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Treatment of Non-Market Economies in Anti-Dumping Proceedings: The Mexican Approach

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Abstract Mexico has employed special methodologies for price-determination and calculation of dumping margins against Chinese imports in almost all anti-dumping investigations. This chapter attempts to explain and analyze the NME-specific procedures employed by Mexican authorities for investigating imports from China. It also clarifies the Mexican standpoint on the controversial issue of how the expiry of Section 15(a)(ii) of China's Accession Protocol to the WTO impacts upon the surviving parts of Section 15 of the Protocol, and whether Mexico has changed its treatment towards Chinese imports following the expiry of Section 15(a)(ii) post 12 December 2016.

Keywords Mexico, Non-market economy, Burden of proof, China, Anti-dumping

10.1. Introduction

Mexico has gradually established itself as one of the leading international trade players in Latin America as well as in the world.[1] From being a closed economy, it has become one of the most open economies for import and export of goods and services. Currently ranked as the second largest economy in Latin America[2] (based on Gross Domestic Product, hereinafter GDP), 'World Bank analysts have predicted that by 2050 the Mexican economy will be the sixth largest economy in the world'.[3] Mexico's success in international trade can be attributed to its large and skilled labour market, geographical

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[1] International Monetary Fund, *Trade Developments in the Latin America and the Caribbean*, Background Papers (Mar., 2017).

[2] World Bank Group, *Mexico Overview* (Apr. 16, 2018), http://www.worldbank.org/en/country/mexico/overview.

[3] Oliver Houlcroft, *How Mexico Became an International Trade Leader*, BIZLATIN HUB (Mar. 1, 2018), https://www.bizlatinhub.com/mexico-international-trade/.

location, consistent economic growth and well-negotiated free trade agreements to which it has become a party.

Mexico is now the thirteenth largest exporting and twelfth largest importing economy in the world.[4] Its top exports include cars, vehicle parts, delivery trucks and computers, and its main exporting partners are the US, Canada and China. Mexico is the largest exporter of flat-screen TVs, refrigerators and freezers.[5] Its top imports are refined petroleum, vehicle parts, integrated systems, computer parts, and broadcasting accessories with these goods primarily being imported from the USA, China, Japan, South Korea and Germany.[6] Together, exports and imports contribute almost eighty percent to Mexican GDP.[7] Hence, foreign trade contributes significantly to the economic growth of Mexico.

In mid 1980s, Mexico undertook the process of trade liberalization as it opened up its economy to trade and investment through market-oriented policies, putting an end to an era of closed economy that employed the policy of import substitution for almost fifty long years.[8] Shortly after embarking on the journey of liberalizing trade in 1980s, Mexico created legislation for dealing with unfair trade practices, thereby becoming one of the first developing countries in the world to have a national trade defence system. Trade liberalization reforms, in the form of elimination or reduction of tariffs and non-tariff barriers to trade, coincided with the international developments Mexico was actively taking part in. In 1986, Mexico became a member of GATT 1947. Upon joining GATT, Mexico also joined the Tokyo Round Anti-Dumping Code. In 1993, it signed North American Free Trade Agreement (NAFTA) with the US and Canada. Mexico also participated actively in Uruguay Round negotiations, and subsequently in 1995, it joined the WTO as a founding member. Since then, Mexico has signed multiple bilateral and regional trade agreements with its major trade partners including South and Central American countries, the EU, Japan and Israel. Moreover, it recently became part of Trans-Pacific Partnership (TPP) which is a free trade agreement designed to liberalize trade and investment between eleven (after the US exit) pacific-rim countries.

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[4] World Bank Group,, *World Bank Database 2016* (Mar. 5, 2018), http://databank.worldbank.org/data/home.aspx.

[5] World Bank Group, *World Integrated Trade Solution*, (Mar. 5, 2018), https://wits.worldbank.org/CountrySnapshot/en/MEX/textview.

[6] *Ibid.*

[7] World Bank Group, *World Integrated Trade Solution*, (Mar. 5, 2018), https://wits.worldbank.org/CountryProfile/en/Country/MEX/StartYear/1990/EndYear/2016/Indicator/NE-IMP-GNFS-ZS.

[8] M. Angeles Villarreal, *NAFTA and the Mexican Economy*, CONG. RES. SERV. (Jun. 3, 2010), https://fas.org/sgp/crs/row/RL34733.pdf.

