

# Brazil-U.S. Trade Agreement: A New Chapter for Trade Facilitation

by Leonardo Branco and Fernanda Kotzias

Reprinted from *Tax Notes International*, September 5, 2022, p. 1131

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Leonardo Branco



Fernanda Kotzias

Leonardo Branco and Fernanda Kotzias are counselors at the Brazilian Administrative Tax and Customs Court of Appeal.

In this article, Branco and Kotzias examine the cooperation, regulatory, and anti-corruption measures implemented by the protocol to the Brazil-U.S. Agreement on Trade and Economic Cooperation.

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On June 8 Brazil adopted Decree No. 11.092/2022, the protocol on trade rules and transparency, which modernized and gave a new dimension to the Agreement on Trade and Economic Cooperation (ATEC) between Brazil and the United States.

Signed in 2010, the ATEC was originally established to expand trade, strengthen economic relations between the two countries, foster an open and predictable environment for international trade and investment (in both goods and services), promote transparency and nondiscrimination in international trade and investment policies and practices, and reduce

non-tariff trade barriers and distortive subsidies to facilitate increased trade. The parties established consultation mechanisms: a bilateral commission of economic and commercial relations and a common agenda aimed at accomplishing its objectives.<sup>1</sup>

The agreement's new protocol was signed in 2021 at the end of the Trump administration and was designed based on the United States–Mexico–Canada Agreement. Its content encompasses much more than fundamental provisions and consultation mechanisms on the obligations adopted by the existing parties in the original text. And in three specific annexes, it added new, concrete commitments regarding trade facilitation and customs cooperation, good regulatory practices, and anti-corruption measures.

Although all three additions are relevant, this article will highlight the content and impact that the annex on trade facilitation will have on Brazil. According to the Brazilian government, this annex is the most advanced and ambitious commitment the country has ever negotiated to reduce red tape at the border. The Brazilian Ministry of Foreign Affairs said that the annex goes beyond the commitments established within the scope of the Agreement on the Facilitation of Trade of the WTO, that the annex will act as an incentive for the already ongoing facilitation measures, and that it will allow the implementation of new adjustments and reforms.<sup>2</sup>

<sup>1</sup>Fernanda Kotzias, "Goodbye, ATA Carnet: A Sign That 2021 Did Not Bring All of the Promised Advances," *Consultor Jurídico* (Dec. 28, 2021) (in Portuguese). The deal was struck, in line with the Revised Kyoto Convention and the Trade Facilitation Agreement, to bring national practices together and make them compatible — to reduce the time it takes to obtain an ordinance and simplify procedures at the border.

<sup>2</sup>Ministry of Foreign Affairs press release No. 123/2020 (Oct. 19, 2020) (in Portuguese).

The multilateral<sup>3</sup> agreements were established within the scope of the WTO and the World Customs Organization, while the regional agreements were established within the scope of Mercosur. Nevertheless, as the official release of the Brazilian Ministry of Foreign Affairs stated, the protocol on the ATEC has more objective prescriptive provisions, demanding effective implementation of rules of facilitation of trade.<sup>4</sup>

This higher degree of substantive provisions can be observed throughout the protocol's Annex I, which follows the example of the Trade Facilitation Agreement article that discusses the obligation of publicity. Although publicity obligations are addressed in all agreements on trade facilitation, the ATEC goes beyond the standard provision that the rules in force must be published on a website, adding that the website must be updated periodically. Most importantly, the annex establishes that customs authorities must inform and guide importers and exporters regarding the rules applied in foreign trade operations, which aligns with the principles of informed compliance and shared responsibility adopted by the U.S. Customs Administration in the 1990s in the Customs Modernization and Informed Compliance Act.

Advanced rulings are also a relevant theme in the document. Although trade facilitation agreements commonly address this matter, the protocol gives it a new approach. Apart from general provisions that demand signatory parties to reply to consultations in a reasonable time frame, the protocol specifically provides a 150-day period for the issuing of consultation solutions.<sup>5</sup> The protocol also allows concerned parties from the other country to consult with the national authority without representation from a national agent. Another innovative feature is the expansion of the consultation scope imposed by multilateral agreements by explicitly including issues regarding quotas, eligibility for the

drawback regime, and deferral and suspension of taxes and tariffs.

Regarding customs routines, the document not only emphasizes the importance of automation, digital documents, and the employment of a single window system — improvements that complement the Brazilian Single Window Portal Project — it also stresses the use of international standards for specified electronic documents, such as the sanitary certificate (e-Phyto), the electronic air waybill (e-AWB), and control of the cargo manifest in the cargo XML format. These provisions represent an important step toward the alignment and compatibility of risk management and customs cooperation, going beyond the use of computerized systems by tackling standardized routines and demands to allow for information exchange.

The concern with the consistency in customs procedures is another notable issue. The ATEC aims to broaden the determination of the Trade Facilitation Agreement on notifications or administrative orientations to incorporate other initiatives such as the training of agents and the publishing of guidelines for customs office activity. In addition, the protocol equally obliges its parties to maintain administrative procedures so that official agents can request information from the customs authority regarding the application of norms and procedures related to foreign trade operations. Also, the parties are required to establish and maintain anti-corruption measures for customs agents, which is unprecedented for the Brazilian system.<sup>6</sup>

Along these lines, the protocol prohibits any kind of service bonus or compensation to official agents to be calculated based on activities related to the effective collection of taxes and penalties if it may lead to conflicts of interest. This is particularly relevant because the protocol came into force during the strike of the tax auditors of the Brazilian Federal Revenue Service —

<sup>3</sup>By multilateral agreements of facilitation, we refer to the WTO's Trade Facilitation Agreement and to the World Customs Organization's Revised Kyoto Convention.

