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## **Antidumping and Countervailing Duty Law and Practice: The Mexican Experience**

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# Antidumping and Countervailing Duty Law and Practice: The Mexican Experience<sup>1</sup>

While much has been written on Canadian and United States antidumping and countervailing duty laws,<sup>2</sup> there is a relative paucity of English-language literature on the antidumping and countervailing duty laws of Mexico.<sup>3</sup> This is unfortunate, especially since Mexico is active in its use of these laws, and since the laws have undergone important recent amendments. This article is intended to rectify this imbalance, at least in part, and contribute to the comparative analysis of Mexican trade remedy laws with the antidumping and countervailing duty laws of its NAFTA partners in particular and other countries in general.

The article is organized as follows. First, it discusses the historical development of Mexican antidumping and countervailing duty laws. It also provides a summary of the

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<sup>1</sup> This Article appears in substantially similar form as Chapter 5 in Gregory W. Bowman, Nick Covelli, David A. Gantz and Ihn Ho Uhm, *Trade Remedies in North America* (Alphen aan den Rijn, NL: Kluwer Law International, 2010). That book provides a comparative legal and economic analysis of Canadian, Mexican, and United States trade remedy laws. Primary authorship of this Article and of Chapter 5 of that book is by David A. Gantz. We acknowledge with gratitude the assistance of Dr. Gabriel Cavazos, Professor Steve Zamora and Licenciados Adrian Vazquez, Isabel Parra and Luis Martinez for their assistance in expanding our understanding of Mexican unfair trade and/or *amparo* laws. Any errors or omissions are, however, our own responsibility. The opinions that we express herein are purely personal and are in no way intended to reflect the views of the Government of Canada, including the Canadian International Trade Tribunal, or of the other institutions with which some of us are affiliated

<sup>2</sup> See, e.g., C. Bown, 'How Different Are Safeguards from Antidumping?: Evidence from US Trade Policies Towards Steel', Working Paper, Brandeis University, Department of Economics & International Business School, 2004; C. Bown, 'Canada's Antidumping and Safeguard Policies: Overt and Subtle Forms of Discrimination', *The World Economy* 30 (2007); J.N. Buchanan, 'Anti-Dumping Law and the Special Import Measures Act', *Canadian Business Law Journal* 11 (1985); N. Covelli & V. Hohots, 'Two Decades with the Special Import Measures Act: A Statistical Analysis of Dumping and Subsidy Cases, 1984–2003', *Canadian Business Law Journal* 39 (2004); J.L. Dunoff, 'The Many Dimensions of Softwood Lumber', *Alberta Law Review* 45 (2007); G. Mastel, *Antidumping Laws and the U.S. Economy* (Armonk, NY: M.E. Sharpe & Co. 1998); M. Moore, 'U.S. "Facts Available" Antidumping Decisions: An Empirical Analysis', *European Journal of Political Economy* 22 (2006); A.M. Rugman & S.D. Porteous, 'Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures', *North Carolina Journal of International Law & Commercial Regulation* 15 (1990); V. Stevens, 'The Political Economy of Anti-Dumping in Canada: Section 45 of the Special Import Measures Act', *University of Toronto Faculty of Law Review* (Winter 2006); I.H. Uhm, 'Judicial Review of Injury Determination by the AD/CVD Authority: Canadian Jurisprudence in the Post-WTO', *Trade Remedy Review* 1 (2005); and Vermulst, E.A. 'The Anti-Dumping Systems of Australia, Canada, the EEC and the United States of America: Have Anti-Dumping Laws Become a Problem in International Trade?', *Michigan Journal of International Law* 10 (1989).

<sup>3</sup> For two exceptions to this, see C.R. Giesze, 'Mexico's New Antidumping and Countervailing Duty System'. *St. Mary's Law Journal* 25 (1994): 927 and B.A. Vazquez, 'The Law of Amparo: A Critical Analysis of the Function and Uses of the Amparo Process in International Trade Law Matters', *United States – Mexico Law Journal* 6 (1998).

major differences between these and US and Canadian antidumping and countervailing duty laws, and accounts for Mexican use of such laws since 1986. Next, the article discusses the application of Mexico's Foreign Trade Law (FTL), as revised through 2006,<sup>4</sup> and its implementing regulations (the FTL Regulations of 2000).<sup>5</sup> The analysis concludes with a discussion of administrative and judicial review, and NAFTA Chapter 19 review, of Mexican antidumping and countervailing duty determinations. While under the Mexican legal system decisional law is not controlling, the analysis nevertheless draws on the decisions of Mexican courts, the World Trade Organization (WTO) Dispute Settlement Body (DSB), and NAFTA Chapter 19 binational panels, as well as on final determinations by the investigating authority in Mexico. All of these are aids to understanding how the FTL and FTL Regulations have been applied in practice.

## **I. HISTORICAL DEVELOPMENT**

### **A. ACCESSION TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE**

Unlike the United States and Canada, Mexico does not have a long history of implementation of antidumping and countervailing duty laws. Rather, the enactment of these laws coincided with Mexico's accession to the General Agreement on Tariffs and Trade (GATT) in 1986. Prior to 1986, Mexico's was primarily a closed economy. High tariffs and the extensive use of import quotas protected high-cost, inefficient local industry; there was no need for antidumping or countervailing duty laws to provide additional protection.<sup>6</sup> As Craig Giesze has observed:

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<sup>4</sup> Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley de Comercio Exterior, *Diario Oficial de la Federación*, 21 Dec. 2006, Decreto por el que se Reforman, Adicionan y Derogan Diversas Disposiciones de la Ley de Comercio Exterior, *Diario Oficial*, 13 Mar. 2003, and Ley de Comercio Exterior, *Diario Oficial*, 27 Jul. 1993, amended by Decreto que reforma, adiciona y deroga disposiciones de diversas leyes relacionadas con el Tratado de Libre Comercio de América del Norte, *Diario Oficial*, 22 Dec. 1993. The OAS provides an English version of the FTL at <[www.sice.oas.org/antidumping/legislation/mexico/LCEXT.asp](http://www.sice.oas.org/antidumping/legislation/mexico/LCEXT.asp)>, but it does not reflect the post-1993 amendments and changes.

<sup>5</sup> Reglamento de la Ley de Comercio Exterior, *Diario Oficial*, 29 Dec. 2000 and *Diario Oficial*, 30 Dec. 1993.

<sup>6</sup> B. Leycegui, 'A Legal Analysis of Mexico's Antidumping and Countervailing Duty Regulatory Framework', in *Trading Punches: Trade Remedy Law and Disputes under NAFTA*, eds B. Leycegui,

*Ad valorem* tariff rates as high as 100 percent in certain product categories, restrictive import quotas, incomprehensible price-reference schemes, cumbersome import licensing requirements, and other burdensome customs procedures effectively strangled all foreign competition at the Mexican border and shielded Mexican producers, manufacturers, and resellers from both fair and unfair import competition in the Mexican domestic market.<sup>7</sup>

Mexico began to move away from an import substitution policy toward broader participation in the world economy shortly after the financial crisis of 1982, a process that resulted in its membership to GATT in 1986 and an abrupt shift in Mexican economic policy. GATT obligations, particularly Article I (Most-Favoured Nation treatment), Article III (non-discrimination/national treatment) and Article XI (prohibition against most import restraints), meant that Mexico could no longer protect its domestic industry through the previous mechanisms such as import quotas and import licensing systems. Both the administration of President de la Madrid and Mexican industry realized that such limitations greatly increased the risks of foreign dumping or subsidization that would injure Mexican domestic producers. Some also saw the desirability of replacing the older forms of protectionism with mechanisms that would arguably be GATT-legal and would also offer protection to domestic interests.

## **B. INITIAL LEGISLATION**

Legislation regulating tariffs is specifically authorized by Article 131 of the Mexican Constitution, which provides in part:

The Executive may be empowered by the Congress of the Union to increase or decrease the amounts of export or import duties enacted by the Congress and to create others, as well as restrict or prohibit imports, exports and goods in transit when it is deemed necessary in order to regulate the economy of the country and the stability of national production.<sup>8</sup>

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W.B.P. Robson & S.D. Stein (Washington, DC: National Planning Association, 1995) and C.R. Giesze, 'Mexico's New Antidumping and Countervailing Duty System', *St. Mary's Law Journal* 25 (1994): 927.

<sup>7</sup> Giesze, 928.

<sup>8</sup> *Constitución Política de los Estados Unidos Mexicanos*, Art. 131.

Mexico's first antidumping law, the 1986 Foreign Trade Act,<sup>9</sup> which was enacted several months before Mexico formally acceded to GATT, was apparently influenced only to a limited extent by the GATT Tokyo Round Antidumping Code, despite the fact that the Code was approved and became a part of Mexican law in 1988.<sup>10</sup> (Mexico did not adhere to the Subsidies Code, presumably because of subsidies programs then in place; the lack of consensus on how to define a subsidy may also have been a factor.)<sup>11</sup> This initial attempt at devising an antidumping law has been criticized as being 'relatively rudimentary and unsophisticated'.<sup>12</sup>

Both the private sector and likely many in the government realized even before the NAFTA negotiations began in 1991 that the 1986 Act had major procedural and substantive deficiencies, but the government wisely held off changes until reciprocal benefits could be obtained from the United States during the NAFTA negotiations.<sup>13</sup> According to observers, everyone was unhappy with the 1986 Act, Mexican industry because the investigating authority, then the Mexican Secretariat of Commerce and Industrial Development (*Secretaria de Comercio y Fomento Industrial* or SECOFI), appeared slow to initiate investigations and willing to delay or dismiss actions for political reasons. US exporters also faulted Mexico because of procedural deficiencies, a lack of transparency, and the utilization of an injury test that did not meet international standards.<sup>14</sup>

### **C. NAFTA NEGOTIATIONS**

The NAFTA negotiations, as well as a US antidumping action against imports of Mexican cement in which the United States blocked adoption of a GATT Panel report in

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<sup>9</sup> Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior, *Diario Oficial*, 13 Jan. 1986.

<sup>10</sup> Decreto por el que se aprueba del Acuerdo relative a la Aplicación del Artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio, *Diario Oficial*, 4 Dec. 1987 and Decreto de promulgación del Acuerdo relative a la Aplicación del Artículo VI del Acuerdo General sobre Aranceles Aduaneros y Comercio, *Diario Oficial*, 21 Apr. 1988.

<sup>11</sup> Leycegui, 44.

<sup>12</sup> Giesze, 930.

<sup>13</sup> Leycegui, 44.

<sup>14</sup> Giesze, 930—933.

favour of Mexico,<sup>15</sup> had a major policy impact on the evolution of Mexico's unfair trade law and practice. The cement experience, affecting one of Mexico's most important and globally competitive industries, likely encouraged Mexico to reform its unfair trade laws in such a manner as to be able to reciprocate in the event that another GATT Contracting Party (such as the United States) applied its unfair trade laws in what Mexico believed to be an unduly harsh manner against Mexican exports.<sup>16</sup>

The results of the successful NAFTA negotiations, conducted under the direction of President Carlos Salinas de Gortari for Mexico, required modifications in Mexico's trade remedy laws. As part of the bargain that extended the Canada – United States Free Trade Agreement (CUSFTA) Chapter 19 binational panel process to Mexico,<sup>17</sup> Mexico was required to make more than twenty procedural changes to the 1986 Act, resulting in the FTL and the FTL Regulations of 1993. The NAFTA-mandated changes required Mexico, *inter alia*, to eliminate the possibility of imposing duties within five days after acceptance of the petition; permit interested parties to participate fully in the process and provide rights of administrative and judicial review of final determinations; provide immediate access to binational panel review of final determinations without exhaustion of administrative remedies; provide the right to annual reviews of dumping and subsidy margins; and implement a variety of changes designed to increase transparency and procedural due process.<sup>18</sup>

#### **D. WTO ACCESSION**

Little more than a year later, Mexico became a charter member of the WTO and party to the WTO Antidumping Agreement (AD Agreement) and the WTO Subsidies and Countervailing Measures Agreement (SCM Agreement), along with the other WTO agreements. The incorporation of the WTO agreements into Mexican law apparently did

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<sup>15</sup> GATT Committee on Antidumping Practices, Panel Report, *United States — Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82, 7 Sep. 1992, not adopted. For additional discussion, see G.W. Bowman, N. Covelli, D.A. Gantz & I.H. Uhm, *Trade Remedies in North America* (Alphen aan den Rijn, NL: Kluwer Law International, 2010), 597-600.

<sup>16</sup> Giesze, 940—941, referencing prominent Mexican lawyers and legislators.

<sup>17</sup> See Bowman, Covelli, Gantz & Uhm, Ch. 2 *passim*.

<sup>18</sup> See NAFTA, Annex 1904.15 and Bowman, Covelli, Gantz & Uhm, Ch. 2 *passim*.

not require any immediate further modifications of the FTL or its Regulations. No further major amendments to the FTL were made until 2003.<sup>19</sup>

## **II. MAJOR DIFFERENCES IN MEXICO'S APPROACH TO ANTIDUMPING AND COUNTERVAILING DUTY LAWS**

The fact that the AD Agreement and the SCM Agreement establish the requirements for national antidumping and countervailing duty laws means that the divergence among the laws of the United States, Canada, and Mexico should be relatively minor. However, as lawyers are frequently made aware, similar laws can be implemented by national authorities in widely divergent manners, particularly with regard to the transparency of the process and adherence to principles of procedural due process.

Leaving aside these procedural issues, there are several significant differences between the laws of the United States and Canada on the one hand, and those of Mexico on the other. The most important of these is the use in Mexico of a single investigating authority to make both dumping and subsidy determinations and material injury determinations, while in the United States and Canada, autonomous, quasi-judicial agencies, the US International Trade Commission (USITC) and the Canadian International Trade Tribunal (CITT), respectively, are responsible for determining material injury or the threat thereof. In Mexico (as in many other WTO Members, including the European Union), a single agency, the Secretariat of the Economy, makes both types of determinations.

