The International Trade Law Review

Second Edition

Editors
Folkert Graafsma and Joris Cornelis

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EDITORS' PREFACE

Ancient wisdom has it that 'anything can happen' in this year of the 'Fire Monkey'.[1] And indeed, while some of this year's events could have been foreseen, such as the impending expiry of part of China's Protocol of Accession, other remarkable incidents such as the Brexit vote have confirmed ancient wisdom. Such events – and the issues and challenges they present – have helped to further propel international trade law from a niche area of interest to a select few onto a stage with a larger and more captive audience.

Brexit has illustrated that a domestic decision can have unexpected and far-reaching international ramifications. And while the world is still struggling to fully comprehend its economic and trade impact, the trading relationship of a number of economies with China continues to attract attention. Notably, it remains to be seen how certain WTO members will respond to the impending expiry of part of China's Protocol of Accession. The relevant part of Section 15 of the Protocol has thus far permitted investigating authorities to derogate from regular calculation methods to determine domestic prices and costs for Chinese products. This impending expiry, set for 11 December 2016, has already stirred up debates ranging from diverse places such as the European Parliament to the *Global Trade and Customs Journal*.

Moreover, the recent findings of the Panel in *Argentina – Biodiesel*, prohibiting investigating authorities from deviating from actual cost records of an exporter in regular market-economy anti-dumping proceedings, has further raised the stakes of the impending expiry of part of the Protocol. Although this Panel Report is currently still under appeal, the additional consequence of this Report is that, while on 11 December part of the Protocol will expire, the previously used alternative cost calculation methods for 'regular' market economies will likewise no longer be permitted towards China after that date. As a result of

1 The Chinese calendar contains horoscope signs based on a yearly categorisation. According to this horoscope, the first day of the Red (Fire) Monkey started on 4 February 2016. The year 2016 is counted per the Gregorian calendar, and (more or less) equals the 4,713th year counted per the Chinese calendar. As a trivial fact it can be noted that famous 'monkeys' include Justin Timberlake and Leonardo Da Vinci.

these combined constrictions, certain jurisdictions have felt compelled to initiate a flurry of anti-dumping proceedings right now, as currently they can still deviate from local Chinese costs and prices without controversy.

We are therefore deeply grateful for the continued participation and support from the following authors who were willing to share their profound knowledge and expertise in this field: Phillipe De Baere from Van Bael & Bellis for the WTO chapter, Alfredo A Bisero Paratz at Wiener Soto Caparros for the Argentine chapter, Mauro Berenholc at Pinheiro Neto Advogados for the Brazilian chapter, our friend and colleague Elena Kumashova for the Eurasian Economic Union Chapter, Shiraz Patodia at Dua Associates for the Indian chapter, Adrian Vázquez at Vázquez Tercero y Zepeda Abogados for the Mexican chapter, Bulent Hacioglu at Trade Resources Company for the Turkish chapter, and the undersigned for the European Union chapter.

And we are even more pleased and honoured to welcome onboard new and acclaimed contributors. Thanks to their in-depth know-how and contributions, this book brings together an even broader set of rich experiences: Ignacio Garcia at Porzio, Rios, Garcia & Asociados Abogados for the Chilean chapter, Erry Bundjamin at Bundjamin & Partners for the Indonesian chapter, Yuko Nihonmatsu and Fumiko Oikawa at Atsmui & Sakai for the Japanese chapter, Lim Koon Huan at Skrine for the Malaysian chapter and, last but not least, Alex Schaefer and Jeff Snyder at Crowell & Moring LLP for the US chapter.

We are indebted to all these outstanding practitioners, who in spite of their demanding schedules, have taken the time to preserve and pass on their insights, gained as the result of years of practice in the field of international trade. We hope and trust therefore that readers find their chapters both useful and insightful.

Folkert Graafsma and Joris Cornelis
Vermulst Verhaeghe Graafsma & Bronckers (V V G B)
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Chapter 11

MEXICO

Adrián Vázquez Benítez and Emilio Arteaga Vázquez[1]

I THE CONTEXT

Chinese and steel imports continued to be two of the biggest concerns in the trade environment of Mexico throughout 2015 and 2016.