In the very year of GATT accession, Mexico enacted legislation that allowed its domestic producers to seek relief against unfair trade practices. Since then, its foreign trade legislation has undergone multiple amendments and reviews. The present legislation and accompanying regulations create a strong and robust trade defense mechanism against unfair trade practices including dumping and subsidization, in order to ensure fair competition between domestic and imported products.[9] In terms of the numbers of anti-dumping (AD) investigations it has initiated, Mexico is the eleventh most active in the world and third most active in Latin America.[10] A total of 144 initiations of AD proceedings in Mexico (from 1995-2016) shows that its domestic industries have made heavy use of these legal provisions.[11] What makes the story of Mexican experience even more relevant is the fact that around thirty-four percent of AD proceedings over the last three decades in Mexico have targeted Chinese imports.[12] Most of these investigations were launched against Chinese metal and manufactured goods, because Mexican industries producing and manufacturing these products have faced the heat of direct competition from Chinese steel and other manufactured goods.[13] The figure below outlines the type of sectors that have faced AD proceedings in Mexico.

[9] A trade practitioner with the experience of dealing in anti-dumping matters in Mexico disagrees with the characterization of this system as "strong and robust", and opines that there are many flaws in the system that needs to be overcome. [Email conversation with a trade lawyer, 22 March 2018]. This is not the focus of the chapter, and hence is not dealt with any further.

[10] World Trade Organization, *Statistics on Anti-Dumping*, WORLD TRADE ORG. (Feb. 28, 2018), https://www.wto.org/english/tratop_e/adp_e/adp_e.htm. The data reflects the number of Anti-dumping Initiations as reported by members to WTO. The covered time range is 01/01/1995 - 31/12/2016.

[11] *Id*.

[12] *See* Figure *2*.

[13] Ministry Of Economy, The Official Statistical Report: Industry And Commerce/ International Commercial Practice Unit Of Mexico (Jun., 21, 2015), https://www.gob.mx/se/acciones-y-programas/industria-y-comercio-unidad-de-practicas-comerciales-internacionales-upci.

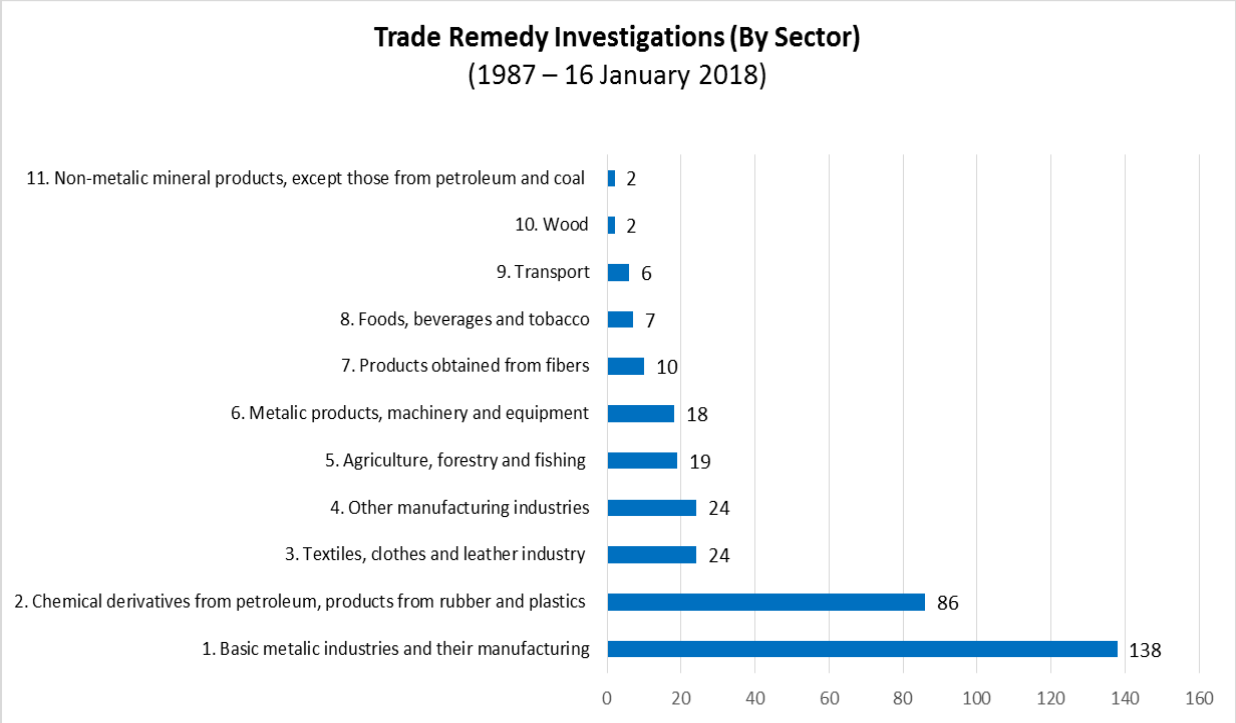


Figure 1: Trade Remedy Investigations, sector-wise. Source Official Statistical Report published by UPCI, Ministry of Economy, Mexico.[14]

This figure shows that the metal and chemical derivatives' industries are the most active sectors in filing petitions with the Mexican investigating authorities for the protection of their domestic market interests. This can be attributed to the fact that Mexico is one of the world's leading producers of metal, petroleum and chemicals, and these industries have the required resources to organize their interests and satisfy evidential requirements for the filing of petitions to initiate AD investigations. Most of the investigations initiated against Chinese imports in Mexico have been in the areas of steel, textile and clothing, and chemicals. [15] The figure below, which illustrates the most frequently, investigated countries, shows that Chinese imports have been the most frequent subject of AD investigations in Mexico.

