Honduras and the Dominican Republic have recently initiated high-profile WTO dispute settlement proceedings against Australia over a set of new Australian laws and regulations requiring that tobacco products be sold in plain packaging starting 1 December 2012. Honduras requested consultations with Australia on 4 April 2012 and the Dominican Republic requested such consultations on 18 July 2012. Ukraine had previously requested consultations with Australia on the same matter on 13 March 2012. All three countries claim that Australia's measures violate several provisions under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement) serving to protect trademarks and geographical indications. Whether the three disputes will be dealt with by a single panel has not been decided but seems likely in light of the manner that previous WTO disputes challenging one and the same measure have been handled.

Paraguay and Venezuela

Finally, a look at recent events in Latin America's Mercosur trading bloc: on 22 June 2012, Mercosur suspended Paraguay's membership for having impeached and removed from office its president, Fernando Lugo. While the members of Mercosur considered that Lugo's fast-track trial broke the democratic order in Paraguay by not allowing its president a proper defence, they decided not to apply economic sanctions to Paraguay in light of that country's disadvantaged economic situation. The suspension of Paraguay's membership enabled Mercosur to resolve a long-standing deadlock over the membership application by another country in the region. Venezuela had signed a Mercosur membership agreement as early as 17 June 2006, but its accession has since then been blocked by the senate of Paraguay. With Paraguay's membership being suspended, other Mercosur members – Brazil and Argentina in particular – pressed for finalising Venezuela's accession. Full membership for Venezuela thus became effective on 31 July 2012.