The second major difference relates to the fact that Mexico is a civil law nation, while both the United States and Canada share the British common law tradition, with the common law tradition dominant in federal administrative tribunals in Canada, despite the civilian influence of Quebec. A discussion of the differences between common and civil

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<sup>19</sup> Ó. Cruz Barney, 'Antecedentes del Systema Contra Prácticas Desleales de Comercio en México: La Evolución de las Disposiciones Antidumping', *Boletín Mexicano de Derecho Comparado* 119 (2007): 12.

law systems is well beyond the scope of this Article,<sup>20</sup> Suffice it to note that there is a higher level of formality in litigation in most civil law jurisdictions. For example, in Mexico, a lawyer cannot represent a client before a court or other judicial body (including a Chapter 19 binational panel) without a duly notarized and authenticated power of attorney from the individual or corporate client. In the United States, in contrast, a lawyer normally must simply file a letter on his or her letterhead representing to the court that he or she represents the named client in the matter at hand. In Canada, the lawyer (and non-lawyer in the case of the CITT) must file a prescribed Notice of Representation.

Much of the litigation against the investigating authority in Mexico, particularly in the early years of NAFTA, raised issues of the competence of the particular branch of *Economía* as a basis for voiding the final determination; most such challenges have been rejected by binational panels under NAFTA.<sup>21</sup>

Also reflecting the civil law tradition and the ‘monist’ approach to incorporating international treaties into domestic law, in Mexico, the WTO agreements, such as the AD Agreement and the SCM Agreement, and, earlier, the Tokyo Round Antidumping Code, are directly incorporated into Mexican law. In the established hierarchy, the Mexican Constitution is at the highest level, followed by international agreements including the WTO agreements, and, finally, by Mexican federal law.<sup>22</sup> In Mexico, unlike in the United States and Canada, the WTO agreements are cited, relied on, and applied in

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<sup>20</sup> See e.g., B. Kozolchik, ‘Law of the U.S. in Comparative — Legal Reasoning Perspective’, in *United States Law of Trade and Investment*, eds B. Kozolchik & J.F. Malloy (Littleton, CO: Fred B. Rothman Publications, 2001), 1-1.

<sup>21</sup> See e.g., Binational Panel, *Imports of high-fructose corn syrup originating in the United States of America (Dumping)* (2 Aug. 2001), MEX-USA-98-1904-01, 52—60 (rejecting claimant's challenge to the investigating authority's issuance of notices of the verification visits as ‘irrelevant’ on grounds that the claimants failed to challenge the validity or results of the visits themselves) and Binational Panel, *Imports of urea originating in the United States of America (Dumping)* (23 May 2002), MEX-USA-00-1904-02, 10—21 and 79 (rejecting claimant's challenge to the competence of *Economía's* Director General of Legal Affairs to carry out the investigation).

<sup>22</sup> Thesis No. P. VII/2007, Supreme Court of Justice (full court), resolving *amparo* 120/2002, 13 Feb. 2007 (holding that ‘International treaties are an integral part of the supreme law of the Union and are placed hierarchically above the general, federal and local laws; interpretation of Article 133 of the Constitution’).

administrative and court proceedings.<sup>23</sup> However, these treaties, once incorporated, must be implemented through the enactment of national laws and regulations, subject to the fact that the international obligations may not be breached by the President or legislature.<sup>24</sup>

One scholar has suggested that this means that the reviewing court or panel ‘must interpret [ ] the Mexican statutes harmoniously with respect to the international agreements [such as the AD Agreement]’.<sup>25</sup> In this sense, Mexico is a hybrid system rather than a true monist system, reflecting the need with respect to trade agreements for implementing legislation in Mexico, as elsewhere, that set out in detail the procedural requirements applicable to antidumping and countervailing duty actions and designate the ‘investigating authority’ (in the WTO agreements) as, in the case of Mexico, the Secretariat of Economy. In any event, unlike in the United States, it is common practice for the Federal Tax Court, when reviewing the authority's administrative decisions, to refer directly to the AD Agreement as well as to relevant provisions of the FTA.<sup>26</sup> In the United States and Canada, parties occasionally argue the provisions of the WTO agreements as support for a preferred interpretation of a provision of national law that is ambiguous, with mixed results. There is, however, no requirement that national law be applied in a manner that is consistent with the WTO agreements; for example, if a US or Canadian law is clearly at odds with the agreements, it prevails as a matter of domestic law.

A third major difference is that, despite the fact that Mexico's FTL provides explicitly both for antidumping (price discrimination) and anti-subsidy actions, in

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<sup>23</sup> See e.g., Binational Panel, *Carbon steel tubing with longitudinal seams originating in the United States of America* (13 Mar. 2008), MEX-USA-2005-1904-01, paras 34 and 73.

<sup>24</sup> *Amparo en revision*, 427/2006, Secretaría Economía, 29 Nov. 2006 (holding that the POR specified in Art. 89 of the FTA must be consistent with Art. 11.4 of the AD Agreement) and *Juicio de Nulidad No. 100(20)4/96/17856/95* (25 Aug. 1998) Segunda Sección, Sala Superior de TFF (the Court is obligated to apply laws and regulations in a manner consistent with international treaties to which Mexico is a party, such as the AD Agreement).

<sup>25</sup> G. Cavazos Villanueva & N. Ranieri, memorandum to various NAFTA binational panellists (30 May 2007), 9 (copy on file with the authors).

<sup>26</sup> See *Juicio de Nulidad No. 100(20)4/96/17856/95* (25 Aug. 1998) (observing that a ‘consistent interpretation’ of the FTL Regulations and Art. 9 of the GATT Antidumping Code requires a certain approach by the Tribunal).

practice (as in Canada, but not in the United States), the field is largely restricted to antidumping actions; as noted below, Mexico has rarely applied a countervailing duty and has initiated only a few subsidy investigations.

Finally, the terminology in Mexico is slightly different from that used in Canada and the United States. Mexican law does not use the term ‘dumping’. Rather, that unfair trade practice is literally ‘price discrimination’ (*discriminación de precios*). Moreover, there is no terminology distinction in Spanish between the antidumping and countervailing duties imposed to offset dumping and subsidization; both are ‘*cuotas compensatorias*’. This Article applies the term ‘compensatory duties’ to both.

### **III. MEXICO'S USE OF ANTIDUMPING AND COUNTERVAILING DUTY LAWS**

Mexico has historically been one of the WTO's most frequent users of the antidumping laws. Between 1989 and 1994, Mexico brought 115 antidumping actions against imported goods.<sup>27</sup> In 1993, nine antidumping cases were opened against China alone, six of them self-initiated by the Secretariat of Economy itself, often targeting broad product categories based on four-digit tariff headings under the Harmonized System.<sup>28</sup> During the 1992—1993 period, fully 44% of total Chinese exports to Mexico were under investigation and/or subject to antidumping orders,<sup>29</sup> suggesting that, as a matter of government policy, the antidumping laws were the principal means of controlling increasing imports from China. More than a decade later, Mexico continued to apply ‘compensatory duties’ in twenty-four instances in the case of dumped imports from China and twelve from the United States, but none from Canada.<sup>30</sup>

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<sup>27</sup> Data adapted from J.L. Guasch & S. Rajapatirana, ‘Antidumping and Competition Policies in Latin America and Caribbean: Total Strangers or Soul Mates?’ (April 1998), available at <[www.worldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1958/wps1958.pdf](http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1958/wps1958.pdf)>, 18 Aug. 2008 (citing various GATT/WTO reports as sources).

<sup>28</sup> G. Niels & A. ten Kate, ‘Anti-dumping Protection in a Liberalising Country: Mexico's Anti-dumping Policy and Practice’, *The World Economy* 7 (2004): 967 et seq.

<sup>29</sup> *Ibid.*

<sup>30</sup> Mexico, *Semi-Annual Report under Article 16.4 of the Agreement*, Annex I, available at <[docsonline.wto.org/DDFDocuments/t/G/ADP/N166MEX.doc](http://docsonline.wto.org/DDFDocuments/t/G/ADP/N166MEX.doc)>.

However, in the period 1995—2007, despite imports from China and elsewhere in Asia, Mexico was not among the top ten initiators of antidumping investigations worldwide, and its ninety-four initiations were dwarfed by such countries as India (508), the United States (402), the European Community (372), Argentina (222), and South Africa (205).<sup>31</sup> In this respect, Mexican frequency was in the same range as Canada, with eighty-seven antidumping actions initiated in Canada during this period, again, based on reporting to the WTO. Of those ninety-four Mexican initiations, nineteen were against the United States and fifteen were against China, but only two were against Canada.<sup>32</sup>

Mexico has been an infrequent user of countervailing duties against government subsidies; it reported initiating only two countervailing duty cases in the period 1995—2007,<sup>33</sup> with ‘compensatory duties’ imposed in only one of them, against the European Union.

Mexican antidumping and countervailing duty investigations have since 1995 targeted the United States and China, with actions against producers in Russia, the Ukraine, Brazil and Taiwan accounting for most of the rest (Table 1). The United States is perhaps under-represented in such procedures given that about two thirds of Mexican imports are from the United States, while China is over-represented, as China accounts for only about 3.3 percent of Mexican imports. The relatively high level of economic integration of the US and Mexican economies (but not the Chinese) likely accounts for this discrepancy.

**Table 1: Countries Subject to Mexican Antidumping/Countervailing Duty Investigations, 1995–June 2008.**

Rank	Country	Number of Cases	Share of Cases	Share of Imports
1.	United States	25	26.0%	68.8%
	China	25	26.0%	3.3%
3.	Russia	6	6.3%	N/A

<sup>31</sup> WTO, *AD Initiations by Reporting Member from 01/01/95 to 31/12/07*, available at <[www.wto.org/english/tratop\\_e/adp\\_e/ad\\_meas\\_rep\\_member\\_e.xls](http://www.wto.org/english/tratop_e/adp_e/ad_meas_rep_member_e.xls)>.

<sup>32</sup> WTO, *AD Measures: Reporting Members vs. Exporting Country from 01/01/95 to 31/12/07*, available at <[www.wto.org/english/tratop\\_e/adp\\_e/ad\\_meas\\_rep\\_exp\\_e.xls](http://www.wto.org/english/tratop_e/adp_e/ad_meas_rep_exp_e.xls)>.

<sup>33</sup> WTO, *CV Initiations: By Reporting Member From: 01/01/95 to: 31/12/07*, available at <[www.wto.org/english/tratop\\_e/scm\\_e/cvd\\_init\\_rep\\_member\\_e.xls](http://www.wto.org/english/tratop_e/scm_e/cvd_init_rep_member_e.xls)>.

	Ukraine	6	6.3%	N/A
5.	Brazil	5	5.2%	1.2%
6.	Taiwan	4	4.2%	2.5%

#### **IV. MEXICO'S TRADE-RELATED INSTITUTIONS**

##### **A. SECRETARIAT OF ECONOMY (*SECRETARÍA DE ECONOMÍA*)**

Under Mexican law, the Secretariat of Economy (*Economía*, or 'the Secretary', formerly SECOFI), as the investigating authority, is responsible, *inter alia*, for 'resolving investigations of unfair trade practices in international trade, as well as determining the compensatory tariffs resulting from said investigations'.<sup>34</sup> Thus, *Economía* is responsible for the functions performed in the United States by the Office of Import Administration of the Department of Commerce and the USITC, and in Canada by the Canadian Border Services Agency (CBSA) and the CITT.

Within *Economía*, investigations are the responsibility of the *Unidad de Prácticas Comerciales Internacionales* (UPCI). The UPCI is further divided into subdivisions for antidumping and countervailing, safeguards, and international trade litigation.<sup>35</sup> The UPCI is the approximate equivalent in responsibilities and authority of the Office of Import Administration within the US Department of Commerce.

##### **B. FOREIGN TRADE COMMISSION (*COMISIÓN DE COMERCIO EXTERIOR*)**

The Foreign Trade Commission (COCEX) is an 'obligatory consulting organ' under the federal administrative powers that is charged with issuing opinions in matters relating to the FTL.<sup>36</sup> However, most of its principal functions relate to customs duties, import or export restraints, and the conduct of international trade negotiations.<sup>37</sup> Among its responsibilities is the review in draft form of proposed amendments to the FTL, and it

<sup>34</sup> See FTL, Art. 5(VII) (authors' translation).

<sup>35</sup> UPCI organization chart, available at <[www.economia.gob.mx/?P=1473](http://www.economia.gob.mx/?P=1473)>.

<sup>36</sup> See FTL, Art. 6.

<sup>37</sup> *Ibid.*, Arts 4(I—V) and 6.

may hold public hearings with interested parties.<sup>38</sup> The COCEX also reviews and provides an opinion on any preliminary or final antidumping or countervailing duty determination by *Economía*, including price undertakings. Such opinions are published in the *Diario Oficial de la Federación (Diario Oficial)*.

The COCEX currently functions at two levels, deputy secretaries and directors-general, with the latter responsible for the primary analysis requested at the deputy secretary level.<sup>39</sup> It acts by majority vote of its member agencies.<sup>40</sup> Many in the business community appear to be supporting expanded functions and greater autonomy for COCEX, possibly including responsibility for antidumping and countervailing duty investigations. In February 2010, legislation was introduced in the Mexican Senate that would, if ultimately enacted, transform COCEX into a decentralized entity with, *inter alia*, responsibility for amending customs duties, establishing non-tariff restrictions and reviewing and resolving antidumping and safeguards investigations.<sup>41</sup>

## V. UNFAIR TRADE PRACTICES UNDER MEXICAN LAW

Under the FTL, ‘The term “unfair trade practices” means the importation of goods under conditions of price discrimination or subsidization in the exporting country, or the country in which it originates or from which it comes, which causes injury to a domestic producer of identical or similar merchandise as defined by Article 39 of this law.’<sup>42</sup> ‘Injury’ is defined in Article 39 as including material injury, threat of injury, or material retardation of the domestic industry. The concepts are the same as in the AD Agreement and the SCM Agreement, as indicated in *Economía’s* regulations, discussed below.<sup>43</sup> The injury test is offered only to countries that provide an injury test on a reciprocal basis to

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<sup>38</sup> *Ibid.*, Arts 6—7.

<sup>39</sup> See the FTL Regulations, Art. 3.

<sup>40</sup> *Ibid.*, Art. 13.

<sup>41</sup> Vazquez Tercero y Asociados, *Urgent Newsflash*, 25 February 2010; see also A. Vazquez, ‘Urgente Reforma a la Ley de Comercio Exterior,’ (2009) *Contaduría Pública: Reforma Fiscal 2010*. (Revista IMCP #448).

<sup>42</sup> See FTL, Art. 28.

<sup>43</sup> See the FTL Regulations, Arts 63—68.

Mexican exporters,<sup>44</sup> presumably including all other WTO Members. Otherwise, compensatory duties can be imposed without the injury test.