[14] Ministry Of Economy, The Official Statistical Report: Industry And Commerce/International Commercial Practice Unit Of Mexico (Jan. 2018), https://www.gob.mx/cms/uploads/attachment/file/288333/Estadisticas_UPCI_160118.pdf.
[15] *Id.*

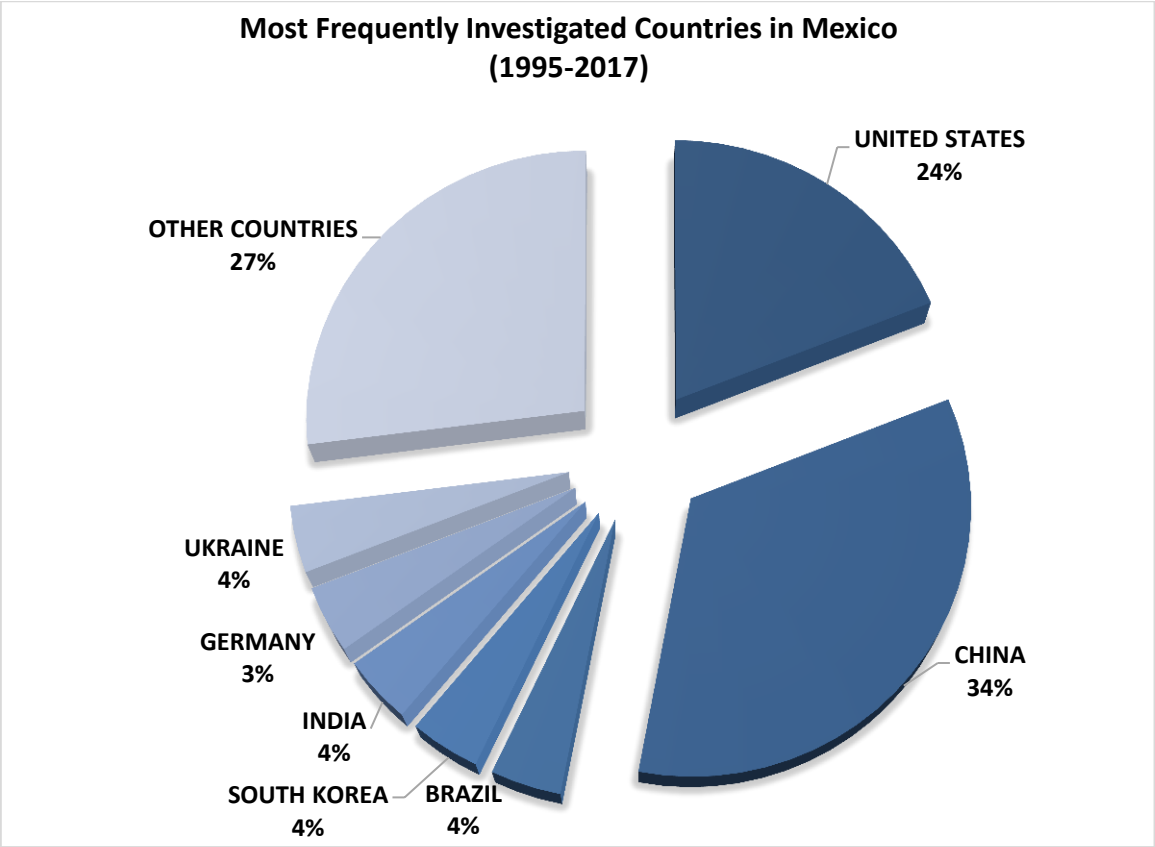


Figure 2: Most Frequently Investigated Countries in Mexico. Source: Official Statistical Report published by UPCI, Ministry of Economy, Mexico.[16]

The figure 2 lists the countries that have most frequently been involved in trade remedy investigations in Mexico. The numbers show that China and the US have been the most frequent respondents in AD investigations. Together, China and the US have been the respondents in over fifty-percent of AD investigations initiated in Mexico. Chinese imports alone have been targeted in thirty-four percent of AD proceedings since 1995. This seems puzzling as Mexico receives over forty-five percent of its imports from the US and only around seventeen percent from China.[17] However, this can be explained. China's victimhood at the hands of Mexican authorities could be attributed to the frequent unfair dumping practices carried out by the exporters in China. It can also be attributed to the

[16] Ministry of Economy, The Official Statistical Report: Industry And Commerce/ International Commercial Practice Unit of Mexico (1995 - 2017) https://www.gob.mx/cms/uploads/attachment/file/306426/Anuario_estad_stico_UPCI_2017.pdf

[17] World Bank Group, *World Integrated Trade Solution 2015*, (Feb. 28, 2018), https://wits.worldbank.org/CountryProfile/en/Country/MEX/Year/2015/Summarytext.