On the one hand, while it is true that Mexico's currency lost 30 per cent of its value over 2015 in relation to the US dollar, on the other hand, Chinese imports continue to grow at a steady pace and, as of December 2015, Mexico's trade deficit with China reached an outstanding US$65,115 million. The currency situation might have been a natural remedy against imports in general; however, the Mexican industry is concerned by the fact that as of December 2016 China will gain market status with regard to the methodology to determine dumping margins in future investigations or reviews against China – the steel industry being the most concerned of all.

The OECD has said that China has created an overcapacity of 400 million tonnes, which has distorted the world markets. In 2015 alone, Chinese exports grew by 20 per cent reaching 112 million tonnes, thereby causing a substantial decrease in steel prices.

Mexico is the second largest steel producer in Latin America, behind Brazil. In 2015 it reached a production of 18.2 million tonnes, imported 13.7 million tonnes and exported 4.3 million tonnes. Imports increased more than 10 per cent while exports dropped substantially, thereby creating a deficit of 9.4 million tonnes (Chinese steel imports accounted for 1.1 million tonnes). Accordingly, in April 2016, Mexico extended the transitory import duties of 15 per cent on 97 steel-related tariff items, which will expire in October 2016, in an effort to decrease the surge of steel imports and give the Mexican steel industry a temporary remedy. In a sense, the transitory import duties partially explain why there has been a decrease in the number of trade remedy investigations in 2016.

1 Adrián Vázquez Benítez is managing partner and Emilio Arteaga Vázquez is an associate at Vázquez Tercero & Zepeda.

However, CANACERO (the Mexican Steel Chamber) has warned that the underlying problem is that in December 2016, Mexico, as well as all WTO members, will be obligated to give China market economy status. CANACERO states that if Mexico gives China market economy status, Mexico will be weakened against dumped imports from China. Thus, Mexico along with Europe and the US has expressed in the OECD Steel Committee that China should not be given market economy status and that regions should have a unified position towards China to reach global solutions.

II OVERVIEW OF TRADE REMEDIES

As of 24 July and 24 August 1986 respectively, Mexico became a signatory country to the Anti-dumping Code and acceded to the General Agreement on Tariffs and Trade (GATT),[2] and since 1 January 1995, it has been a member of the World Trade Organization (WTO). One year prior to its accession to GATT, Mexico established its trade remedies regime through the Law that Regulates the Application of Article 131 of the Constitution as regards Foreign Trade. The former Mexican Ministry of Commerce started to conduct trade remedy investigations in 1987,[3] and since then it has initiated 323 trade remedy investigations and imposed 177 and anti-dumping and countervailing measures.[4] As a result of Mexico's commitments in Annex 1905.15 of the North American Free Trade Agreement (NAFTA), the aforementioned law was abrogated on 23 July 1993, and replaced by the Foreign Trade Law (FTL), which continues to be in force.[5]

Historically, anti-dumping duties have been the trade defence instrument most frequently used by Mexican authorities. On the one hand, 92 per cent of the total number of initiated investigations and imposed measures are anti-dumping. Subsidy and safeguard investigations, on the other hand, account for 7 per cent and 1 per cent respectively.[6] Over the period 2006–2016, one safeguard, four subsidy and 54 anti-dumping investigations have been initiated, while only 38 new anti-dumping duties and three countervailing subsidy measures have been imposed.[7] Thus, Mexican authorities continue to rely predominantly on anti-dumping duties as their preferred trade defence instrument.

2 Constance A Hamilton, 'Review of trade and investment liberalization measures by Mexico and prospects for future United States-Mexican relations' (USTIC Publication, 1990) pp. 4–15.

3 Secretaría de Economía, www.gob.mx/cms/uploads/attachment/file/105937/Estadisticas_de_la_UPCI.pdf, accessed 15 July 2016.

4 Ibid.

5 North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289.

6 See footnote 3, *supra*.

7 Ibid.

Trade remedy investigations are conducted by the Ministry of Economy through its Foreign Trade Practices Unit (UPCI) and as of July 2016 it has six ongoing original anti-dumping investigations.[8] In five of those six the product under investigation is a metal-related good.[9] Countries involved are China, Taiwan, South Korea and India.[10]

Mexico currently has 67 countervailing measures in force,[11] 64 of which are anti-dumping duties while the remaining three are countervailing measures on subsidies. The domestic industry frequently requests anti-dumping investigations into Chinese exporters, and these have led to 30 anti-dumping duties applicable to Chinese products. The country of origin of products with the second most anti-dumping duties is the United States (eight), followed by India (five), Russia and Ukraine, with four duties each, and Brazil (three). In recent years the Mexican steel industry has been constantly active in the trade remedy system, alleging anti-dumping practices from steel-exporting countries. Consequently, the majority of anti-dumping duties apply to the metallic industries and manufactured goods (39 duties), followed by the chemical, oil derivate and plastic industry with 10.