## **VI. DETERMINATION OF DUMPING**

Under Mexican law, price discrimination (dumping) ‘consists of the introduction of goods into the national territory at a price below their normal value’.<sup>45</sup>

### **A. DETERMINATION OF NORMAL VALUE**

As for other WTO Members, the normal value of a good exported to Mexico is to be determined through a comparison of the price of identical or similar merchandise sold in the internal market ‘in the course of normal commercial operations’.<sup>46</sup> If no such sales exist, or if those sales ‘do not permit a valid comparison’, normal value is to be based on the highest-priced sales in a third-country market, as long as they are at a ‘representative price’. Alternatively (without a preferential ranking of the two third-country price or constructed value alternatives), normal value is to be based on constructed value (*valor reconstruido*), which consists of manufacturing costs, general expenses, and a reasonable profit in normal commercial operations in the country of origin.<sup>47</sup>

#### **1. Normal Commercial Operations**

Sales under normal commercial operations are defined as sales between independent buyers and sellers reflecting market conditions in the exporting country as commonly take place or within a representative period. However, sales that in the judgment of the Secretary reflect sustained losses are excluded from normal value calculations; such transactions are those which do not permit the covering of production costs and general expenses in general commercial operations, during a representative

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<sup>44</sup> See FTL, Art. 29.

<sup>45</sup> *Ibid.*, Art. 30.

<sup>46</sup> *Ibid.*, Art. 31.

<sup>47</sup> *Ibid.* The United States and Canada use ‘constructed value’; we use the same terminology here (for purposes of clarity), despite the fact that a literal translation of the Spanish is ‘reconstructed value’.

period that may be longer than the POI. If third country sales are insufficient to generate representative profits, constructed value is to be used to calculate normal value.<sup>48</sup>

If goods are imported from an intermediate country that is not the producer, the normal value is the comparable price for identical or similar merchandise in the country from which the goods are shipped to Mexico. However, if the merchandise is simply in transit from the intermediate country and the goods are neither produced nor sold at a comparable price in the country of export, normal value is based on the price in the market of the originating country.<sup>49</sup>

## **2. Cost of Production Analysis and Use of Constructed Value**

Given the fact that the AD Agreement permits the exclusion of below-cost sales because they are not in the ordinary course of trade,<sup>50</sup> the Secretary possesses the authority to seek from respondents the production cost data that would be required to determine whether below-cost sales have occurred, whether or not the petitioners request the Secretary to seek production cost data from the respondents. The Secretary's exercise of relatively broad discretion as to whether and when to seek production cost data from respondents in an antidumping investigation, and to decide to use constructed value instead of home market prices if the examined sales are consistently below cost, has been affirmed by at least one reviewing binational panel.<sup>51</sup> That panel explicitly confirmed that the change in methodology for calculating normal value was consistent with the AD Agreement, with the FTL, and with the standard of review then provided by the Mexican Tax Code.<sup>52</sup>

## **3. Surrogate Country Values for Non-Market Economies**

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<sup>48</sup> *Ibid.*, Art. 32.

<sup>49</sup> *Ibid.*, Art. 34.

<sup>50</sup> See the AD Agreement, Art. 2.2.1.

<sup>51</sup> *Carbon Steel Tubing*, paras 56—77.

<sup>52</sup> See Art. 238 of the *Código Fiscal*, the standard of review by both Mexican courts and binational Ch. 19 panels until 2006.

In an approach similar to that of the United States and Canada, normal value for goods from a non-market economy (NME) (*economía centralmente planificada*) is ‘the price of identical or similar merchandise in a third country with a market economy, which can be considered as a substitute for the NME for purposes of the investigation’. The general determination of normal value is then made, as discussed earlier.<sup>53</sup> A centrally planned economy is defined as ‘one that does not reflect market principles’, as determined by the Secretary ‘for each sector or industry under consideration’, using more or less the same factors as those used in the United States.<sup>54</sup> In other words, the Secretary is not required to determine normal value for all exports from a centrally planned economy, such as China, using the surrogate country approach. Rather, the Secretary can treat sectors reflecting market principles under normal antidumping rules in which the actual costs incurred by the producers under investigation are utilized. However, it is our understanding that in Mexico, as in the United States, the Secretary has not used such authority to calculate normal value for any Chinese goods other than in this manner.

Mexico's use of NME methodology has been controversial. In past cases, the United States has been used as the basis for determining normal value for goods from Russia, China, and Ukraine. Germany has also been used for China, Spain for Kazakhstan, and Trinidad and Tobago for Ukraine.<sup>55</sup> *Economía* actually used Mexican industry as the surrogate in several NME antidumping actions, including one from China. As of 2000, the FTL Regulations define NMEs more specifically than in the past, to some extent reflecting the US approach, taking into account whether wages are determined

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<sup>53</sup> See FTL, Art. 33 and the FTL Regulations, Art. 48.

<sup>54</sup> See the FTL Regulations, Art. 48. The statutory factors used in the United States for NME determinations are as follows:

- (i) the extent to which the currency of the foreign country is convertible into the currency of other countries;
- (ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management,
- (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country,
- (iv) the extent of government ownership or control of the means of production,
- (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and
- (vi) such other factors as the administering authority considers appropriate.

19 U.S.C. §1677(18)(B).

<sup>55</sup> Niels & ten Kate, 976 et seq.

through negotiations between labour and management; whether commercial transactions are free of government interference; and whether the financial position of the exporting industry is distorted by such factors as bad debt or barter trade.<sup>56</sup>

In a 2008 case, the Secretary chose Indonesia as the surrogate country for the calculation of compensatory duties applicable to paintbrushes from China.<sup>57</sup> Interestingly, the Secretary appears to put the initial onus of choosing an appropriate surrogate country on the Mexican industry petitioner. In a recent proceeding relating to steel pipe from China, *Economía* rejected the allegations in the petition, largely on the grounds that the surrogate suggested by the petitioner (Italy) was inappropriate and that the petitioner had failed to offer evidence supporting a more appropriate surrogate.<sup>58</sup>

A substantial number of the compensatory duties applied to goods imported from China were terminated or scheduled for termination beginning in October 2008 in accordance with a bilateral agreement between Mexico and China concluded in June 2008 and approved by the Mexican Senate.<sup>59</sup> The accord provided for certain transitional provisions for a phase-out over a three-year period rather than elimination of all compensatory duties immediately. The accord reflected a list of products contained in China's 2001 WTO Accession Protocol that permitted Mexico to depart from WTO rules with respect to restrictions on those products for a period of six years, which expired in 2007. However, the accord does not prevent Mexico from continuing to treat China as an NME for the remainder of the 15 year period specified in China's Accession Protocol.<sup>60</sup> There is nothing in the FTL that would prevent Mexico from using NME methodology

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<sup>56</sup> See the FTL Regulations, Art. 48.

<sup>57</sup> Final Antidumping Determination concerning Paintbrushes with Hog, Synthetic or Mixed Bristles from the People's Republic of China, *Diario Oficial*, 29 Jul. 2008, para. 20(I)(c) (compensatory duties rejected on other grounds).

<sup>58</sup> Final Antidumping Determination concerning Steel Pipe from the People's Republic of China and Ukraine, *Diario Oficial*, 29 Apr. 2008, paras 73—132 and 135.

<sup>59</sup> Acuerdo entre el Gobierno de los Estados Unidos de Mexico y el Gobierno del la Reública Popular de China en Materia de Medidas de Remedio Comercial, 1 Jun. 2008, available at <[www.apparelandfootwear.org/letters/acuerdochinmex061308.pdf](http://www.apparelandfootwear.org/letters/acuerdochinmex061308.pdf)>, *Diario Oficial*, 13 Oct. 2008. The agreement consists of two pages of text and approximately fifty pages of annexes specifying the phase-out of the antidumping duties between 2008 and 2011.

<sup>60</sup> See China's Accession Protocol, para. 15 and Annex 7 (Mexico).

against other nations, such as Vietnam, but there had been no Mexican antidumping actions against Vietnam as of early 2010.

The agreement was challenged by private parties on constitutional grounds under Mexico's *amparo* procedures, which are discussed in section XV.C. of this Article). The tribunal determined the agreement to have been illegally concluded insofar as it eliminated tariffs on 953 products imported from China. However, *Economía* and the President declared that the *amparo* judgment applied only to the four tariff categories that were specifically challenged in the lawsuit based on injury to the moving party; the remaining tariff items were unaffected, and the tariff reductions or eliminations will apparently continue.<sup>61</sup>

#### **4. Circumstances of Sale and Other Adjustments for Price Comparability**

Consistent with the requirement in the AD Agreement that a 'fair comparison shall be made' between normal value and export price,<sup>62</sup> Mexican law requires that adjustments be made, among others, for differences in terms and conditions of sale, quantities, physical characteristics, and indirect charges.<sup>63</sup> With regard to determining whether the subject merchandise is similar to the Mexican-made product, the authority may not simply analyse the physical composition and characteristics of the product but also must consider the similarity of functions and commercial substitutability.<sup>64</sup>

When an interested party requests that a particular adjustment be taken into account by the authority, the party must provide appropriate supporting evidence. The Regulations provide detailed instructions for adjustments in all of these areas.<sup>65</sup> Under Mexican law, adjustments may be made for 'relative differences in levels of trade'.<sup>66</sup> The level of trade adjustment is made only if the differences have not been taken into account

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<sup>61</sup> *Economía*, 'Vigente Acuerdo México — China en Materia de Cuotas Compensatorias', available at <elcapitalinoaldia.blogspot.com/2009/02/vigente-acuerdo-mexico-china-en-materia.html>.

<sup>62</sup> See the AD Agreement, Art. 2.4.

<sup>63</sup> See FTL, Art. 36.

<sup>64</sup> Juicio No. 6830/01-17-11-2/956/02-S 1-03-01 (28 Oct. 2003), Primera Sección, Sala Superior, TFJFA.

<sup>65</sup> See the FTL Regulations, Arts 52—57.

<sup>66</sup> *Ibid.*, Art. 53.

elsewhere in the calculations.<sup>67</sup> Differences in terms and conditions of sale are adjusted for both normal value and export price; adjustments for differences in quantities, physical differences, and differing taxation are made only to normal value.<sup>68</sup>

## **B. DETERMINATION OF EXPORT PRICE**

### **1. Sales Other Than between Arm's-Length Purchasers**

When no export price is available or when, in the Secretary's judgment, the export price is not reliable because some sort of compensation arrangement exists between the exporter and importer or with a third party, as in the United States, the export price may be calculated on the basis of the first sale in the national territory to an unrelated purchaser, or failing evidence of such sales, on a basis that the authority determines is reasonable.<sup>69</sup> This is a common problem for determination of export price because perhaps 40% of world trade is between related parties, as when, for example, Toyota of Japan sells a small truck to Toyota of Mexico. If such related parties are affected by an antidumping investigation, the authority would likely ignore the transfer price within the Toyota group and instead use as the basis for export price the first sale to an unrelated party, such as one of Toyota's independent dealers in Mexico.

### **2. FOB Export Prices**

When faced with a situation in which the export price is the free on board (FOB) price in the exporting nation, but it has been increased for analysis purposes by the shipping and other expenses incurred in bringing the goods to Mexico, there is concern that the adjusted FOB price, if used as the export price, could overstate the export price and thus result in avoidance of compensatory duties because the export price as adjusted

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<sup>67</sup> *Ibid.*, Art. 52.

<sup>68</sup> *Ibid.*, Art. 53.

<sup>69</sup> See FTL, Art. 35.

exceeds the normal value. Accordingly, the Federal Tax Court has affirmed the Secretary's authority to reduce the export price by adjusting for this potential distortion.<sup>70</sup>

## **VII. DETERMINATION OF SUBSIDIZED GOODS**

The FTL incorporates only two articles specifically governing subsidies, likely reflecting the very limited role that measures against subsidies play in Mexican trade law. Only one subsidies action by Mexico has become significantly controversial, one concerning olive oil. In the proceeding before *Economía*, the Secretary had determined the existence of subsidies and imposed compensatory duties ranging from USD 0.40 to USD 0.73 per kg; imports of olive oil from the European Union (EU) with a customs value of USD 4.05 or more were exempted from the compensatory duties.<sup>71</sup> The EU Mission to Mexico participated in the investigation;<sup>72</sup> it was joined by representatives of the embassies of Spain and Italy for the public hearing.<sup>73</sup> All parties were offered the opportunity to advance and refute arguments and participate in cross-examination, as with antidumping proceedings in Mexico, under the FTL.

Based on that final determination, the European Community charged Mexico with violating Article VI of GATT and various provisions of the SCM Agreement.<sup>74</sup> However, the WTO Panel upheld only the EC challenges based on injury, rejecting challenges to the authority's refusal to conduct an analysis demonstrating whether EC subsidies to olive growers were passed through to the firms that exported olive oil to Mexico and thus created a benefit to the exporters under Article 1 of the SCM Agreement.<sup>75</sup>

### **A. DEFINING A SUBSIDY**

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<sup>70</sup> Juicio No. 100(14)19/98/17778/97 (29 Oct. 1998), Segunda Sección de la Sala Superior, Tribunal Fiscal.

<sup>71</sup> Final Determination in the Investigation of Price Subsidization of Imports of Olive Oil, *Diario Oficial*, 1 Aug. 2005, paras 448—450.

<sup>72</sup> *Ibid.*, para. 40.

<sup>73</sup> *Ibid.*, para. 68.

<sup>74</sup> Panel Report, *Mexico — Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341, adopted 21 Oct. 2008.

<sup>75</sup> *Ibid.*, para. 8.2(d). See s. 5.8, below.

A ‘subsidy’ is defined as a ‘financial contribution’ offered by a foreign government, including its public or mixed organs, its entities, or any regional organ, public or mixed entity established by various countries, directly or indirectly, to an enterprise or production sector, or a group of enterprises or production sectors, which provides a benefit.<sup>76</sup> A subsidy also includes any form of income or price support that offers a benefit. The export subsidies listed in Annex 1 of the SCM Agreement are also to be considered actionable subsidies under the FTL.<sup>77</sup>

**B. ANTI-SUBSIDY MEASURES IN THE EXPORTING COUNTRY**

The amount of any subsidy on exports to Mexico calculated by Mexican authorities is to be reduced by any export taxes or other measures to which the exported merchandise has been subjected in the country of exportation that is designed to neutralize the amount of the subsidies conferred.<sup>78</sup>

**VIII. INJURY**

Following Article VI of GATT, Article 3 of the AD Agreement, and Article 14 of the SCM Agreement, the FTL provides for material injury or threat thereof to a domestic industry or retardation of the creation of a domestic industry.<sup>79</sup> In the investigation, it must be proved that dumped or subsidized imports are causing injury to the domestic industry, in accordance with the law. Effects on the domestic industry caused by factors other than dumped imports may not be attributed by the authority to such imports.