Mexican treatment of non-market economies (NMEs) in AD investigations and its constant use of special methodologies in establishing dumping against Chinese imports. Mexico has treated China as a NME in almost all AD investigations and it has therefore employed special methodologies for price-determination and calculation of dumping margins.

This chapter attempts to explain and analyze how Mexico has treated NMEs (mainly China) in AD investigations and if that approach has undergone a change post 12 December 2016. The following section provides an account of how AD procedures are handled pursuant to the existing legal and institutional frameworks in Mexico. In Section 3.1, the focus lies on the NME-specific procedures employed by Mexican authorities for investigating imports from China. Section 4.1 clarifies the Mexican standpoint on the controversial issue of how the expiry of Section 15(a)(ii) of China's Accession Protocol to the WTO impacts upon the surviving parts of Section 15 of the Protocol, and whether Mexico has changed its treatment towards Chinese imports following the expiry of Section 15(a)(ii) post 12 December 2016. The final section puts forward some concluding thoughts that reiterate how Mexican treatment of this issue has reaffirmed Mexico's long-standing interest in the multilateral trading system. Its explicit and proactive change of approach post the expiry of Section 15(a)(ii) can lay down a roadmap for other member countries to follow. The findings laid down in this chapter are based on the available literature, database of domestic AD cases, official legislations and semi-structured interviews that the author has conducted with the Mexican government officials and private trade lawyers.

10.2. Legal and Institutional Frameworks: Handling of Anti-Dumping Procedures in Mexico

As per Article 133 of the Constitution of Mexico, international treaties occupy a higher position than the domestic laws; the provisions of the former prevail in case of a conflict with the latter.[18] This consequently means that the Agreement Establishing the World Trade Organization[19] (along with its multilateral agreements including the Anti-Dumping Agreement[20]) constitutes a part of Mexican law. In addition, Mexico has also codified its trade remedy commitments in its domestic legislations and regulations.

[18] Political Constitution of the United Mexican States, CP, art. 133, Diario Oficial de [a Federaci6n [DOF] (Feb. 5, 2017) (Mex.).
[19] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144.
[20] Agreement on the Implementation of Article VI of GATT 1994, Apr. 15, 1994, 1868 U.N.T.S. 201, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144.

The Foreign Trade Law [21] (Ley de Comercio Exterior, hereinafter 'FTL') and the accompanying set of Regulations to the Foreign Trade Law[22] (Reglamento de la Ley de Comercio Exterior, hereinafter 'Regulations') are two official texts that have ratified and reinforced Mexico's commitment towards WTO trade remedy provisions. These official texts provide a detailed and somewhat comprehensive account of procedures for the conduct of investigations and the application of AD, countervailing and safeguard measures.

FTL and the accompanying Regulations make Mexico's Ministry of Economy (Secretaria de Economia) responsible for the conduct of trade remedy procedures including antidumping, countervailing and safeguard investigations and to make determinations regarding compensatory duties. The Unit on International Trade Practices (Unidad de Practicas Comerciales Internacionales, hereinafter 'UPCI') is the primary ministerial unit responsible for the administration of trade remedies system. UPCI's key function is to operate the trade defense system in an efficient and timely manner and to provide protection to the domestic industry against unfair international trade practices. UPCI is responsible for investigating the existence of dumping or subsidies, injury, and the causal relation between them. After carrying out the investigations, which can either be initiated on a petition or on *suo moto* basis, the UPCI makes recommendations regarding the imposition of AD or countervailing duties to the Minister (Secretario de Economia).[23] The UPCI also provides technical and substantive assistance to the domestic exporters facing trade remedy proceedings in other countries. The Foreign Trade Commission (Comision de Comercio Exterior, hereinafter 'COCEX') is an advisory authority that can advise modification or review of trade remedy determinations proposed by the UPCI. As per Article 6 of FTL, it is an obligatory consulting organ and is in charge of giving opinion on subjects related to foreign trade. All its opinions are published in the Diario Oficial de la Federacion (Diario Oficial).

[21] Ley De Comercio Exterior § 1-98 (1995) (Mex.). [hereinafter FTL]
[22] Reglamento De La Ley De Comercio Exterior § 1-215 (2014) (Mex.). [hereinafter Regulations]
[23] FTL, *supra* note 21, art. 5.