As noted above, subsidy and safeguard investigations are not commonly used by Mexican authorities and the domestic industry. The most recent four investigations into subsidies have targeted pharmaceutical products – three from India and one from China – while countervailing measures were imposed only with respect to Indian products. With respect to safeguards, the most recent investigation initiated, on welded helicoidal steel pipes, dates from 2010. The UPCI decided not to impose safeguard measures. The domestic industry, however, recently succeeded in the imposition of anti-dumping duties on all three countries.[12]

When dealing with Chinese products in anti-dumping investigations, the UPCI uses a surrogate country approach for the calculation of normal value. Brazil is frequently used as surrogate country, and India, the United States and Colombia have also been used. The UPCI calculates individual dumping margins to exporters or producers, provided they duly submit all the information requested by the UPCI through questionnaires. An unduly filed submission may greatly affect the possibility of achieving individual margins. On another

8 Ibid.

9 Coated sheet steel from China and Taiwan (initiated 17 December 2015); Ferromanganese from South Korea (initiated 8 January 2016, preliminary 11 July 2016); Steel wire from China (initiated 2 September 2015, preliminary 22 December 2015); Cooking Aluminum Items from China (initiated 15 April 2015, preliminary 22 December 2015); Ferro-silicomanganese from India (initiated 7 September 2015, preliminary 29 March 2016), and Ceramic tiles from China (initiated 8 May 2015, preliminary 19 May 2016).

10 Ibid.

11 The total number of measures includes provisional anti-dumping duties and excludes one measure imposed on chicken legs and thighs from the United States. In its final determination, issued on 20 September 2012, UPCI imposed the anti-dumping measure but suspended it because of a sudden price volatility caused by the avian influenza virus type A, subtype H7N3. This measure is currently being challenged at a NAFTA panel.

12 Welded Longitudinal and Helicoidal Steel Pipe from India, Spain and the United States (initiated 23 December 2014, preliminary 14 July 2015, final 20 April 2016). Surprisingly, the United States was hit with the highest duty, while Spain and India obtained a relatively small duty.

subject, price undertakings are very rare in the Mexican trade remedy system. The most recent price undertaking was in 2014, which dealt with a highly complex case concerning an anti-dumping investigation into cold-rolled steel from Korea. Korean producers have recently requested an increase of the quota, through an administrative review of the undertaking.[13] Chinese ceramic tile producers are also approaching the UPCI to reach an agreement.

III LEGAL FRAMEWORK AND WTO CONFORMITY

According to Article 133 of the Mexican Constitution, treaties entered into by the president and ratified by Mexico shall become supreme law of the Union, along with the Constitution and the federal laws. Therefore treaties, such as the WTO agreements, are self-executing in nature. The FTL is the relevant legislation that regulates international trade, including trade defence instruments. The Regulations to the Foreign Trade Law (RFTL), which were enacted by the executive branch and published on 30 December 1993, further develop the provisions of the FTL. In the event that the FTL or RFTL contradict an international treaty provision, Mexican authorities shall apply directly the latter in accordance with the principle of hierarchy of laws established in the Mexican Supreme Court of Justice's jurisprudence. In sum, treaties are considered to be at a superior level with respect to laws, while the latter are above regulations. In the event of failure to comply with treaty provisions, the acts of the Mexican authorities can be challenged by companies and individuals through legal remedies. Hence, the acts and decisions of the UPCI must be consistent with the Agreement on Implementation of Article VI of the GATT 1994 (ADA), the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Safeguards (AS).

Although the FTL and RFTL were enacted because of Mexico's commitments under NAFTA, they are in general consistent with the WTO agreements, as they were enacted when NAFTA and relevant WTO agreements were being negotiated.[14] The FTL and RFTL, however, have been subject to few amendments. The FTL has been amended on five occasions,[15] and the RFTL only twice.[16]

In contrast to the jurisdictions of most WTO members, Mexico has a particular feature in its trade remedy system: in accordance with footnotes 17 and 42 of the ADA and ASCM, respectively,[17] and with Mexico's Schedule to Annex 1905.15 of NAFTA, the FTL

13 Cold-rolled steel from South Korea, administrative review (initiated 25 May 2016).

14 The NAFTA negotiations were initiated on 5 February 1991 and concluded on 7 December 1992, while the negotiations of the Anti-dumping, Safeguard and Subsidies Agreements were initiated after the Ministerial Declaration on the Uruguay Round, issued on 20 September 1986, and were concluded when the Agreement Establishing the World Trade Organization was signed on 15 April 1994.