**A. PRODUCTION TO BE CONSIDERED**

It is understood that in determining injury, the authority will consider all Mexican producers of identical or similar merchandise or those whose production in the aggregate constitutes ‘an important proportion of total domestic production’.<sup>80</sup> Mexican law on

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<sup>76</sup> See FTL, Art. 37.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, Art. 38.

<sup>79</sup> *Ibid.*, Art. 39.

<sup>80</sup> *Ibid.*, Art. 40.

what constitutes an ‘important proportion’ is not entirely clear. In one early 1990s proceeding, the investigating authority (then SECOFI) determined that Canadian source imports of hot rolled steel sheet constituting only 6% of total imports and 1.4% of total production were sufficient to justify an injury finding.<sup>81</sup> However, when Mexican producers are linked to or are importers or exporters of the merchandise, the term ‘domestic industry’ refers only to the remaining producers. If all Mexican producers are so linked, the authority may consider the Mexican producers of intermediate products used to produce the final product under investigation.<sup>82</sup>

## **B. INJURY FACTORS**

Again following the AD Agreement and the SCM Agreement, the FTL requires the Secretary to consider the volume of dumped or subsidized imports, whether there has been a significant increase in absolute or relative terms, the effect on Mexican prices of the dumped or subsidized imports, and if the imports are sold at lower prices, whether they decrease Mexican prices or impede price increases that otherwise would have occurred.<sup>83</sup> In determining causation of injury to the Mexican industry, the factors to be considered are essentially those set out in Article 3.4 of the AD Agreement, such as actual or potential reduction of sales, benefits, production volume, market share, and capacity utilization; factors affecting local prices, including the magnitude of dumping margins, effects on investment and capital flows, employment and salaries; along with any other factors that the Secretary considers relevant.<sup>84</sup> These factors are not exclusive, and none of them alone must be demonstrated to result in an injury determination; the Secretary has considerable latitude to consider other factors relating to the Mexican industry.<sup>85</sup>

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<sup>81</sup> Binational Panel, *Hot rolled steel sheet originating in or exported from Canada (Dumping)* (16 Jun. 1997), MEX-96-1904-03, 33—36 (courtesy translation) (remanding the issue to SECOFI for an assessment of the basis for including Canadian imports in determining injury to the domestic industry through cumulation).

<sup>82</sup> *Ibid.*

<sup>83</sup> See FTL, Art. 41(I—II).

<sup>84</sup> See the AD Agreement, Art. 3.1 and FTL, Art. 41.

<sup>85</sup> See FTL, Art. 41.

In one proceeding involving imports of carbon steel tubing to satisfy a competitively bid-upon gas pipeline project in Mexico, the Secretary analysed not only the traditional volume questions, but also the full range of issues relating to why the foreign producer (Berg) was the successful bidder and whether the Mexican industry (Tubacero) would have been able to satisfy the contract, such as technical competence, access to capital, quality control, ability to meet delivery schedules, and the like. The Secretary alleged, and a binational panel agreed, that the injury analysis was consistent with the AD Agreement and Mexican law.<sup>86</sup> In a proceeding relating to paintbrushes from China, the Secretary took into account, in analyzing injury, that the United States, New Zealand, and Australia had investigated imports of similar merchandise in the past and determined the existence of dumping margins of more than double digits, although, ultimately, compensatory duties were not imposed by Mexico.<sup>87</sup>

### **C. THREAT OF INJURY FACTORS**

Threat determinations must take into account several factors, including the existence of a significant increase in the volume of dumped or subsidized imports that shows a probability that such imports will substantially increase; sufficient foreign production capacity to demonstrate that increased exports are likely, assessing the existence of other export markets that may absorb such increases; whether imports have or will have the effect of lowering domestic prices of the merchandise (or significantly retarding domestic price increases), so as to increase demand for additional imports; the existence of the merchandise subject to the investigation; the nature of any subsidy and its effects on commerce; and any other elements that the Secretary considers relevant to the Mexican industry.<sup>88</sup>

Again, tracking the AD Agreement and the SCM Agreement, none of the above-enumerated factors alone constitutes the basis for a threat finding, but in the aggregate,

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<sup>86</sup> *Carbon Steel Tubing*, paras 99—110.

<sup>87</sup> Final Antidumping Determination concerning Paintbrushes with Hog, Synthetic or Mixed Bristles from the People's Republic of China, *Diario Oficial*, 29 July 2008 para. 18(R). The US antidumping margins were determined to be 352%. *Ibid.*, para. 228(A).

<sup>88</sup> See FTL, Art. 42.

they must demonstrate that injury will occur in the absence of the application of compensatory duties. The determination must be ‘based on facts and not simply on allegations, conjecture or remote possibilities’.<sup>89</sup>

Mexico's threat of injury analysis was challenged by the United States in *Mexico — HFCS*.<sup>90</sup> In that proceeding, the WTO Panel determined that Mexico had acted inconsistently with Article 3 of the AD Agreement by failing to consider not only the injury factors specific to threat findings, but also those that are generally applicable to injury determinations as listed in Article 3.4.<sup>91</sup> The Panel also found that by viewing the domestic industry as being comprised only of sellers to industrial producers, excluding any analysis of sales of sugar for household use, Mexico further acted inconsistently with its obligation to consider the impact of imports on the ‘domestic industry as a whole’.<sup>92</sup>

In *Bovine Carcasses*, a binational panel faulted the Secretary, in a threat of injury determination, for considering the capacity of all US exporters, not only those that were found to be dumping.<sup>93</sup> In the same proceeding, the Panel affirmed the right of the Secretary to make an affirmative injury finding without at the same time determining that all of the injury factors listed in the FTL are present, but stated that the Secretary is required to make a determination that the dumped imports were the cause of the alleged material injury.<sup>94</sup>

#### **D. SIMILAR PRODUCTS AND CUMULATION**

The Secretary is authorized, when determining injury, to cumulate the volume and the effects of identical or similar merchandise imported from two or more countries that are subject to the investigation.<sup>95</sup> This appears to be the regular practice of the Secretary

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<sup>89</sup> *Ibid.*

<sup>90</sup> Panel Report, *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 Feb. 2000.

<sup>91</sup> *Ibid.*, para. 7.142.

<sup>92</sup> *Ibid.*, paras 7.147—7.148.

<sup>93</sup> Binational Panel, *Bovine Carcasses from the United States* (15 Mar. 2004), MEX-USA-00-1904-02, paras 15.44 and 15.48.

<sup>94</sup> *Ibid.*, paras 16.23—16.26.

<sup>95</sup> See FTL, Art. 43.

in the case of fungible products from different countries, such as hot rolled steel.<sup>96</sup> *Economía* has cumulated in at least four other proceedings since 2003.<sup>97</sup> *Economía* appears to follow standard practices for determining whether products are similar:

The similarity of products is determined on the basis of the information developed in the administrative proceeding, in which it is determined that there does not exist proof that the merchandise that is the object of the investigation has such variation in its characteristics such that they could not be considered similar products.<sup>98</sup>

#### **E. REGIONAL MARKETS**

In appropriate circumstances, *Economía* has authority to divide the country into two or more regional markets for the determination of injury based on competition in each distinct market, a process that facilitates a showing of material injury because the Mexican industry petitioners do not need to demonstrate injury to the industry throughout Mexico. However, for the Secretary to follow this approach, it must be shown that the producers in the distinct Mexican market sell all or almost all of their production in that region, and that demand in that region is not supplied to a substantial degree from producers located elsewhere in the country.<sup>99</sup> It must also be demonstrated that injury is caused to the producers of all or almost all of the production within the regional market. To the best of our knowledge, no final determinations by *Economía* have applied a regional market analysis, perhaps because, in general, the Mexican market is considered to be concentrated and ‘focused’.<sup>100</sup>

#### **F. IMPORTS TO BE REVIEWED IN THE INVESTIGATIONS**

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<sup>96</sup> *Hot Rolled Steel Sheet*, 32—36.

<sup>97</sup> See e.g., Final Determination in the Investigation of Ceramic Tableware or Pieces thereof Imported from Colombia, Ecuador and Indonesia, *Diario Oficial*, 16 Jul. 2003 (imposing compensatory duties on imports from Ecuador and Indonesia) and Final Determination in the Investigation of Carbon Steel Tubes from Romania and Russia, *Diario Oficial*, 21 Apr. 2004 (imposing compensatory duties on imports from both countries).

<sup>98</sup> *Paintbrushes*, paras 188—197 and 198 (discussing variations in quality, size, and other characteristics but concluding that all are similar products).

<sup>99</sup> See FTL, Art. 44. The FTL language tracks Art. 4.1(ii) of the AD Agreement.

<sup>100</sup> E-mail correspondence with G. Cavazos of the law faculty of the Tecnológico de Monterrey (19 Nov. 2008) (copy on file with the authors).

The FTL Regulations specify that the period for which imports are to be reviewed in determining injury or threat of injury (period of analysis) is three years, as in the United States and Canada).<sup>101</sup> The Regulations require that the period of investigation for determining AD or CVD margins cover imports for at least six months prior to the initiation of the investigation, which period may be expanded based on the Secretary's judgment after the initiation.<sup>102</sup> Neither the AD Agreement nor the SCM Agreement explicitly requires any particular period for review of imports. The precise periods of analysis selected by *Economía*, presumably with an eye toward making it easier for the Mexican industry to show injury, have been subject to several WTO challenges.

In *Mexico — Rice*,<sup>103</sup> the Appellate Body determined that *Economía's* choice for the period of analysis of data ending fifteen months before the initiation of the investigation constituted a failure to make a determination of injury based on 'positive evidence' under Article 3.1 of the AD Agreement and was inconsistent with other Subsections of Article 3 (governing injury determinations).<sup>104</sup> The Appellate Body also found that limiting the injury analysis to six-month periods in 1997, 1998, and 1999 (March through August in each year) without a 'proper justification' constituted a failure by Mexico to make the 'objective examination' required by Article 3.1 of the AD Agreement and was also inconsistent with Article 3.5.<sup>105</sup>

In a similar WTO action brought by Guatemala against Mexico, *Mexico — Steel Pipe Dumping*,<sup>106</sup> the Panel found that Mexico had acted inconsistently with Article 3 of the AD Agreement regarding its obligation to conduct an objective investigation because the injury data analysed was limited to three six-month periods (July through December) without sufficient justification for use of partial-year data.<sup>107</sup> At the same time, the Panel

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<sup>101</sup> FTL Regulations, Art. 65.

<sup>102</sup> See the FTL Regulations, Art. 76.

<sup>103</sup> Appellate Body Report, *Mexico — Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted 20 Dec. 2005.

<sup>104</sup> *Ibid.*, para. 172.

<sup>105</sup> *Ibid.*, para. 188.

<sup>106</sup> Panel Report, *Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 Jul. 2007.

<sup>107</sup> *Ibid.*, para. 7.261.

rejected the Guatemalan allegations that the period of analysis terminating eight months (instead of the fifteen months in *Mexico — Rice*) before initiation of the investigation and two years before the imposition of compensatory duties also constituted a violation.<sup>108</sup>

Finally, in *Mexico — Olive Oil*, brought by the EU, a WTO Panel rejected another effort by Mexico to manipulate the period of analysis, this time by calculating imports based on nine months (April through December) of 2000, 2001, and 2002, rather than full-year data. The Panel determined that the practice was inconsistent with the requirement in Article 15.1 of the SCM Agreement that injury be based on ‘positive evidence’. The excluded three-month periods were periods when Mexico's seasonal industry was actually producing olive oil.<sup>109</sup> The Panel observed ‘that *Economía* would have had more reliable data and a fuller picture of the state of the industry if it had not excluded from its analysis the periods in time when the industry was actually producing the product under investigation’.<sup>110</sup>

These WTO rulings indicate to Mexican authorities that a period of analysis that excludes the eight months of imports preceding the investigation is acceptable but fifteen months is not, and that absent some exceptional justification, calendar-year import data must be used for determining injury. The results likely further reduce the discretion that *Economía* may exercise in manipulating the periods of review so as to facilitate a finding of injury.

## **IX. PROCEDURES IN ANTIDUMPING AND SUBSIDY INVESTIGATIONS**

Most procedures relating to the conduct of Mexican investigations are set out in the FTL and its Regulations. Where the FTL and its Regulations are silent, the Federal

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<sup>108</sup> *Ibid.*, para. 7.240.

<sup>109</sup> Panel Report, *Mexico — Olive Oil*, para.7.288.

<sup>110</sup> *Ibid.*, para. 7.289.

Tax Code of Mexico is applied to supplement the FTL provisions, except with regard to notifications and verifications.<sup>111</sup>

**A. THE PETITION (*SOLICITUD*)**

Petitions may be presented by legally constituted organizations, corporate entities, or individuals who are producers of merchandise identical or similar to that which is imported under conditions of unfair competition. Petitioners must represent at least 25% of total Mexican production of identical, similar, or directly competitive merchandise and 50% of the production represented by those producers expressing a position on the action.<sup>112</sup> Petitions must meet various administrative requirements, be in writing, and be accompanied by a certification as to the truth of the arguments made in favour of applying compensatory duties (or safeguard measures).<sup>113</sup> The investigation must be initiated within twenty-five days of its receipt by the authority, unless, within seventeen days, the Secretary requests additional information. If the petition does not meet the established requirements, it must be rejected by the authority within twenty days.<sup>114</sup> A notice of initiation must be published in the *Diario Oficial*.

Consistently with the AD Agreement and the FTL,<sup>115</sup> the Secretary will decline to impose compensatory duties when the 25% and 50% requirements for initiating an investigation and imposing duties are not met. However, it appears that in some instances at least, the final determination of the lack of sufficient Mexican industry support for the petition is made as part of the final determination process rather than before initiation.<sup>116</sup>

**B. INFORMATION GENERALLY**

With publication of the initiation notices, interested parties are sent copies of the petition and given twenty-three days from receipt of the petition to present arguments,

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<sup>111</sup> See FTL, Art. 85.