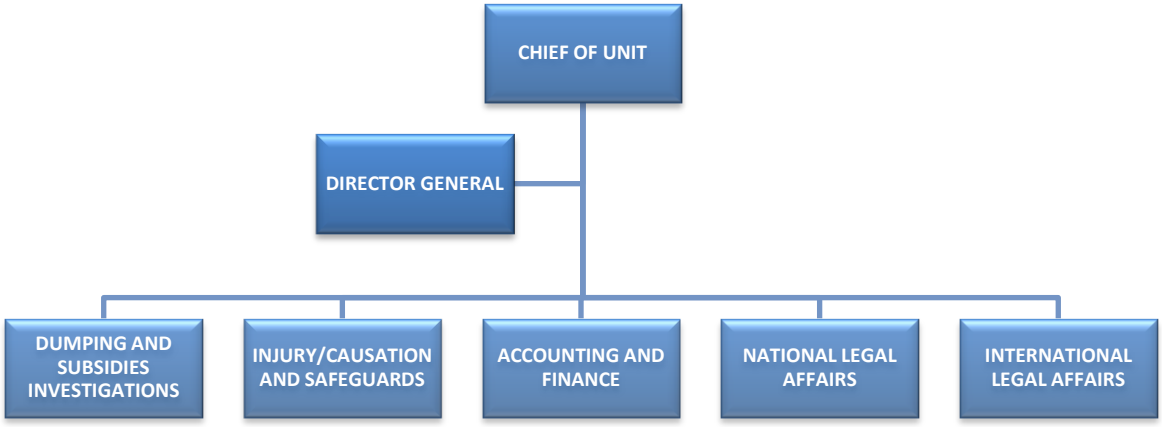


Figure 3: Institutional Framework of UPCI

As can be seen in the diagram below, UPCI is divided into several specialized divisions which are known as Deputy General Directorates (Direccion General Adjunta). As illustrated in the diagram, UPCI is headed by a Chief (*Jefe de la Unidad*) and then a Director General. The Unit is organized in five specialized divisions and each of these divisions is headed by a Deputy Director General (DDG). Each DDG is assisted by several Director level officials. The five divisions are as follows: (i) *Dumping and Subsidy Investigations division* that conducts investigations to determine whether dumping or subsidy exists or not; (ii) *Injury/Causation and Safeguards division* that investigates whether dumped or subsidized products cause injury or threat to injury to the domestic industry; (iii) *Accounting and Finance division* provides assistance on the accounting and finance matters involved in investigations; (iv) *National Legal Affairs division* ensures that all domestic actions and decisions are consistent with the foreign trade legislation and international trade rules, and it represents the Ministry of Economy in domestic judicial proceedings including appeals filed in national courts against the decisions taken by UPCI; (v) *International Legal Affairs division* seeks to protect Mexican trade interests at an international level through multiple functions that include the following: defending Mexico at international dispute settlement proceedings (including the WTO dispute settlement forum and other forums under various bilateral and regional trade agreements); participating in multilateral as well as bilateral negotiations on trade remedy matters; and providing assistance to Mexican exporters facing trade remedy proceedings abroad.

The UPCI has a staff of approximately 100 officials (that include around 80 specialists and 20 support staff). The divisions consist of various experts including lawyers, economists, international trade, and finance and accounting specialists. The selection process of UPCI's staff is long and rigorous. The selection of public service officials at UPCI is made with

the help of an intense recruitment process that includes interviews, written tests and a lengthy training procedure. The public service officials during their assignment at the UPCI are required to look beyond their individual expertise and acquire a working understanding of different areas including law, economics, international trade, diplomacy and finance.

10.3 Anti-Dumping Investigations: Methodologies Used for Non-Market Economies

The WTO members have agreed under Article VI of GATT 1994 and the Anti-Dumping Agreement that it is necessary to ensure comparability between the normal value and the export price in AD investigations. This comparability can only be ensured if the normal value of the product in exporting country is not distorted or unreliable due to reasons including "non-market" conditions prevailing in the exporting country or in that specific industry. In non-market economies, prices are influenced by state intervention and hence not determined by the forces of supply and demand following an "arm's length" transaction between buyers and sellers.

Non-market economy (NME), officially referred to as 'centrally planned economy' (*economia centralmente planificada*) in the Mexican legislation, is considered as an economy that does not operate on market principles.[24] Article VI:I of GATT 1994, read together with Second Ad Note to Article VI, confirms that if an economy, or an industry or sector of an exporting member does not generate market-determined prices and costs due to NME conditions, an importing member may employ an alternative market-determined normal value for price comparability by following special set of methodologies.[25] However, WTO legislation does not indicate how normal value can be calculated in such circumstances. It does not prescribe the use of any alternative method and, hence, WTO members have employed different methodologies for dealing with the calculation of normal value in cases where they reject or replace the home-market prices and costs.

In Mexico, the UPCI can determine the normal value using one of the several methods. Article 31 of FTL provides that if market economy conditions prevail, the normal value can be calculated using one of the three options. The *first* option is to use the sales price in the exporting country's home market. The *second* option is to use the export price of an identical product to a third country. The *third* option is to use the constructed value method

[24] FTL, *supra* note 21, art. 33. The term NME does not exist in the Mexican legislation. It is nonetheless used in this chapter interchangeably with centrally planned economies.