15 22 December 1993, 31 December 2000, 13 March 2003, 24 January 2006, and 21 December 2006.

16 29 December 2000 and 22 May 2014.

17 Footnote 17 and 42 of the ADA and ASCM provide the following: 'Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.'

and RFTL provide for the right of interested parties to an investigation to access and examine confidential information contained in the administrative record when acting through their external legal representatives and provided that they meet certain conditions.[18]

There have been important nuanced differences between domestic law and relevant WTO law. Notably, Mexico amended Article 68 of the FTL on 21 December 2006, to bring it into conformity with Article 5.8 of the ADA, as it was found inconsistent in *Mexico – Anti-Dumping Measures on Rice*.[19] However, Mexico has recently amended Article 105 of the RFTL, contradicting articles 5.8 and 11.9 of the ADA and ASCM.[20] In accordance with the reasoning of the Appellate Body in the aforementioned case, Article 5.8 of the ADA mandates the 'immediate termination' of the investigation in respect of the individual exporter or producer for which a zero or *de minimis* margin is established.[21] Therefore, the 'logical consequence' is to exclude said exporters or producers from the scope of subsequent administrative and changed-circumstances reviews, because said reviews examine, respectively, the 'duty paid' and 'the need for the continued imposition of the duty'.[22] Article 105 of the RFTL would seem currently inconsistent with Articles 5.8 and 11.9 of the ADA and ASCM respectively, because it allows the UPCI to investigate in administrative or changed-circumstances reviews those individual exporters and producers found to have zero or *de minimis* dumping or subsidy margins in a sunset, administrative or changed-circumstances review. In a recent administrative review on butyl-ether from the United States, a US producer was withdrawn from the anti-dumping order, while the UPCI maintained its legal authority to conduct subsequent reviews of its dumping margins.[23]

Another nuance between WTO and domestic law is with respect to when the period of investigation should end in anti-dumping investigations. Although the ADA is silent, the Committee on Anti-Dumping Practices established that data collection for dumping investigations should end as close to the date of initiation as is practicable.[24] The FTL is silent in this regard; however, the RFTL departs from the Committee's decision as it provides that the period of investigation should be as close to the date of the domestic industry petition instead of the initiation of the investigation.[25]

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18 Adrián Vázquez, 'Protection of Confidential Information in the Mexican Trade Remedy System', (2014) Vol. 9 No. 7/8 *Global Trade and Customs Journal*.

19 Appellate Body report, *Mexico – Definitive Anti-dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII at para. 306.

20 Article 5.8 of the ADA in its relevant part provides: 'There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible […] Article 11.9 of the SCM in its relevant part provides: […] There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidised imports, actual or potential, or the injury, is negligible.'

21 Appellate Body report, *Mexico – Definitive Anti-dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII at para. 218.

22 Ibid. at para. 305.

23 Butyl-ether from the United States, administrative review (initiated 5 December 2014, preliminary 16 July 2015, final 25 May 2016).

24 G/ADP/6, adopted by the Committee on Anti-Dumping Practices on 5 May 2000.

25 Article 76 of the RFTL.

With respect to safeguards, the FTL and RFTL fail to include the condition of 'unforeseen developments' established in Article XIX(a) GATT 1994 as a cumulative condition to impose safeguards in accordance with the Appellate Body's report in *Argentina – Footwear (EC)*.[26]

Finally it should be said that once an investigation is ended and ordered for publication, an inter-ministry commission – the Foreign Trade Commission (COCEX) – should vote on the results.[27] COCEX has no decision-making authority.

IV RECENT CHANGES TO THE REGIME

The most recent amendment to the FTL was published on 21 December 2006, whereas the RFTL was only recently amended again on 22 May 2014. These amendments to the RFTL were discussed in last year's Mexican chapter for *The International Trade Law Review*.[28]

The 2015 amendments to the internal regulations of the Federal Tax and Administrative Court came with the purpose of creating specialised chambers on foreign trade matters. The said specialised chambers have begun to review final determinations with regard to anti-dumping sunset reviews. Notwithstanding this, there is a pending judicial controversy in which the claimant has challenged the judicial decision alleging that the judicial review authority relies not on the specialised chamber in foreign trade matters, but rather on the superior chamber. In fact, one may argue that a proper reading of the internal regulations vests judicial authority on the specialised chambers with regard to the application of anti-dumping and countervailing duties made by customs authorities, but not in the determination of anti-dumping and countervailing duties made by the trade remedy investigating authorities (i.e., the UPCI).