<sup>112</sup> *Ibid.*, Art. 50. See also the AD Agreement, Art. 5.4.

<sup>113</sup> See FTL, Art. 50 and the FTL Regulations, Art. 75.

<sup>114</sup> See FTL, Art. 52.

<sup>115</sup> *Ibid.*, Art. 50 and the AD Agreement, Art. 5.4.

<sup>116</sup> *Paintbrushes*, paras 236—238 (determining that the Mexican paintbrush industry had failed to meet the required percentages).

information, and proof to *Economía*.<sup>117</sup> The Secretary may request the information from interested parties that it considers relevant, based on the Secretary's questionnaire. Generally, the Secretary is authorized to request information not only from interested parties, but also from customs officers, agents, representatives, and persons receiving the imported goods, and from any other person whom it deems appropriate to provide information and data at their disposal.<sup>118</sup> If the request for information is not satisfied, the Secretary may make its decision based on information available.<sup>119</sup> Parties must serve each other with copies of their submissions to the investigating authority.<sup>120</sup>

As a general rule, interested parties must be provided with access to all of the information in *Economía's* files related to the presentation of their case.<sup>121</sup> Once sixty days have passed after the passage of a final determination, the interested parties in one proceeding may have access to the non-confidential information in the record of other completed investigations.<sup>122</sup>

### C. NOTICES GENERALLY

Notifications required under the FTL may be sent to an interested party or his or her legal representative through personal service to his or her domicile, by certified mail with return receipt, or by any other direct means, such as by courier or methods using electronic delivery or other technology. Notices are effective as of the working day following the day on which they were sent.<sup>123</sup> Despite the legal formalities required, under Mexican law as interpreted by binational panels, minor errors in complying with the various notice requirements, including those of initial and preliminary determinations, are not acts of nuisance or harm that would affect the legal rights of the complainants

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<sup>117</sup> See FTL, Art. 53. It is assumed that the petition is received by the interested parties within five days after it is sent, from which time the twenty-three days begin to run.

<sup>118</sup> *Ibid.*, Art. 55.

<sup>119</sup> *Ibid.*, Art. 54.

<sup>120</sup> *Ibid.*, Art. 55.

<sup>121</sup> *Ibid.*, Art. 80.

<sup>122</sup> *Ibid.*, Art. 80.

<sup>123</sup> *Ibid.*, Art. 84.

under the Constitution, but rather are communications of the status of the investigation, as determinations are issued by the investigating authority.<sup>124</sup>

#### **D. CONFIDENTIAL INFORMATION**

Confidential information provided to *Economía* in the course of an investigation is made available only to accredited legal representatives of the interested parties and to any persons who, under international treaties, are accorded such access.<sup>125</sup> Procedures are established for authorization of such access by the Secretary; the information may not be used for personal benefit, and those who possess it must take all reasonable means to prevent its unauthorized disclosure. Sanctions are provided for violations under Mexican law generally and under the FTL.<sup>126</sup> Disclosure of confidential information for personal benefit is subject to a fine that is proportional to the injury caused or to the benefit received. The Secretary is to take into account, in setting the fine, the value of the infraction, the damages caused, as well as the prior history, personal circumstances, and economic status of the person committing the infraction.<sup>127</sup>

An exception to disclosure is maintained for certain restricted commercial information and confidential government information. Non-confidential summaries of confidential submissions must be provided to interested parties under Article 12.1 of the SCM Agreement, a requirement that may, depending on the circumstances, be satisfied by redacted versions of the confidential documents. Mexican practice with regard to such summaries was challenged successfully by the EC in *Mexico — Olive Oil*. In that case, the Panel found that dissemination of the redacted public version of the documents was insufficient for parties ‘to obtain a reasonable understanding of the deleted information’.<sup>128</sup>

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<sup>124</sup> *Bovine Carcasses*, para. 8.38.

<sup>125</sup> See FTL, Art. 80.

<sup>126</sup> *Ibid.*, Art. 80.

<sup>127</sup> *Ibid.*, Art. 93(VI). The amount of the fine may be based on a multiple of the daily minimum wage in the Federal District of Mexico.

<sup>128</sup> Panel Report, *Mexico — Olive Oil*, paras 7.98-7.102.

## **E. INTERESTED PARTIES**

Interested parties include the petitioning producers, importers and exporters of the merchandise under investigation, as well as foreign individuals who have a direct interest in the investigation or are defined as interested parties under international agreements.<sup>129</sup> The definition is important under NAFTA as otherwise; under NAFTA, Mexico must provide interested parties with the right of full participation in the administrative process, disclosure meetings regarding the results, and administrative and judicial review. Interested parties under NAFTA are guaranteed access to all non-confidential material in the administrative record; their counsel are afforded access to confidential information.<sup>130</sup>

However, in Mexico as elsewhere, the investigating authority is not required to investigate individually all of the respondent enterprises in determining the existence of dumping and injury. For example, in *Bovine Carcasses*, the binational panel concluded that it was appropriate for the Secretary to consider data from only seven of sixteen respondents. In that instance, in the final determination, the Secretary offered the complaining firm an opportunity for a subsequent individual determination of dumping if it provided the necessary information to *Economía*.<sup>131</sup>

## **F. PUBLIC HEARINGS**

Interested parties have a right to a public hearing before *Economía* in which they may provide argumentation in defence of their interests, with an opportunity for cross-examination of other parties (even though that practice does not occur formally in the Mexican legal system) and questioning by *Economía*.<sup>132</sup> The public hearing is held after the publication of the preliminary determination and before the publication of the final determination,<sup>133</sup> as in the United States. Any type of proof may be offered at the hearing other than admissions by the authorities or information against the public order or

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<sup>129</sup> See FTL, Art. 51 and Juicio No. 100(20)18/98/11332/97 (30 Jun. 1998) TFF (confirming the scope of the term ‘interested party’ as set out in the FTL).

<sup>130</sup> See NAFTA, Annex 1904.5(c) and 1904.5(h)—(j) (Mexico).

<sup>131</sup> *Bovine Carcasses*, paras 12—12.5.

<sup>132</sup> See FTL, Art. 81 and the correspondence with G. Cavazos.

<sup>133</sup> See FTL, Art. 81.

offensive to morals or decency.<sup>134</sup> The interested parties are afforded a comment period after the hearing to expand on their conclusions presented at the hearing. The acceptance or rejection of given pieces of evidence by the Secretary is not subject to judicial or administrative review. It is worth noting that public hearings and oral arguments in trade proceedings in Mexico were virtually unknown before 1994,<sup>135</sup> again reflecting the civil law tradition. However, such hearings are held as a matter of course in proceedings before *Economía*, except those in which the proceeding is terminated at the time of the preliminary determination of dumping and injury, as the hearing follows the publication of the preliminary determination, as in the United States. As *Economía* observed in one determination, ‘All [parties] had the opportunity to present their positions and to refute or question orally the opposing parties with regard to the information, data and proofs that were presented...’ and to respond to questions asked by the investigating authority.<sup>136</sup>

#### **G. VERIFICATION OF INFORMATION**

The Secretary is authorized to verify the information presented in the course of the investigation by the parties, and upon authorization of the interested parties, may issue an administrative order regarding those parties that the Secretary decides to verify.<sup>137</sup> Procedures followed are designed to permit *Economía* to determine whether the evidence presented by the interested parties is accurate, complete, and consistent with their financial statements. If, as a result of the verification, the Secretary determines that the information that had been presented is inaccurate, incomplete, or inconsistent with the financial statements, the Secretary may proceed on the basis of the best information available.<sup>138</sup>

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<sup>134</sup> *Ibid.*, Art. 82.

<sup>135</sup> One of the authors, serving on one of the first NAFTA Ch. 19 binational panels reviewing a Mexican antidumping determination, recalls discussions with counsel for several of the Mexican parties about the lack of experience that many of them had with oral arguments in administrative proceedings.

<sup>136</sup> Final determination in the Administrative Proceeding regarding the Scope of the Final Determination imposing compensatory duties on Electrical Machinery and Parts Thereof Originating in the Peoples' Republic of China, paras 18—19, *Diario Oficial*, 17 Jun. 2008 (authors' translation).

<sup>137</sup> See FTL, Art. 83.

<sup>138</sup> *Ibid.*, Arts 64 and 83.

Such verification visits are to be notified in writing specifying the tax domicile, establishment, or place in which the desired information is to be found. Verifications are subject to detailed procedures on the part of *Economía*. When verification is to be carried out in a foreign country, for example, the United States or Canada, its government is to receive prior notification to confirm that it does not oppose the verification visit by Mexican authorities.<sup>139</sup> If the request for the verification visit is not accepted, the Secretary proceeds with the investigation on the basis of the facts of which it has knowledge<sup>140</sup> ('facts available' in the United States), usually the information presented by petitioners. For this reason, it is unusual for interested parties or their governments to decline requests for verification.

In general, the rules regarding verification requests, at least in theory, have been treated more formally and strictly than corresponding requests from the authorities in the United States and Canada. This is presumably a result, at least in part, of the requirements of the Mexican Constitution that relate to the entry of government officials to a person's home or place of business and access to their property.<sup>141</sup> Verifications normally take place on working days and during working hours; any deviation from this practice must be specified in the official letter authorizing the verification.<sup>142</sup> The official records of the verification must be witnessed by two persons provided by the party, subject to verification and thus the underlying administrative determination, unless the party is absent or is unwilling to provide witnesses, in which case the responsible authority does so.<sup>143</sup>

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<sup>139</sup> *Ibid.*, Art. 83.

<sup>140</sup> *Ibid.*

<sup>141</sup> See the Mexican Constitution, Art. 16, which states:

No one shall be disturbed [*molestarse*] in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken...Administrative officials may enter private homes for the sole purpose of ascertaining whether the sanitary and police regulations have been complied with; and may demand to be shown the books and documents required to prove compliance with fiscal rulings, in which latter cases they must abide by the provisions of the respective laws and be subject to the formalities prescribed for cases of search.

<sup>142</sup> See FTL, Art. 83.

<sup>143</sup> *Ibid.*

A relatively minor inaccuracy in the verification letter, such as failure to name all of the verifiers, has in the past led to challenges to the validity of the verification, including challenges before NAFTA Chapter 19 panels.<sup>144</sup> Such challenges would not likely be considered in the United States in the absence of a serious violation of procedural due process that causes harm to one of the parties. Since 2006, changes in the standard of review for administrative proceedings in Mexico have made it more difficult for interested parties to challenge *Economía's* final determinations based on minor procedural errors, including those in verification notices, where the errors have not caused harm to parties.<sup>145</sup> However, as early as the mid-1990s, binational panels were prepared to reject claims based on procedural irregularities, as noted earlier.

#### **H. PERIOD OF INVESTIGATION**

Neither the AD Agreement nor the FTL provide much guidance to investigating authorities regarding the POI, beyond the requirement that it be at least six months. This leaves the Secretary with considerable discretion, which may be affected by the suggestions of petitioners or by the cyclical nature of imports of the product under investigation. In one instance, the Secretary decided to determine dumping based on a one-year period that ended sixteen months before the complaint was filed with the Secretary, as discussed earlier. That decision regarding the POI was upheld by a binational panel based on the unusual nature of the imports (a single competitive bid for carbon steel tubing) and on the fact that the respondent had not challenged the POI in a timely manner or provided evidence that it was improper.<sup>146</sup>

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<sup>144</sup> See e.g., Binational Panel, *Antidumping investigation of Mexico into imports of flat coated steel products from the United States of America (Dumping)* (27 Sep. 1996), MEX-94-1904-01, paras 87—90 (unsuccessfully challenging the validity of the compensatory duties, *inter alia*, based on failure in the notice of verification to specify the place of verification, period covered, failure to notify the US government, and permitting the participation of foreign legal representatives). Challenges were also lodged against the competency of the SECOFI officials involved in the verification. *Ibid.*, paras 62—74.

<sup>145</sup> See s. 5.15.3, below.

<sup>146</sup> *Carbon Steel Tubing*, paras 30—53.

## **X. PRELIMINARY AND FINAL DETERMINATIONS**

### **A. PRELIMINARY DETERMINATION**

A preliminary determination must be issued within ninety days from the initiation of an investigation (down from 120 days in the original FTL). The Secretary has three alternatives: (a) set a preliminary compensatory duty after a minimum of forty-five days following publication of the notice in the *Diario Oficial*, based on the results of the preliminary determination; (b) refrain from imposing duties but continue the investigation; or (c) terminate the investigation on the grounds of insufficient evidence of dumping or subsidization, or of injury or threat of injury, or a causal relationship between them.<sup>147</sup> The parties are notified, and the determination is published in the *Diario Oficial*. There is no provision for the issuance of separate determinations, as in the United States and Canada, presumably because *Economía* is responsible for both the dumping or subsidy determination and the determination of injury.

### **B. FINAL DETERMINATION**

#### **1. Role of COCEX**

When the investigation has been concluded by the Secretary, the draft final determination is submitted to COCEX for its opinion<sup>148</sup> (not necessarily its approval, because the Secretary is not bound to follow COCEX's advice). It is difficult to determine the actual extent of Commission participation in *Economía's* final determinations; typically, the final determination will simply indicate that the draft determination was presented to the Commission as required by law, a quorum of COCEX was present, and the determination was approved unanimously.<sup>149</sup> The technical secretary of COCEX may

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<sup>147</sup> See FTL, Art. 57.

<sup>148</sup> *Ibid.*, Art. 58.

<sup>149</sup> See e.g., *Paintbrushes*, paras 83—84 and *Steel Pipe*, paras 50—61.

question orally a representative of *Economía* on behalf of COCEX once the draft determination has been presented to COCEX.<sup>150</sup>

We understand that in some instances, COCEX provides observations to *Economía* but that COCEX has rarely opposed a final determination of dumping or subsidization proposed by *Economía*.<sup>151</sup> In one instance in which COCEX did express opposition, relating to imports of stearic acid, *Economía* proceeded to impose compensatory duties.<sup>152</sup> In another instance, concerning ammonium sulphate, COCEX did not oppose the continuation of the compensatory duty outright but recommended that it be suspended to promote productivity and in light of the current circumstances affecting the industry worldwide. *Economía* formally extended the duties for five years but suspended them consistent with the COCEX recommendations.<sup>153</sup>

## **2. *Economía's* Options**

Within 210 days of the initiation of the investigation (down from 260 days in the original FTL), the Secretary may (a) impose a final compensatory duty, (b) revoke the provisional duty earlier imposed, or (c) declare the investigation concluded without the imposition of a countervailing duty.<sup>154</sup> The parties are again notified and the determination is published in the *Diario Oficial*. However, at least one binational panel has applied the deadlines in the AD Agreement and Mexican law flexibly. When a complainant objected that *Economía* had failed to meet the statutory requirements for issuing the final determination, the Panel noted that the complainant had delayed the proceedings by failing to provide information about economic and legal injury on a

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<sup>150</sup> *Olive Oil*, paras 70—72 (in this instance COCEX supported the determination).