[25] This is in consonance with World Trade Organisation, Protocol on the Accession of the People's Republic of China, art. 15 (a)(ii), WTO Doc. WT/L/432 (Nov. 23, 2001) [hereinafter Chinese Accession Protocol].

based on the cost of production and other general costs and profits in ordinary course of trade in the country of origin. The second and third options are employed when the home market prices cannot be used due to no sales of the given or similar product in the home market, or lack of availability of product or information, or unreliability of prices due to market distortions.[26] Article 33 provides that in case of NMEs, the UPCI can calculate the normal value by using a surrogate country. In this case, UPCI can calculate the normal value with the help of surrogate's home market prices, export price, or a constructed value based on the costs and prices derived from the chosen surrogate.[27]

In case of China, the UPCI can use Chinese prices and costs for the industry under investigation where it is established that market economy conditions prevail in that industry, and it may reject those prices or costs where market economy conditions do not prevail.[28] The constructed value method will be used in NME investigations only when the petitioners have proved that the internal prices of the surrogate country are not suitable for price comparison. UPCI will normally use the sales price of surrogate country in cases where the industry or economy does not operate in market economy conditions. In fact, this is the most commonly used method in investigations involving NME conditions which are precisely defined in the Mexican legislation.[29] Article 48 of the Regulations, read together with Article 33 of FTL, provides three classifying elements that clearly define the term "centrally planned economy".

(i) The cost and price structures do not reflect market principles; *or*
(ii) The enterprises of the sector or industry under investigation have cost and price structures which are not determined in accordance with such principles;
(iii) *And* hence, in both cases, sales of the identical or like product in the country in question do not reflect the market value of the product.

Attention must be paid to the conjunctions used in the provision. The first two criteria are alternate, and the third factor is consequential upon the first or the second criteria. An economy will be treated as a centrally planned economy if either the first and third criteria are met or the second and third are met. The use of 'or' between the first and second criteria symptomatically widens the classification of centrally planned economies. This means that UPCI has the authority to determine whether an economy is centrally planned or not either based on a macro analysis of the cost and price structures in the country as a

[26] FTL, *supra* note 21, art. 31.
[27] *Id*., arts. 33 and 48.
[28] Chinese Accession Protocol, *supra* note 25, art. 15(a)(ii).
[29] The method is provided in art. 33 of FTL, *supra* note 21 and art. 48 of the Regulations, *supra* note 22. Surrogacy method as employed by UPCI is explained in the following section.

whole *or* a micro analysis of the cost and price structures of the specific industry or sector that is under investigation. The only complementing requirement in both scenarios is that market value or cost of production of the product under investigation seems distorted and unequal to the market value or cost of production of a like product manufactured in a different country which is not centrally planned.

Mexico does not differentiate between NMEs and economies in transition. Moreover, there is no list of countries classified as NMEs in Mexico as this status is granted on a case-by-case basis. Article 48 of the Regulations provides seven factors, *inter alia*, that must be taken into account by UPCI officials to determine whether home-market prices of exporting country can be used or if they need to be replaced by alternative prices and costs for price comparison. In other words, the following factors are considered to examine whether an economy or a specific industry in question should be treated as NME or a market economy.

(i) the currency of the foreign country under investigation must be generally convertible in the international currency markets;
(ii) salaries in the said foreign country must be established through free negotiation between workers and employers;
(iii) decisions relating to prices, cost and supply of inputs, including raw materials, technology, production, sales and investment, in the sector or industry under investigation, must be taken in response to market signals without any significant State interference;
(iv) the industry under investigation must have only one set of accounting records which it uses for all purposes and which is audited according to generally accepted accounting criteria;
(v) the production costs and financial situation of the sector or industry under investigation must not be distorted in relation to the depreciation of assets, bad debts, barter trade and debt compensation;
(vi) the foreign investment and joint ventures with foreign firms are allowed; *or*
(vii) any other factors considered relevant by the investigating unit.

The first six factors are to be considered to determine whether the industry or sector under investigation operates in full market economy conditions. They are not alternative to each other. However, the official text switches to the use of 'or' between the sixth and the seventh factor. This signifies that the investigating authority has the full discretion to apply any other factors or criteria in addition to the ones provided in this legal provision to determine whether a given industry operates in market economy conditions. The seventh

factor gives a wide discretionary power in the hands of the UPCI officials to apply any other factor which it deems relevant for the assessment. This indicates that the list provided in this statutory provision is not exhaustive.