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

As noted previously, investigations against China constitute the vast majority of Mexico's unfair trade practice investigations. During 2015, Mexico initiated nine anti-dumping investigations. Five of those investigations were against China. During 2016, only one anti-dumping investigation has been initiated, although not against China.

Four out of five investigations against China during 2015 relate to basic metal industries and products manufactured therefrom. Only one of these four investigations related to the steel industry has come to an end and the UPCI imposed definitive anti-dumping measures, while two of them saw the imposition of provisional anti-dumping measures and one has not reached a preliminary finding. Although the outcome of these latter cases could result in a

26 Appellate Body report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I at para. 89.

27 COCEX stands for Comisión de Comercio Exterior.

28 Adrián Vázquez and Emilio Arteaga, 'Mexico' in Folkert Graafsma, Joris Cornelis and Konsantinos Adamantopoulos (eds), *The International Trade Law Review* (Law Business Research, 2015) pp. 79–80.

negative determination of dumping or injury, it is quite likely that all final determinations will impose definitive anti-dumping measures, given the current trade environment with China and in the steel world market.

Mexico continues to harden its administrative practice towards China, and the preliminary finding in the ceramic tiles case confirms the current criterion of the UPCI.[29] In essence, any party that is a non-producing exporter of the goods subject to investigation shall be deprived of the right to have an individual dumping margin. The UPCI's central argument for ceasing to calculate specific dumping margins for non-producing exporters is that two dumping margins could be calculated (one for the producing exporter and one for the trader) in connection with a single transaction, and that such a result is illogical given that trading companies are not those who establish the export price.

Likewise, in the preliminary finding in the ceramic tiles case, the UPCI also dealt with the choice of surrogate country, and confirmed that the choice of surrogate country is not a matter of preference among countries, but rather a reasonability criterion. Thus, the UPCI determined that pretending to assess which is a 'better surrogate country' would impose on the parties an unreasonable burden of proof, given that it would imply that the parties would have to analyse each and every one of the possible surrogate countries, thereby affecting control of the investigation by the ministry and the consequential extension of terms beyond those provided by law. With this approach, it shall suffice for the surrogate country proposed by petitioners to be reasonably similar to China for it to be maintained during the preliminary and final stages, given that the standard is not an assessment of which surrogate country is most appropriate, rather that it shall suffice that it be reasonably similar.

What comes into question now is what the position of the UPCI will be after December 2016, in light of the market economy status that Mexico is obligated to afford to China after 2016, upon conclusion of the 15-year period following China's accession to the WTO. There has not been an official position from Mexican authorities with regard to whether the UPCI will begin affording China market economy status or whether it will maintain the surrogate country approach.

A highly interesting case was the apples from the US anti-dumping investigation, initiated in December of 2014 and concluded in June 2016. Contrary to Article 5.10 of the WTO Anti-dumping Agreement, the investigation took over 18 months, after having delayed a preliminary determination 13 months after initiation.[30] In such investigation, the UPCI decided to sample US exporters, a practice that is not often seen in Mexico, and determined provisional dumping duties as high as 20 per cent, while three sampled producers obtained a zero per cent duty, and non-sampled producers obtained a 7.5 per cent duty. However, the final determination concluded with a negative finding for the US industry, in light of no injury causation from dumped imports. This case without a doubt would have undergone a WTO challenge, which Mexico chose to avoid by issuing a negative finding.

29 Ceramic tiles from China (initiated 8 May 2015, preliminary 19 May 2015).

30 Apples from the US (initiated 4 December 2014, preliminary 6 January 2016, final 7 June 2016).

VI TRADE DISPUTES

i Mexico under the WTO

In this area, the most recent trade disputes related to trade remedies involving Mexico are no longer recent, as their reports were adopted on 24 July 2007 and 21 October 2008.[31] Thus, under this section, although not related to trade remedies, we will briefly address Mexico's most recent WTO disputes as a complainant, namely *US – COOL (Article 21.5 – Canada and Mexico)* and *US – Tuna II (Article 21.5 – Mexico)*.[32] In both disputes the challenged measures brought into compliance involved regulation surrounding labels, one being origin-related and the other an 'eco-label' that were found to be inconsistent with certain provisions of the Agreement on Technical Barriers to Trade (TBT) and GATT.[33] This section will solely address the findings related to the claims of Article 2.1 TBT, given their relevance in trade regulations.