<sup>151</sup> See the correspondence with G. Cavazos.

<sup>152</sup> Final determination in the Antidumping Investigation concerning Stearic Acid originating in the United States of America, *Diario Oficial*, 8 Apr. 2005, and correspondence with Isabel Parras, UPCI Mexico (copy on file with the authors).

<sup>153</sup> Final determination reviewing the continuation of the compensatory duty on Imports of Ammonium Sulfate from the United States of America, *Diario Oficial*, 28 Aug. 2008, paras 147—158.

<sup>154</sup> See FTL, Art. 59.

timely basis and in light of other circumstances of the investigation, and the Panel refused to declare the final determination to be illegal.<sup>155</sup>

Once a compensatory duty has been applied, interested parties may ask the Secretary to determine whether a specific product is subject to the duty, that is, request a determination of the scope of the order.<sup>156</sup>

## **XI. IMPOSITION OF DUTIES**

### **A. AMOUNT OF DUTIES**

The Secretary is directed to impose compensatory duties, which, in the case of dumping represents the difference between normal value and export price, and with subsidies, are equal to the amount of the benefit.<sup>157</sup> However, the compensatory duties may be less than the dumping margin or amount of the subsidies if they are adequate to discourage imports when there are conditions of ‘unfair trade practices’. While in the United States and Canada, duties are not usually imposed at a lower level than the dumping margin calculated by the authorities, Mexico operates with more flexibility in this respect. For example, duties have been imposed at levels below the actual dumping margins in several instances of final determinations affecting imported steel.<sup>158</sup> Compensatory duties at a lower rate have been imposed in some instances after testing for the effects on the domestic industry. For example, in *Pencil Sharpeners from China*, *Economía* found a dumping margin of USD 35.42 per kilogram, but after analysis imposed compensatory duties of only USD 10 per kilogram.<sup>159</sup> In *Epoxide of Soybean Oil from the United States*, *Economía* found a dumping margin of 91.98%, but it ultimately imposed compensatory duties at the rate of 62.45%.<sup>160</sup>

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<sup>155</sup> *Carbon Steel Tubing*, para. 56.

<sup>156</sup> See FTL, Art. 60.

<sup>157</sup> *Ibid.*, Art. 62.

<sup>158</sup> See the correspondence with G. Cavazos.

<sup>159</sup> Final Determination in the Antidumping Investigation concerning Pencil Sharpeners from China, *Diario Oficial*, 6 June 2006 paras 72 and 148—151. (This is not a misprint; imports of these small plastic pencil sharpeners are assessed duty by weight.)

<sup>160</sup> *Soybean Oil*, paras 93 and 210—211.

The Secretariat of Finance and Public Credit (*Hacienda*) is responsible for collecting the preliminary or final compensatory duties, and to this end may accept guaranties as specified in the *Codigo Fiscal*.<sup>161</sup>

*Economía* is directed to calculate individual margins for foreign producers that provide sufficient information to do so. Such margins serve as a basis for determining the compensatory duties applicable to those producers. Compensatory duties may be calculated on the basis of the best information available when (a) the producers did not participate in the investigation, (b) the producers did not present the required information on a timely basis, impede the investigation, produce incomplete or incorrect data, or fail to provide their financial information, which would preclude determination of individual margins; or (c) the producers did not export the subject goods during the POI.<sup>162</sup> Use of information available ('facts available' in US law) is not permitted in circumstances in which the Secretary has not properly requested the desired information from the participants in the investigation, based on the requirement that the Secretary 'specify in detail the information required'.<sup>163</sup>

Nor are compensatory duties limited to respondents that participated as interested parties in the investigation. As one binational panel has observed:

The authority for establishing antidumping duties is not restricted to the importers that appeared during the administrative antidumping investigation because it also involved those persons that imported the merchandise from the country that has committed unfair trade practices...so that such determinations have a general character and should be applied to all importers of like products.<sup>164</sup>

Such importers are subject to an 'all other importers' rate, as in the United States and Canada. This approach in Mexico has been confirmed by Mexican courts.<sup>165</sup>

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<sup>161</sup> See FTL, Art. 65.

<sup>162</sup> *Ibid.*, Art. 64.

<sup>163</sup> *Bovine Carcasses*, paras 11.53—11.56.

<sup>164</sup> *Carbon Steel Tubing*, para. 88, citing FTL Arts 28, 66, and 67.

<sup>165</sup> *Tavistock Holding, S.A. de C.V. and others, Amparo in revision 103/2004* (22 Sep. 2004) ('Antidumping Duties, the Determinations Are Established to Be of General Application').

Compensatory duties may be imposed based on specific import quantities or on an ad valorem basis, with the latter to be based on customs value.<sup>166</sup> It is the responsibility of the importer to calculate the amount of compensatory duties in the customs declaration and to pay them, along with other import taxes, at the time of importation.<sup>167</sup>

## **B. SCOPE AND EXCLUSIONS**

Importers of the like or identical product subject to compensatory duties are not subject to such duties if they prove that the country of origin or source of the imports is different from the country or countries that are subject to compensatory duties.<sup>168</sup>

Interested parties may request the Secretary to rule as to whether a particular good is subject to a compensatory duty that has been applied to a class of goods. Such proceedings are subject to relatively short deadlines; *Economía* must initiate the scope investigation within twenty days of receiving the request and issue a final determination for publication in the *Diario Oficial* within sixty days following initiation.<sup>169</sup> Scope issues are relatively common when compensatory duties are imposed on specific classes of goods. For example, in a proceeding involving polyester fibre from Korea, the importers successfully petitioned *Economía* to exclude from the compensatory duties certain low fusion polyester fibre. *Economía* undertook a full investigation, concluding, *inter alia*, that the low fusion fibres were different in physical characteristics, raw materials used, and design (as well as higher pricing) from the conventional polyester fibre specified in the original 2003 order.<sup>170</sup>

Various imports are exempt from compensatory duties. These include passenger baggage on international flights; household effects; imports by border area residents for their personal use; donated gifts for cultural purposes, teaching, investigation, public

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<sup>166</sup> See FTL, Art. 87.

<sup>167</sup> *Ibid.*, Art. 89.

<sup>168</sup> *Ibid.*, Art. 66.

<sup>169</sup> *Ibid.*, Art. 89A.

<sup>170</sup> Final Determination in the Administrative Proceeding concerning Product Coverage relating to the Final Resolution on the Imposition of Compensatory Duties on Imports of Cut Polyester Fiber Originating in the Republic of Korea, *Diario Oficial*, 11 Jul. 2005, paras 72—74 and 93—99(B).

health, or social services; imports by public entities and charities exempt from income taxes; and others authorized by the Secretary.<sup>171</sup>

**C. PERIOD**

Compensatory duties in effect ‘shall remain in force during the time and to the extent necessary to counteract the damage to the domestic industry’.<sup>172</sup> This proviso is subject to the ‘sunset review’ provisions, discussed below.

**XII. REVIEWS OF COMPENSATORY DUTIES**

**A. ANNUAL REVIEWS**

As in the United States (and informally in Canada), final compensatory duties may be reviewed and revised annually at the request of any party or at any time at the Secretary's discretion. This review may take place regardless of whether the determination is subject to alternative dispute resolution or to an administrative or judicial proceeding.<sup>173</sup> In other words, a review of compensatory duties may be requested independently of any legal review that is pending, including one under Chapter 19 of NAFTA (alternative dispute resolution). The notices of initiation and conclusion of the review are to be published in the *Diario Oficial*. During the review period, the interested parties may undertake the agreements specified elsewhere in the FTL.<sup>174</sup> The proposed determination is again subject to review by COCEX for its opinion.

When a determination based on threat of injury is reviewed, the Secretary's review should include, as appropriate, a review of the investment that could not have been made without the imposition of compensatory duties. If the Secretary determines that the investment has not been made, the compensatory duty may be revoked.<sup>175</sup> This provision is presumably designed to address a situation in which a prospective investor in

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<sup>171</sup> See FTL, Art. 71.

<sup>172</sup> *Ibid.*, Art. 67.

<sup>173</sup> *Ibid.*, Art. 68.

<sup>174</sup> See s. 5.13, below.

<sup>175</sup> See FTL, Art. 69.

a domestic industry asserted to *Economía* that an investment would be made if and only if compensatory duties were imposed, and that assertion was in significant part responsible for the finding of threat of material injury.

## **B. OTHER REVIEWS**

If a foreign producer has not exported goods to Mexico during the POI, it would nevertheless be subject to payment of compensatory duties if a final determination of dumping and injury is issued. Accordingly, such a producer may petition the Secretary to initiate a ‘new-shipper’ review proceeding for the purpose of determining individual dumping margins for the producer. To qualify for such a review, the foreign producer must demonstrate that it has exported the merchandise to Mexico subsequent to the issuance of the compensatory duty order and that such duties have been paid upon importation. The foreign producer must also show that it has no commercial relationship with any of the producers that are subject to individual dumping margins.<sup>176</sup>

Any review of compensatory duties requires a demonstration that there were exports to Mexico of the product during the period being reviewed. Otherwise, according to the Tax Court, it is impossible to demonstrate positive proof of price discrimination under Mexican Law, including Article 131 of the Mexican Constitution, and under the AD Agreement.<sup>177</sup>

## **C. SUNSET REVIEWS**

The mandatory five-year review of antidumping and countervailing duty orders specified in Article of the 11.3 AD Agreement and Article 21.3 of SCM Agreement is incorporated into the FTL. Compensatory duties are to be eliminated within five years from the date on which they became effective unless the Secretary during this period has initiated (a) an annual review at the request of an interested party in which there is an analysis of the amount of price discrimination or subsidy and the finding of injury, or (b)

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<sup>176</sup> *Ibid.*, Art. 89D.

<sup>177</sup> Jucio de Nulidad No. 100(20)4/96/17856/95 (25 Aug. 2008).

an examination of the existing compensatory duty to determine if its removal would lead to the continuation or repetition of the dumping or subsidizing.<sup>178</sup>

If the compensatory duty has been eliminated because of the lack of initiation of either such proceeding, that action is duly notified to the interested parties and published in the *Diario Oficial*. The Secretary is also required to notify all domestic producers of which *Economía* has knowledge no less than forty-five days before the scheduled expiry of compensatory duties.<sup>179</sup> For the Secretary to initiate an investigation of the continued validity of the compensatory duties, one or more Mexican producers must express their interest in such a review, within twenty-five days of the termination date of the order.<sup>180</sup> Other procedural requirements and deadlines are also applicable.<sup>181</sup>

Mexico's practice in sunset reviews departs in one significant way from the practice in the United States and Canada. In the United States, the review results either in the continuation of the antidumping or countervailing duty order, or in its rescission. In Canada, the authorities have the power as well to continue the order with an amendment to exclude a country or product, but not to modify the duty rate. In Mexico, *Economía* also reserves the authority to modify the compensatory duty if it decides to extend the order.<sup>182</sup> This has occurred in at least two instances. In a review of the compensatory duties imposed in 1995 in *Liquid Caustic Soda*, *Economía* continued the compensatory duties in force, increasing the dumping margin from 38.89% to 44.09% and the reference price from USD 147.43 per metric tonne to USD 195.67 per metric tonne.<sup>183</sup> (Entries of the product below the reference price pay compensatory duties for the difference between the entered price and the reference price.) Similarly, in *Ammonium Sulfate*, *Economía*

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<sup>178</sup> See FTL, Art. 70.

<sup>179</sup> *Ibid.*, Art. 70A.

<sup>180</sup> *Ibid.*, Art. 70B.

<sup>181</sup> *Ibid.*, Art. 89F.

<sup>182</sup> *Ibid.*, Art. 89F.

<sup>183</sup> *Economía*, Final Determination and Continuation in Force of Compensatory Duties on Imports of Liquid Caustic Soda from the United States, *Diario Oficial*, 6 Jun. 2006, paras 1—2 and 83.

also continued the 1997 compensatory duty order in place and increased the reference price from USD 97.18 per metric tonne to USD 138 per metric tonne.<sup>184</sup>

Legally, according to one binational panel reviewing *Economía's* determination in *Liquid Caustic Soda*, the exercise of this authority to modify does not transform the sunset review into an annual review.<sup>185</sup> Also, under Mexican law, *Economía's* determinations in sunset reviews originally were not listed among those subject to administrative or judicial review until the 2003 amendments.<sup>186</sup> A binational panel, in a split decision, consequently determined prior to 2003 that it had no jurisdiction to review Mexican sunset review determinations because such review was dependent on a demonstration that the determination would be reviewable by administrative or judicial courts in Mexico.<sup>187</sup> At the time NAFTA was concluded, the WTO agreements had not been completed or entered into force. The Mexican government decided when the FTL was amended in 2003 to include sunset reviews in the *Economía* decisions subject to judicial review.

### **XIII. CONCILIATION AND PRICE UNDERTAKINGS**

#### **A. CONCILIATION DURING THE INVESTIGATION**

In the course of the investigation, interested parties may ask *Economía* to convene a conciliation meeting, at which proposals may be made to resolve the case and terminate the investigation. The various interested parties are given an opportunity to be heard and to discuss solutions.<sup>188</sup> If such proposals are adopted, they are to be approved by *Economía* and incorporated into a final resolution, of which the parties are notified and which is published in the *Diario Oficial*.<sup>189</sup>

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<sup>184</sup> *Economía*, Final Determination and Continuation in Force of Compensatory Duties on Imports of Ammonium Sulfate from the United States, *Diario Oficial*, 12 Dec. 2003, paras 2, 142—145 and 156.

<sup>185</sup> Binational Panel, *Liquid Caustic Soda from the United States* (31 Jul. 2006) MEX-USA-2003-1904-01, paras 25—26 (majority opinion).