Article 48 provides an indicative list of factors; however, the practice dictates that it is mandatory to address the first six factors along with the required evidence. Nevertheless, this assessment is systemic in nature. In other words, UPCI may determine that market economy conditions exist even if all the factors are not completely and sufficiently satisfied as long as sufficient evidence and arguments are presented to satisfy at the least two or three of these factors. Before 12 December 2016, the petitioner was only required to point to the legal presumption under Section 15 (a)(ii) of the China's Accession Protocol to argue the prevalence of NME conditions. However, post 12 December 2016, the petitioner is required to provide arguments and evidence in support of these factors. There is a question as to whether these factors mentioned in paragraph two of Article 48 should be read with its preceding paragraph. Put differently, once you have satisfied or shown that some of these factors are not met, it is unclear as to whether there is a second layer of statutory requirement to show that the failure of having met these factors are having an actual impact on the cost and prices in China.

As can be seen, some of these factors are industry-specific, while the others are country-specific. A combination of industry and country centric factors allows UPCI to conduct a comprehensive macro-level as well as micro-level analysis of the prevailing conditions. The requirement of currency convertibility, free negotiation for determination of salary between workers and employers, and permissibility of foreign investment and joint ventures are the country-specific factors that allow UPCI to carry out a macro-level assessment of the conditions prevailing in the country. Macro-level assessment is important because the conditions prevailing in the country as a whole may have a significant bearing on the state of conditions a specific industry or sector is operating in.

The other three factors in the list are industry or sector specific. These factors are: (i) the possibility and extent to which a state can interfere in decisions relating to costs, prices, supply, production, sales and investment; (ii) the use of generally accepted accounting criteria; and (iii) the distortion of production costs and financial state of the industry due to depreciation of assets, bad debts, barter trade and debt compensation. These factors allow a micro-level analysis of the market economy conditions prevailing in the specific industry or sector which is under investigation. Practice dictates that the seventh factor, which does not specify a specific criterion but creates a wide discretion in favor of the UPCI, allows the investigating officials to take into account additional product-specific factors.

Empirical findings suggest that the investigating officials at the UPCI give heavier emphasis to micro-level than the macro-level factors to determine this issue.

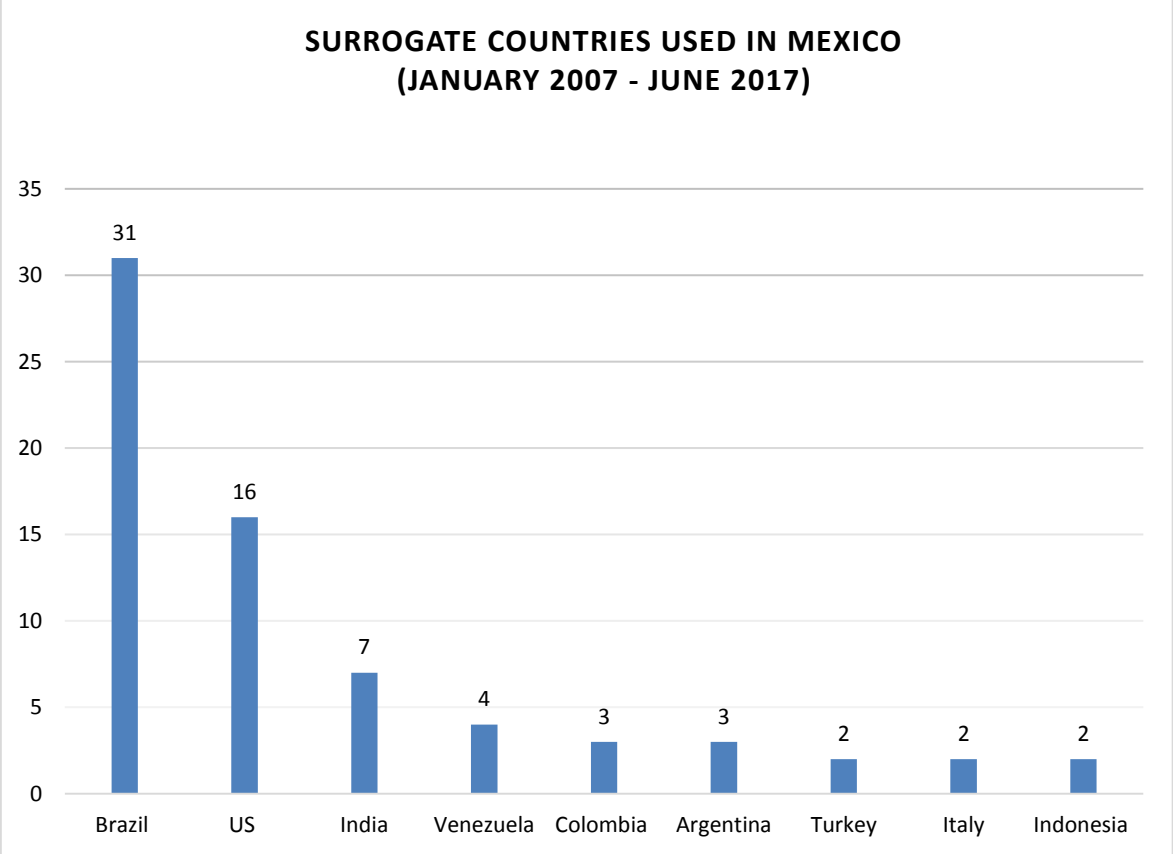
In practice, petitioners propose whether the product under investigation should be treated as operating under NME conditions, and the UPCI would generally accept these suggestions. This has particularly been observed in investigations against Chinese imports, as petitioners in Mexico have suggested the use of NME methodology in almost all AD investigations initiated against Chinese products. It is surprising to learn that in the last 15 years, while facing an AD investigation in Mexico, respondents from China have never presented strong arguments or evidence to counter these assertions.[30] In a majority of the cases, they have not made any attempt to rebut the legal presumption that was provided under Section 15(a)(ii). It seems that they either accepted the NME assertions made against their imports or they had assumed that the investigating authorities would not accept their home-market prices in any event, or perhaps they were not fully prepared to face the proceedings and challenge the presumption with sufficient evidence. Because the Chinese respondents almost never rebutted the legal presumption, the UPCI has employed surrogate or (occasionally) constructed value approach in almost all AD investigations against Chinese imports.