In *US – COOL (Article 21.5 – Canada and Mexico)* the measure brought into compliance required, as under the original measure, retailers to provide country origin information on certain meat products with one of the five specified labels based on an origin criterion.[34] In essence, the amended measure continued to induced livestock and meat producers in the US to use domestic livestock as up-stream producers had to comply with the requirement of an unbroken chain of origin information.[35] Furthermore, given the specificity of the amended labels, the challenged measure increased the record-keeping burden (and segregation) on livestock and meat producers to substantiate origin claims in the meat cuts of certain labels.[36]

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31 Panel report, *Mexico – Anti-dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207; and Panel report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX.

32 Appellate Body report, *US – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of DSU by Canada and Mexico*, WT/DS384/RW; WT/DS386/RW, adopted 29 May 2015 (*US – COOL (Article 21.5 – Canada and Mexico)*); and Appellate Body report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of DSU by Mexico*, WT/DS381/AB/R, adopted 3 December 2015 (*US – Tuna II (Article 21.5 – Mexico)*).

33 Articles 2.1 TBT and III:4 GATT in Appellate Body report, *US – COOL (Article 21.5 – Canada and Mexico)*; and Articles 2.1 TBT and I:1 and III:4 GATT in Appellate Body report *US – Tuna II (Article 21.5 – Mexico)*.

34 For instance, label A is for meat cuts from livestock born, raised and slaughter in the United States; label B is for meat cuts from livestock born and raised in one country (or more countries if applicable) and the United States, while the slaughtering is also done in the United States; label C is for meat products from livestock born and raised in one country (or more countries if applicable), while the livestock is only imported into the United States for slaughtering purposes see Appellate Body report, *US – COOL (Article 21.5 – Canada and Mexico)* at paras 4.14–4.17.

35 Ibid. at paras 5.8 and 5.18.

36 The original COOL measure allowed commingling of livestock for meat cuts with labels B and C, and certain flexibility was granted with respect to information communicated in the said labels; see ibid. at paras 5.27–5.29.

It was found that the COOL measure *de facto* modified the competitive opportunities of like imported livestock to their detriment due to the increased record-keeping requirements. Such detrimental impact was found to be 'disproportionate' and therefore inconsistent with Article 2.1 TBT, because the need to provide consumers with information regarding where livestock were born, raised and slaughtered could not be explained by an increased record-keeping requirement imposed on livestock and meat producers while certain labels were potentially inaccurate[37] and a substantial amount of information was lost through exemptions.[38]

Interestingly, once the Appellate Body's compliance report was adopted, Mexico requested authorisation from the Dispute Settlement Body to suspend concessions for US$514.8 million in export revenue and US$198.6 million in losses from domestic price suppression.[39] The US obviously objected, arguing that the level of suspension could only include the loss of international trade. The Panel agreed with the US position, and the level of impairment accruing from the COOL measure was set at US$227.758 million.[40] A few days after the decision was issued and authorisation was granted, US Congress repealed the COOL measure,[41] a successful victory for Mexico (and Canada).

In contrast to the COOL dispute, the trade dispute concerning the 'tuna/dolphin-safe labelling regime' between Mexico and the US is far from being over. This dispute has already been subject to a compliance proceeding in which it was found that the tuna/dolphin-safe labelling regime was, again, inconsistent with Article 2.1 TBT. In sum, the amended tuna 'measure' or regime continued to lay down certain conditions for tuna products to exhibit the dolphin-safe label, by (1) disqualifying tuna products obtained by setting on dolphins – a fishing method that is predominantly used by Mexican fishers in the Eastern Tropical Pacific (ETP); (2) extending the certification, tracking and verification requirements for all tuna products, but imposing more burdensome requirements to those caught in the ETP than those from all other fisheries; and (3) providing the possibility for a US authority to determine, in certain circumstances, that tuna caught in the 'other fisheries' must comply with certification and tracking requirements similar to those applicable to the ETP (known as the 'determination provisions'). Although the determination provisions were found to be inconsistent, the core of the dispute, however, was left unresolved. The Appellate Body reversed several of the Panel's findings as it did not assess properly whether the tuna measure, which disqualifies most Mexican tuna from the dolphin-safe label, was adequately 'calibrated' to the risks posed to dolphins by different fishing methods other than setting on dolphins in different fisheries.