<sup>4</sup>See press release, *supra* note 2.

<sup>5</sup>The legislation stipulates a deadline of 360 days for publication, which, despite being quite long and incompatible with the dynamics of international trade, is not always met.

<sup>6</sup>It is important to highlight that the Brazilian Federal Revenue Service has integrity policies and channels for reporting irregularities, but such resources are applied to the whole institution, and there are no rules or policies specific to customs activities, even though it deserves specific treatment given that the purview of the agents affects issues of national security and of the security and rights of consumers. The ideal scenario would be for the customs administration to create new rules and procedures aimed at correct and full compliance with this rule.

including those auditors stationed in customs posts. The strike's objective was to pass a regulation on the so-called efficiency bonus, which, from the perspective of the agreement, shall not consider tax revenue as an acceptable variable, regardless of whether it is done in a direct or indirect manner.

The new ATEC rules prohibit any part of government official remuneration from being calculated based on taxes, duties, and penalties collected, creating a directed limitation on the scope of article 6 of Law No. 13.464/2017 and hindering the agents' plea behind the strike, at least for those in customs posts.

Brazil and the United States agreed in the protocol on the necessity of creating procedures to correct minor customs errors without penalty. No sanction is to be imposed on minor errors unless they are made in a frequent and perpetrated manner. This decision prioritizes legal certainty and broadens customs cooperation.

A practical example of this situation is the imposition of the penalty on importers and exporters that provide insufficient or incomplete descriptions of goods.<sup>7</sup> In Brazil, this situation normally results in a fine equivalent to 1 percent of the customs value of the good. However, under the new provisions of the protocol, the fine shall be waived when the declaration's gaps and inconsistencies are considered a minor and excusable mistake.<sup>8</sup>

In the section on customs penalties, it is striking that the language is more restrictive than the Trade Facilitation Agreement and the Revised Kyoto Convention. The protocol establishes that the penalty shall be imposed solely on the person legally responsible for the violation, whereas the other agreements allow punishments for other individuals directly or indirectly related to the operation, regardless of their involvement in the detected irregular activity. The language contained in this document would prevent the imposition of a penalty on individuals and companies with joint liability appointed by law —

which currently happens in Brazil and would have been, up until now, acceptable according to the multilateral agreements in force.

Although the ATEC is a bilateral instrument, the stipulated advantages and more beneficial treatments in the new protocol shall be applied to trade operations without distinction, ranging across all origins and destinations. This stems from the commitments taken on by both countries under the WTO, particularly the principle of the most favored nation (Article I of the 1994 General Agreement on Tariffs and Trade), according to which there must prevail nondiscriminatory treatment among members, with the automatic extension of benefits and advantages negotiated with the other members of the organization.

Finally, it is important to highlight that the protocol deepens the importance of public-private partnerships under the scope of the Authorized Economic Operator program through the creation of a joint work plan aimed at the negotiation of the mutual recognition agreement between Brazil and the United States and in the joint and aligned management of the programs in both countries. Such an initiative — despite the already known customs benefits — places Brazil on track for the adoption of international practices and standards of customs governance and trade compliance that will improve the country's access to, and integration with, value chains as well as expedite exchanges and trade flows. The importance of the program<sup>9</sup> in reducing red tape at the border should also be acknowledged.<sup>10</sup>

Based on this assessment of the protocol and its innovations, it is evident that trade facilitation is an extremely broad issue, and there are no previously defined conceptual limits. Although

<sup>9</sup> Fernando Pieri Leonardo, "Authorized Economic Operator: A Return to the Presumption of Good Faith," *Consultor Jurídico* (May 24, 2022) (in Portuguese).

<sup>10</sup> Branco, "American Elections, Brazilian Taxation, and the Multilateral Trading System," *Bloomberg Law*, Nov. 27, 2020. The concern is not new, but the ATEC expands the implementation of the Trade Facilitation Agreement, which had already been the subject of Brazilian debate in the last few years: "All such measures are aimed at reducing time and costs in the cross-border flow and making international trade more fluid, as well as promoting customs cooperation with differentiated treatment towards developing countries, transforming them into strategic measures for Brazil, alongside the implementation of the Mercosur Customs Code, in the search for the improvement and modernization of customs and the harmonization, integration and elimination of barriers and the indication of a commercial policy, which involves the review of export restrictions."

<sup>7</sup> Article 84 of Provisional Measure No. 2.158-35/2001 combined with sections I, II, and III of article 69 of Law No. 10.833/2003.

<sup>8</sup> This also falls under the interpretation presented by the Administrative Council of Fiscal Resources (CARF), in CARF Ruling No. 3401-005.131 (July 21, 2018) (in Portuguese).

the Trade Facilitation Agreement addresses facilitation within the triad of freedom of transit, simplification of fees, and formalities and transparency, and the Revised Kyoto Convention seeks balance between simplification and efficiency of customs procedures, the ATEC widens the concept by bringing to the discussion mechanisms for integrity in customs and closer public-private cooperation.

With each new agreement, the matter of trade facilitation acquires additional dimensions, which makes it a complex and thought-provoking subject. For now, we can conclude that the protocol on the ATEC begins a new chapter on policies and rules concerning trade facilitation in Brazil, leading to a scenario in which, more than ever before, operators' attention and expectations are turned to the implementation of international commitments. ■

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