<sup>186</sup> See FTL, Art. 94 (XI), referring to Article 89(F).

<sup>187</sup> Binational Panel, *Liquid Caustic Soda*, para. 29, referring to FTL, Art. 97.

<sup>188</sup> See the FTL Regulations, Arts 86—88.

<sup>189</sup> See FTL, Art. 61.

## **B. UNDERTAKINGS BETWEEN EXPORTERS AND GOVERNMENTS**

When in the course of an investigation, the exporter of the merchandise ‘voluntarily agrees to modify its prices or halt its exports, or the government of the exporter eliminates or limits the subsidies under investigation, the Secretary shall suspend or terminate the investigation without imposing compensatory duties’.<sup>190</sup> In the process, the Secretary is to determine if these or similar undertakings eliminate the injury caused by the unfair trade practices. Suspension cannot occur until after there has been a preliminary finding of an unfair trade practice.<sup>191</sup> Any suspension or termination order must be submitted to COCEX prior to its publication; the opinion of COCEX is also to be published in the *Diario Oficial*.<sup>192</sup>

Compliance with the undertakings may be reviewed *sua sponte* by *Economía* or at the request of a party. If it is determined that there has been a failure to comply, the investigation is to be continued and compensatory duties will be imposed based on the facts of which *Economía* has knowledge.<sup>193</sup>

## **XIV. CIRCUMVENTION (*ELUSIÓN*)**

In Mexico, as in the United States, there is concern that the goal of protecting a domestic industry against injury (whether in an antidumping, anti-subsidy, or safeguard action) will be thwarted if foreign producers take any of several steps to evade the impact of compensatory duties on their dumped or subsidized exports to Mexico. Thus, several types of circumvention are actionable under Mexican law. These include (a) importing materials, parts, or components into Mexico for the purpose of assembling finished goods that are subject to a compensatory duty; (b) sending materials, parts, or components to a third country for assembly and thence exportation to Mexico; (c) importing goods into Mexico that differ in minor respects from goods subject to compensatory duties; (d) importing goods into Mexico in a category that is subject to a lower compensatory duty;

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<sup>190</sup> *Ibid.*, Art. 72 (authors' translation).

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*, Art. 73.

<sup>193</sup> See FTL, Art. 74.

and (e) any other conduct that results in the failure to pay compensatory duties or comply with a safeguard measure.<sup>194</sup> For example, in a proceeding relating to embossed towels from China, *Economía* imposed 379% compensatory duties on bulk towelling from China because bulk towelling was being imported so as to evade the compensatory duty earlier imposed on embossed towels.<sup>195</sup>

Merchandise that is imported under any of these circumstances is subject to payment of compensatory duties or safeguard measures. Investigations of possible circumvention are to be initiated by the Secretary based on the request of an interested party.<sup>196</sup> Interested parties at the same time may request the Secretary to clarify or make more precise the final compensatory duty determinations.<sup>197</sup>

## **XV. ADMINISTRATIVE AND COURT REVIEW**

Typically, an interested party that wishes to challenge one of *Economía's* determinations (or the first collection of a compensatory duty) has several different options. First, if he or she and the other interested parties concur, or if the party is not from a NAFTA country, the challenge may be pursued administratively within *Economía* and then before the Federal Tax Court (*Tribunal Federal de Justicia Fiscal y Administrativa* (TFJFA), formerly *Tribunal Fiscal de la Nación*, in a nullity trial (*juicio de nulidad*). The determination of TFJFA may then be subject to review under Mexico's *amparo* jurisdiction (*juicio de amparo*). Alternatively, it may be possible to challenge *Economía's* final determination or assessment of duties directly in *amparo*, bypassing TFJFA. Alternatively, if the party is a national of the United States or Canada, he or she may seek review under Chapter 19 of NAFTA. One expert has suggested that in general if an interested party wishes to challenge the substance of an *Economía* determination it

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<sup>194</sup> *Ibid.*, Art. 89B. See e.g., Final Determination in the Circumvention Investigation of the Evasion of Payment of Compensatory Duties on Imports of Paper Sacks for Cement Imported from Brazil, *Diario Oficial*, 9 Oct. 2008 (terminated by consent of the parties).

<sup>195</sup> Final Determination in the Circumvention Investigation of the Evasion of Payment of Definitive Compensatory Duties on Imports of Embossed Towels from the People's Republic of China, *Diario Oficial*, 21 Apr. 2008.

<sup>196</sup> *Ibid.*

<sup>197</sup> See FTL, Art. 89C.

would likely choose the NAFTA binational panel option. If, in contrast, the claims are based on alleged violation of legal formalities, a *Jucio de Nulidad* would be the preferred route.<sup>198</sup>

Under some exceptional circumstances, initiations of review, preliminary determinations, and other administrative acts affecting parties subject to investigation are also subject to review. In most circumstances, an interested party challenging a final determination will allege that the evidence or legal arguments were inappropriately or incorrectly evaluated by *Economía*, that the dumping or subsidies margin was miscalculated, or that the parties' rights of due process were not respected by *Economía*.<sup>199</sup> As noted earlier, certain determinations by the Secretary, such as those relating to sunset reviews, are not reviewable under Mexican law.

#### **A. ADMINISTRATIVE APPEALS**

Administrative appeals are provided within *Economía*, *inter alia*, for final determinations in the area of compensatory duties and related administrative actions, including the results of annual reviews, terminations of investigations, undertakings, and the imposition of sanctions.<sup>200</sup> *Economía* must review its own administrative act and revoke, modify, or confirm the act.<sup>201</sup> The ruling in an action for revocation, modification, or confirmation of the challenged determination must set out the action challenged and the legal principles that are the basis of the determination and the various conclusions of the determination.<sup>202</sup>

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<sup>198</sup> Correspondence with Adrian Vazquez, 3 Dec. 2009 (on file with authors).

<sup>199</sup> Isabel Parras, *Judicial Review*, undated, PowerPoint® presentation by *Economía*, 1 (copy on file with the authors).

<sup>200</sup> See FTL, Art. 94. See also *ibid.*, Arts 95—98 and the *Código Fiscal*, Arts 116—128.

<sup>201</sup> Parras, 199.

<sup>202</sup> See FTL, Art. 95.

Exhaustion of such administrative remedies, following the procedures specified in the Federal Tax Code, is a condition precedent for appeal of the *Economía* determination to TFJFA.<sup>203</sup>

**B. COURT REVIEW: *TRIBUNAL FEDERAL DE JUSTICIA FISCAL Y ADMINISTRATIVA***

The upper chamber of TFJFA<sup>204</sup> has jurisdiction, *inter alia*, over appeals from final antidumping, subsidy, and safeguard determinations once administrative appeals have been exhausted.<sup>205</sup> TFJFA is roughly the equivalent of an ‘Article I’ court in the United States, such as the US Tax Court; it is part of the executive branch but operates autonomously in exercising its powers.<sup>206</sup> Its functions are limited to reviewing administrative acts. Procedures before TFJFA, including those relating to compensatory duties, are governed both by the Federal Tax Code and by the Administrative Procedure Law (*Ley Federal de Procedimiento Contencioso Administrativo*).<sup>207</sup>

The standards of court (and Chapter 19 binational panel) review for *Economía*'s final determinations (and most administrative decisions by other Mexican administrative agencies) are as follows:

An administrative determination shall be declared illegal when one of the following grounds is established:

- I. Lack of jurisdiction of the official who issued, ordered, carried out the proceeding from which the said determination was derived.
- II. Omission of the formal requirements provided by law, which affects an individual's defences and goes beyond the result of the challenged determination, including the lack of legal grounding or reasoning, as the case may be.
- III. Procedural errors which affect an individual's defences and go beyond the result of the challenged determination.
- IV. If the facts, which underlie the determination, do not exist, are different or were erroneously weighed, or if (the determination) was issued in violation of applicable legal provisions or if the correct provisions were not applied.

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<sup>203</sup> *Ibid.*

<sup>204</sup> Formerly the *Tribunal Fiscal de la Federacion* (We have used ‘Mexican Tax Court’ in both instances).

<sup>205</sup> *Ibid.*

<sup>206</sup> Leycegui, 56.

<sup>207</sup> *Diario Oficial*, 27 Dec. 2006.

- V. When an administrative determination issued under discretionary powers does not correspond with the purposes for which the law confers those powers.<sup>208</sup>

*For purposes of subsections II and III of this article, the following defects (among others) shall not be deemed as impacting the affected party's defenses or the implications of the decision:*

- a) when a summons does not include a reference to the fact that such summons refers to an order for a home inspection, provided that such inspection is initiated with the person to whom the summons was addressed.*
- b) when a summons does not provide sufficient detail regarding the manner in which the person serving the summons ascertained that s/he was at the correct address, provided the proceeding took place at the address indicated on the document that had to be served.*
- c) when there were procedural defects with respect to the delivery of the summons, provided the proceeding contemplated under such summons directly involved the affected party or his/her legal representative.*
- d) when there have been irregularities with respect to summons, notices pertaining to requests for information, data or documents, or even in the requests themselves, provided the affected party has responded to such summons, notices or requests by submitting the required information or documentation.*
- e) when the tax payer who is being visited/inspected is not made aware of the results of a request made to third parties, provided the decision that is being challenged is not based on such results.*
- f) when certain evidence that has been submitted to prove facts included in the observations or in the last partial minutes of the proceeding has not been duly assessed, provided such evidence is not suitable to such end.*

Based on public policy considerations, the court may declare *sua sponte*: the lack of authority of the relevant official to issue the challenged decision or to order the issuance or follow the procedures leading to such decision, and the total absence of grounds or motivation for the decision.

Arbitration bodies and other bodies dealing with alternative dispute resolution mechanisms in the context of unfair practices, regulated under international treaties and agreements that Mexico has become a party to, will not be authorized to review the circumstances listed under this Article on an *ex parte* basis.<sup>209</sup>

Article 51 — except for part IV — remains heavily focused on procedural rather than substantive errors by the administrative agency, although, as noted earlier, the reviewing court will consider the consistency of the final determination with relevant provisions of

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<sup>208</sup> *Ley Federal de Procedimiento Contencioso Administrativo*, Art. 51. Prior to 2006, the standard of review (also applicable to NAFTA Ch. 19 proceedings against Mexican administrative decisions) was Art. 238 of the *Código Fiscal*.

<sup>209</sup> *Ley Federal de Procedimiento Contencioso Administrativo*, Art. 51 (authors' translation) (emphasis added).

the AD Agreement as well as Mexican law and regulations. The penultimate paragraph, giving the court authority to decide *sua sponte* that a government official acted without proper authorization, is a good example of the importance of such issues under Mexican law. It is notable that this standard of review is less deferential than the applicable standards of review for antidumping and countervailing duty determinations in the United States and Canada, with the Canadian standard of review generally being the most deferential of the three.<sup>210</sup>

Article 51 represents major changes as of 2006 in the standard of review for *Economía* (and other administrative agency) actions. As noted earlier, challenges to the validity of administrative determinations based on technical violations by *Economía*, particularly during verifications, resulted in the past in the nullifying of such determinations, even though there was no evidence of harm to any interested party. The italicized section of Article 51 will likely make it much more difficult for interested parties to convince the courts (or binational panels) to nullify *Economía* determinations on such highly technical grounds, in the absence of a showing of prejudice.

### **C. COURT REVIEW: AMPARO PROCEEDINGS**

Mexico's unique and important *amparo* proceedings for constitutional challenges against allegedly illegal acts by the government (including those relating to unfair trade practice determinations) have no parallel in the common law tradition and few parallels in other civil law jurisdictions. As a group of eminent scholars has noted:

It is no exaggeration to say that the record of adherence to the rule of law in Mexico is in direct proportion to the effectiveness of the federal courts in using *amparo* procedures, since it is by means of *amparo* that individuals are protected by the courts against governmental abuses of authority.<sup>211</sup>

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<sup>210</sup> See Bowman, Covelli, Gantz & Uhm, 24–25.

<sup>211</sup> S. Zamora et al., *Mexican Law* (Oxford: Oxford University Press, 2004), 258.

A thorough discussion of *amparo* proceedings is beyond the scope of this Article;<sup>212</sup> this section discusses the basic issues as they apply to *Economía*.

The writ of *amparo* apparently has its roots in the nineteenth century and is now governed by Articles 103 and 107 of the Mexican Constitution. *Amparo* proceedings have been defined by a leading Mexican constitutional scholar, Hector Fix, as:

a way and means of constitutional control, exercised by jurisdictional organs, under action, whose object is the constitutional protection of the plaintiff of affected party, in the cases set forth in Constitutional Article 103.<sup>213</sup> Thus, the Constitutional Protection tends to restore the damage that the party suffered in the exercise of the particular individual right demonstrated to be violated by the authorities.<sup>214</sup>

It is evident from the text that *amparo* proceedings reflect some unique characteristics: most are challenges against individual constitutional guarantees, as provided in Article 103(I); under Article 107(II), a judgment benefits only the individual claimant who has requested it, not other individuals suffering from the same illegal government action, in contrast to constitutional practice in the United States and to some other Mexican Federal Tax Court decisions. *Amparo* suits are heard only by the federal judiciary, including the Supreme Court, circuit courts, and federal district courts, and there must be a demonstration by claimants of a legally protected interest.<sup>215</sup> Under Articles 107(I)(a) and 107(IV), *amparo* is an extraordinary remedy,<sup>216</sup> at least as set out in the Constitution.<sup>217</sup>

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<sup>212</sup> See e.g., *ibid.*, Ch. 8, B, Zagaris, 'The Amparo Process in Mexico' (1998) 6 *United States — Mexico Law Journal*, 61, C. Loperena Ruiz, 'The Process of Amparo in Commercial Matters', *United States — Mexico Law Journal* 6 (1998): 43, A. Vazquez B., 'The Law of Amparo: A Critical Analysis of the Function and Uses of the Amparo Process in International Trade Law Matters', *United States — Mexico Law Journal* 6 (1998): 51, and G. Cavazos Villanueva, 'Binational Panels of Arbitration: Impartial Adjudicators or Spawning Ground of New Ideas?' (1997), 126—136, available at <tspace.library.utoronto.ca/bitstream/1807/11337/1/MQ29454.pdf>.

<sup>213</sup> Article 103 of the Mexican Constitution states:

'The federal courts shall decide all controversies that arise:

- I. Out of law or acts of the authorities that violate individual guarantees.
- II. Because of laws or acts of the federal authority restricting or encroaching on the sovereignty of the States.
- III. Because of laws or acts of State authorities that invade the sphere of federal authority'.