37 Appellate Body report, *US – COOL (Article 21.5 – Canada and Mexico)* at para 5.46–47.

38 Ibid. (The following exemptions are found in the amended COOL measure: (1) used as an ingredient in a 'processed food item'; (2) prepared or served at a 'food service establishment'; or (3) sold by entities not meeting the definition of the term 'retailer'.)

39 Mexico, *US – COOL (Article 22.2 – Mexico)*, 19 June 2016, WT/DS386/35.

40 Arbitrator, *US – COOL (Article 22.6 – US)*, WT/DS384/ARB; WT/DS386/ARB, circulated 7 December 2015, para 7.1.

41 WTO, 'DSB grants authorization to Canada and Mexico for retaliation against the US in the "COOL dispute"', www.wto.org/english/news_e/news15_e/dsb_18dec15_e.htm (accessed 21 July 2016).

The aforementioned case currently has three proceedings under review. On 3 May 2016, a panel was established to review the adequate level of suspension.[42] On 2 June 2016, a compliance panel to review whether the new 2016 amendments to the tuna labelling regime is WTO compliant was established after the US request,[43] given that the relevant US authorities amended, on 23 March 2016, certain aspects of determination provisions, as well as certification, tracking and verification requirements.[44] Likewise, a second compliance panel was established at request of Mexico on 11 July 2016, as it continues to consider the tuna labelling regime, including the 2016 amendments, not to be WTO compliant, mainly because it continues to disqualify most Mexican tuna from the said label.[45] It therefore remains to be seen whether the disqualification from the dolphin-safe label of tuna caught by setting on dolphins, as well as the different certification, tracking and verification requirements, are a 'legitimate distinction' due to – or can be explained by – the risks posed by this fishing method to dolphins, the unique risk profile of the ETP (i.e., the natural tuna-dolphin association), and how the tuna labelling regime addresses the risks posed to dolphins by fishing methods other than setting on dolphins in other oceans that have different risk profiles.

The above-mentioned disputes have exposed the difficulties for WTO members to adopt measures that fall under the category of technical regulations, such as labels, which may have a negative effect on international trade. Though WTO members have the right to regulate and set a level that they deem appropriate, WTO case law, particularly the recent TBT cases, sheds light that the negative effects on imported goods have been difficult to justify. The fine print of measures may reflect arbitrary and unjustifiable discrimination by, for instance, imposing unproportionate burdens, establishing exemptions, ignoring similar circumstance or risks, aspects that may reflect the lack of 'even-handedness' or that the measure is not rationally connected with the measures' objective. In that sense, measures must be sufficiently 'tightened', for both domestic and imported goods in light of the circumstances that may prevail in different places, as well as avoiding any 'loose ends' that may not be reconciled with the objective of the measure.

ii Mexico as respondent in NAFTA disputes

Recently, the UPCI's determinations have been challenged under the dispute settlement mechanism provided in Chapter 19 NAFTA. Since 2011 five disputes have been filed before the NAFTA Secretariat, but users are facing serious challenges. To date, the only recent case that has completely finished its due course was the review of the final determination of the sunset review of the anti-dumping duty on a certain type of stearic acid from the US.[46] Such determination was challenged by the domestic industry on the grounds that the UPCI

42 *US – Tuna II (Article 22.6 – US)*, WT/DS381/34, 3 May 2016 (Mexico sought redress for US$473 million, which was obviously challenged by the US.)

43 *US – Tuna II (Article 21.5 – US)*, WT/DS381/37, 2 June 2016.

44 Federal Register/Vol. 81, No. 56/Wednesday, 23 March 2016/Rules and Regulations, p. 15444.

45 *US – Tuna II (21.5 – Second Recourse by Mexico)*, WT/DS381/39, 11 July 2016.

46 MEX-USA-2011-1904-01, Review of the Final determination, of the effective examination and the official review on anti-dumping duties regarding imports of certain types of stearic acid originating from the United States of America (Panel Request 11 November 2011).

incorrectly admitted an alleged 'new shipper', who should have initiated a new-shipper review instead. The panel upheld the final determination, where applicable duties on such party – the alleged new shipper – had been revoked.

As for the remaining four disputes, the proceedings are either at the early stages,[47] the panel is yet to be established,[48] the proceedings have been suspended,[49] or no decision has been issued.[50] Of particular relevance is the dispute concerning the final determination of the anti-dumping investigation on monobutyl ether of ethylene glycol from the United States. This case was brought by two exporters claiming, among other matters, that the UPCI did not carry out an 'objective examination' in its injury determination pursuant to Article 3.1 ADA. In addition, one exporter claimed that it was not provided a full opportunity to defend its case as the UPCI rejected to take into account evidence offered in due time. With questionable legal findings, the Panel issued its decision upholding the UPCI's injury determination, however, it ordered the UPCI to take into account the rejected evidence and issue a new final determination considering thereof. Needless to say, the Panel 'forgot' to set a deadline for compliance, and the UPCI is yet to comply. Moreover, the proceeding have been suspended because the chairman of the Panel renounced to his position, since he was appointed as a judge in one of the new specialised chambers on foreign trade matters. In fact, at the time of writing, the proceedings have been suspended for over seven months, and the UPCI has already carried out a changed-circumstance review of the anti-dumping duty.[51]

Given the above, we can only conclude that NAFTA Chapter 19 panels are proving not to be an adequate remedy for exporters who seek to challenge a final determination in a prompt manner and through a more impartial, specialised and experienced tribunal.

VII OUTLOOK

There has been a relatively low development of trade events during 2015–2016. The TPP signature is by far the most import trade deal, which is far from being enacted. In trade disputes, while there has been an increase of NAFTA Panels, Mexico has not seen new activity in the WTO dispute settlement system. Despite being treated unfairly during trade remedy investigations, China continues to be be patient and friendly towards Latin American countries.

47 MEX-USA-2016-1904-01, Review of the Final Determination of the Changed-Circumstances Review of anti-dumping duties imposed to imports of monobutyl ether of ethylene glycol from the United States (Panel Request 30 June 2016).

48 MEX-USA-2015-1904-01, Review of the Final Determination of anti-dumping duties imposed to imports of ammonium sulphate, from the United States of America and the People's Republic of China (Panel Request 6 November 2015).

49 MEX-USA-2012-1904-02, Review of the Final Determination of anti-dumping duties imposed to imports of ethylene glycol monobutyl ether, from the United States of America (Panel Request 9 October 2012).

50 MEX-USA-2012-1904-01, Review of the Final Determination of anti-dumping duties imposed to imports of chicken thighs and legs, from the United States of America (Panel Request 3 September 2012). (The oral hearing was held on 25 August 2015, the decision is yet to be published. Interestingly, the anti-dumping duties have never been applied.)

51 See footnote 23.

While Mexico continues to act against Chinese imports, mostly in steel-related products, the unfavourable currency exchange over 2015–2016 has become a neutraliser tool for new trade remedy petitions. Mexico took aggressive measures to protect the steel industry by increasing import duties, and has placed anti-dumping measures in most investigations it has concluded in 2015–2016. Thus, it can be seen that despite being a free and open market, Mexico often places tariffs and non-tariff restrictions to protect its dominant industries. The challenge, however, is what decision it will take in its treatment of China after 2016 upon conclusion of the 15-year period following China's accession to the WTO. If Mexico decides not to grant China market economy treatment, China could eventually consider taking Mexico to a WTO panel. We will see more on this in the year to come.

Appendix 1

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Adrián Vázquez Benítez obtained his law degree from the National Autonomous University of Mexico (UNAM). For 25 years he has practised in international trade, WTO, customs and regulatory issues. He was chair of the international trade committee of the Mexican Institute of Public Accountants and is chair of the anti-dumping committee of the US–Mexico Bar Association. Mr Vázquez is the author of the book *Sistema Anti-dumping Mexicano: Normatividad y Práctica*. He has represented private parties in complex litigation and assisted sovereign countries in the most important trade disputes in Mexico, before administrative agencies, appellate bodies and in alternative dispute resolution under the NAFTA and the WTO. Mr Vázquez has represented domestic industries during trade negotiations, advising the government of Mexico, and he appears in the indicative list of governmental and non-governmental panelists who can sit on dispute resolution panels, as required by Article 8.4 of the WTO Dispute Settlement Understanding. Mr Vázquez has given lectures in international trade across the world.

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