<sup>214</sup> H. Fix Zamudio, 'A Brief Introduction to the Mexican Writ of Amparo', *California Western International Law Journal* 9 (1979): 306.

<sup>215</sup> *Ibid.*, 264—265.

<sup>216</sup> Parras, above n. 199, 4.

<sup>217</sup> Article 107 provides, in pertinent part, as follows:

In the area of antidumping and countervailing duty law, most *amparo* proceedings are reviews of the determinations by TFJFA, which themselves are reviews of administrative appeals within *Economía*. Determinations by the *amparo* court of first instance are appealable to the circuit courts and, in very limited circumstances, to the Supreme Court.<sup>218</sup> The *amparo* court has the authority to require *Economía* to restore the claimant's right to his or her status before the violation, and to direct *Economía* to act in a manner consistent with the claimant's constitutional rights.

According to Mexican trade lawyer and Chapter 19 Panellist Adrian Vasquez, indirect *amparo* actions challenge the issuance by the authority of a provision of general character that is considered unconstitutional, including laws, treaties, and federal, local, or other administrative regulations.<sup>219</sup> Indirect *amparo* determinations may be subject to

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All controversies mentioned in Art. 103 shall be subject to the legal forms and procedure prescribed by law, on the following bases:

- I. A trial in *amparo* shall always be held at the instance of the injured party.
- II. The judgment shall always be such that it affects only private individuals, being limited to affording redress and protection in the special case to which the complaint refers, without making any general declaration as to the law or act on which the complaint is based.
- III. In judicial civil, criminal, or labor matters a writ of *amparo* shall be granted only:
  - a. Against final judgments or awards against which no ordinary recourse is available by virtue of which these judgments can be modified or amended, whether the violation of the law is committed in the judgments or awards, or whether, if committed during the course of the trial, the violation prejudices the petitioner's defense to the extent of affecting the judgment; provided that in civil or criminal judicial matters opportune objection and protest were made against it because of refusal to rectify the wrong and that if (the violation) was committed in first instance, it was urged in second instance as a grievance.
  - b. Against acts at the trial, the execution of which would be irreparable out of court, or at the conclusion of the trial once all available recourses have been exhausted.
  - c. Against acts that affect persons who are strangers to the trial.
- IV. In administrative matters, *amparo* may be invoked against decisions which cause an injury that cannot be remedied through any legal recourse, trial, or defense. It shall not be necessary to exhaust these remedies when the law that established them, in authorizing the suspension of the contested act, demand greater requirements than the regulatory law for trials in *amparo* requires as a condition for ordering such suspension.

<sup>218</sup> See the Mexican Constitution, Art. 107(VI, VII, and IX).

<sup>219</sup> Vasquez, 53.

further judicial review, while direct *amparo* determinations are generally subject to only one level of review, by the circuit courts,<sup>220</sup> as noted earlier. However:

as a general rule direct amparo parties may not challenge the constitutionality of laws or regulations. It is understood that a constitutional violation has occurred...Violations to individual rights made in the sentence [decision] or resolution itself are also affected. Any of these errors give individuals the right to pursue amparo protection and obtain the restoration of the violated individual rights.<sup>221</sup>

*Amparo* was supposedly discouraged initially in international trade law cases because of court decisions holding that the Mexican interested parties were not really parties but acting as assistants of Mexican authorities. Foreign producers were also said to lack standing because they were not financially responsible for paying the compensatory duties, which is the responsibility of the importer of record. However, Mexican court decisions later determined that both importers and foreign producers could take advantage of *amparo* jurisdiction.<sup>222</sup> The flexibility of the procedure is such that, under appropriate circumstances, a determination by *Economía* can be appealed directly to *amparo* courts or to *amparo* jurisdiction after administrative remedies and TFJFA jurisdiction have been exhausted, the latter providing several bites to the proverbial apple.

Notwithstanding the challenges to the use of *amparo* for international trade matters, during the years of Mexico's antidumping practice from 1987 through 1995, about sixty of *Economía's* final compensatory duties determinations had been appealed directly to the *amparo* courts; *amparo* was granted in nine, denied in forty, and the rest were pending.<sup>223</sup> In several instances, the *amparo* courts have explicitly upheld the constitutionality of the FTL and the compensatory duties imposed under it.<sup>224</sup>

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<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*, 54.

<sup>222</sup> *Ibid.*, 58. See also Tesis de jurisprudencia No. 52/96, Segunda Sala, Novena Epoca, vol. 4, 27 Sep. 1996, 227 ('foreign exporters have a legal interest to lodge an *amparo* against the administrative determinations issued in investigative procedures related to unfair trade practices') (authors' translation).

<sup>223</sup> Leycegui, above n. 3, 57 (quoting Mexican government data).

<sup>224</sup> G. Bárcenas, 'Empresa Amparada contra Cuotas Compensatorias es Leonesa', *El Diario del Estado de Guanajuato* (6 Mar. 2008).

Mexican courts have determined that *amparo* proceedings may not be used against binational panel decisions on the ground that the issuance of a binational panel determination in itself, without confirming actions by the investigating authority (then SECOFI), does not cause such injury to an individual resulting from the actions of the government so as to give the *amparo* tribunal jurisdiction. In any event, according to the *amparo* court, any violation is not caused by a court action reviewable under *amparo* jurisdiction.<sup>225</sup> This is consistent with the general *amparo* principle that actions can be brought only against persons who hold public office, whether legally or *de facto*, and are able to perform official acts or duties as a result, and not against private individuals.<sup>226</sup>

#### **D. EFFECT OF REVIEW**

At the request of an interested party, the Secretary must carry out the final decisions issued as a consequence of a revocation appeal, a nullification judgment, or an order from an alternative dispute settlement mechanism (e.g., Chapter 19 of NAFTA), on condition that the requesting party was a party to the proceeding that resulted in the ruling.<sup>227</sup> The request must be submitted to the Secretary within thirty days of the issuance of the final ruling.

#### **E. NAFTA CHAPTER 19 REVIEW**

An interested party in an antidumping or countervailing duty proceeding brought in Mexico against enterprises in another NAFTA Party may seek review of an antidumping or countervailing duty determination by *Economía* under Chapter 19 of NAFTA, in lieu of judicial review in Mexican courts.<sup>228</sup> The binational panel, effectively

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<sup>225</sup> *USX Corporation y otras, Amparo en Revision No. 280/98*. An attempt was made to serve one of the authors who had served as a binational panellist in one of the first Ch. 19 actions against Mexican authorities, but the *amparo* action was ultimately dismissed. See also Cavazos, 130 (noting that a Mexican *amparo* court had determined that a binational panel resolution was not final and thus not challengeable in *amparo* because the determination would have to be implemented by *Economía*).

<sup>226</sup> Zamora et al., 264—265.

<sup>227</sup> See FTL, Art. 89E.

<sup>228</sup> The same rules of course apply to such actions brought by administrative authorities in the United States and Canada. For a more in-depth discussion of NAFTA Chapter 19, see Bowman, Covelli, Gantz & Uhm, Ch. 2; Gantz, D., *Resolution of Trade Disputes Under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 Law & Policy in Int'l Business 297 (1998). Binational panels

acting as a surrogate for the national court, reviews the consistency of *Economía's* administrative determination with Mexican antidumping or countervailing duty laws. In a sense, the binational panel process serves a function in some respects analogous to diversity jurisdiction in US federal courts: it removes a proceeding from a local (national) court that potentially might treat (or be perceived as treating) domestic parties more favorably than parties from outside the jurisdiction, and places it with a reviewing body (the binational panel) that is not an organ of the domestic state in question (in this case, Mexico). It is virtually unique in the sense that it is an international (binational) tribunal, but reviews national administrative decisions not under WTO law but under the unfair trade laws of the nation imposing the antidumping or countervailing duties, including as appropriate the 'statutes, legislative history, regulations, administrative practice and judicial precedents'.<sup>229</sup>

Binational panel review is not automatic; it must be requested. Technically speaking, the interested party in question cannot itself request binational panel review; rather, it must ask its national government to make the request. Because NAFTA Party governments have no discretion to decline such requests from their domestic interested parties, as a practical and legal matter interested parties can obtain binational panel review of *Economía* determinations if they so desire. NAFTA Party governments also can request binational panel review on their own motion.<sup>230</sup>

Requests for binational panel review must be made in within thirty days of the publication of the final determination or of the imposition of the preliminary measures being challenged.<sup>231</sup> A timely request removes the proceeding from the Mexican judicial system entirely, so that no further judicial review or appeal is possible.<sup>232</sup> The binational panels themselves are comprised of trade law experts from each affected NAFTA Party. While in theory panel formation is intended to work semi-automatically, with panelists

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have no jurisdiction over other trade-related administrative decisions, such as those relating to customs classification or valuation.

<sup>229</sup> See NAFTA, Art. 1904(2).

<sup>230</sup> See NAFTA Art. 1904(2)–(5).

<sup>231</sup> *Ibid.*, Art. 1904(4).

<sup>232</sup> *Ibid.*, Art. 1904(11).

selected from a roster of trade experts maintained by each NAFTA Party, in practice the process has not always worked effectively.<sup>233</sup> Once a panel has been formed, the parties that may participate in the binational panel review process are the same as those permitted to appear in the Mexican judicial proceedings that they supersede; and the laws applied, standards of review used, and general legal principles considered by the binational panel are the same as those for Mexican courts, as discussed above.<sup>234</sup> Panel decisions are by majority vote, and they are issued via written opinion (often with dissenting opinions as well).<sup>235</sup> Unlike domestic Mexican courts, however, binational panels may not reverse a determination by *Economía*. Rather, the panel may affirm the administrative determination or remand it to *Economía* for further determinations not inconsistent with the binational panel's decision.<sup>236</sup>

There is no appeal of a binational panel decision. The only available remedy is the narrow one of an Extraordinary Challenge Committee (ECC). An ECC may be formed to hear allegations that:

- (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct, (ii) the panel seriously departed from a fundamental rule of procedure, or (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, *and*
- (b) any of the actions set out in subparagraph (a) has materially affected the panel's decision *and* threatens the integrity of the binational panel review process . . . .<sup>237</sup>

The rules of procedure for ECCs are similar to those of binational panels. ECCs can deny the asserted challenge (which has the effect of affirming the binational panel's decision), 'vacate the original panel decision', or 'remand it to the original panel for action not inconsistent with the [ECC]'s decision'.<sup>238</sup> To date, Mexico has not resorted to the

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<sup>233</sup> *Ibid.*, Annex 1901.2(1) & 1904.4. For further discussion, see Bowman, Covelli, Gantz & Uhm, 27–29.

<sup>234</sup> *Ibid.*, Art. 1904(3)

<sup>235</sup> *Ibid.* Annex 1904.4(5).

<sup>236</sup> *Ibid.*, Art. 1904(8).

<sup>237</sup> *Ibid.*, Art. 1904(13).

<sup>238</sup> *Ibid.*

extraordinary challenge process, although the United States has against both Mexico and Canada, in each case without success.<sup>239</sup>

While binational panel review removes a case from the Mexican judicial system entirely, it is nonetheless possible to challenge constitutionally the binational panel review process *itself* pursuant to Mexico's *amparo* jurisdiction. An early challenge to the binational panel process was in fact lodged under Mexico's *amparo* jurisdiction, but was ultimately rejected by the Supreme Court, effectively because the complainants could not demonstrate that harm had been caused by actions of the government (the then-Secretary of Economy and Industrial Development, or SECOFI).<sup>240</sup> Thus, to date the binational panel process remains in place as a parallel avenue for review of antidumping and countervailing duty determinations by *Economía*.

The Chapter 19 mechanism has been used extensively by interested parties against all three NAFTA Parties, since historically all three have been frequent users of antidumping and countervailing duty laws in their NAFTA relations and elsewhere, as noted earlier.<sup>241</sup> As of February 2009, 124 Chapter 19 actions had been filed, 84 against the US authorities, 22 against Canadian authorities and 18 against the Mexican authorities. Of these, more than a third were terminated by the request of the parties, and more than 50 decisions had been rendered; a total of less than 15 remained pending.<sup>242</sup> Of

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<sup>239</sup> See, e.g., *Gray Portland Cement and Clinker from Mexico*, ECC-2000-1904-01 USA, 30 Oct. 2003, 7 (against Mexico), and *Pure Magnesium from Canada*, ECC-2003-1904-01 USA, 7 Oct. 2004 (against Canada). In the latter case, the ECC found that the binational panel had manifestly exceeded its powers by failing to apply the correct standard of review, and that such action materially affected the Panel's decision, but that because 'the Panel's action did not threaten the integrity of the Binational Panel review process,' the binational panel decision should stand.

For a detailed case study of the circumstances surrounding *Gray Portland Cement and Clinker*, see Bowman, Covelli, Gantz & Uhm, Ch. 14.

<sup>240</sup> *USX Corporation y Otra, Amparo en Revisión* No. 280/98, *Suprema Corte de Justicia, Primera Sala*.

<sup>241</sup> WTO, Antidumping Investigations by Reporting Country (1995–2006)

<[www.wto.org/english/tratop\\_e/adp\\_e/adp\\_stattab2\\_e.xls](http://www.wto.org/english/tratop_e/adp_e/adp_stattab2_e.xls)> (showing that during the period the United States had reported 373 actions, leading the WTO, with Canada filing 142 and Mexico, 92, putting all of them in the top 12 world-wide). .

<sup>242</sup> NAFTA Secretariat, Status Report of Dispute Settlement.

the panel decisions rendered, a 2005 study determined that over 80 per cent resulted in unanimous rulings regardless of panellist nationality.<sup>243</sup>

## **XVI. CONCLUSION**

Mexican antidumping and countervailing duty law and practice have matured significantly in the nearly twenty-five years since the first statutes were enacted. While there are still some deficiencies (as in almost any investigating authority anywhere in the world), as indicated by several WTO DSB decisions, the level of transparency, procedural due process, and expertise of the responsible functionaries has steadily increased. This is as would be expected of a nation that is a Member not only of the WTO, but also of NAFTA and the Organization for Economic Cooperation and Development (OECD), and one that maintains in UPCI a cadre of expert international trade attorneys to oversee *Economía's* procedures and determinations.

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<sup>243</sup> Leycegui, Remarks Given at DC Bar Association Conference.