10.4. The Use of Surrogacy Method against Chinese Imports

Article 33 of FTL provides that in cases where the imports originate in a centrally planned economy, the price of an identical or like product in a comparably substitutable third country (known in trade law jargon as a "surrogate country") with market economy conditions shall be taken to be the normal value of the good in question. Article 48 of the Regulations complements this provision and provides a criterion that can be used by UPCI for the selection of a surrogate country. It provides that there should be 'reasonable' similarity between the surrogate country and the exporting country. In particular, for the purposes of selecting a surrogate country, UPCI officials must apply economic criteria such as the similarity between the production processes, the cost of the elements that are extensively used in the production process of the product under investigation, or, if this information relating to the product in question is not available, than they can look at the production process or cost of production for the closest group or category of products that are available in the country of origin as in the surrogate country.

[30] Interview with a trade lawyer; confirmed in interview with government officials [details withheld].

As it can be seen, these factors that guide the selection of a surrogate country are quite industry-specific. Even in practice, it has been observed that the surrogate country is mostly selected on the basis of a micro-level analysis that involves a "reasonable" similarity comparison between the respective industries or sectors of exporting and surrogate country.[31] Industry-specific similarity analysis may include a study of production processes, nature and costs of inputs, quantity and quality of inputs, production capacity, scale of production, number of domestic producers, and the availability of reliable data regarding home-market prices.[32] The following illustrations provide an empirical look at the UPCI's selection of surrogate countries against Chinese imports in the recent years.



[31] Notice for Initiation, Polyester short fiber (China) § 24 (J, K), 212, (Secretaria De Economia, Feb. 5, 2018) (Mex.), http://www.contactopyme.gob.mx/upci/paginas/3187.pdf.
[32] Jorge Miranda & Eduardo Diaz-Gavito, *Mexico* in GUIDE TO INTERNATIONAL ANTI-DUMPING PRACTICE 433-34 (Derk Bienen eds., 2013).

Figure 4: Surrogate Countries Used, Frequency of their Use

**Source: Semi-annual reports submitted by Mexico to the WTO Committee on Anti-Dumping Practices.[33]

As can be seen in the chart above, the most frequently used countries as surrogates in AD investigations in Mexico against Chinese imports are Brazil and the US. Brazil has been used by the UPCI in more than forty percent of the investigations and the US in more than twenty percent of investigations against China. This shows a selective approach of Mexico as its selection has been limited to either the US or Brazilian more than sixty percent of these investigations. This might be a bit puzzling for the readers; however, this narrowly selective approach can be explained by looking at the sector-wise selection of surrogate countries (as shown in the table below).

Figure 5: Product-Specific Use of Surrogate Countries

IN: India
TR: Turkey
ID: Indonesia
VE: Venezuela

[33] The time range covered is from 1 January 2007 to 30 June 2017. The semi-annual report from 1 January to 30 June 2017 is the most recently submitted report (as of the date of this writing). The data records original investigations only. Review and subsequent proceedings are not taken into account.

Products	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Carbon and alloy steel tubing	-	-	-	-	-	-	-	-	-	USA	USA
Coated flat steel products	-	-	-	-	-	-	-	-	Brazil	Brazil	Brazil
Steel wire rod	-	-	-	-	-	-	-	-	Brazil	Brazil	-
Ceramic floor and wall tiles	-	-	-	-	-	-	-	-	USA	USA	-
Aluminium kitchenware	-	-	-	-	-	-	-	-	Brazil	Brazil	-
Prestressed products	-	-	-	-	-	-	-	-	Brazil	Brazil	-
Ammonium sulphate	-	-		-	-	-	-	USA	USA		-
Children's bicycles	-	-	-	-	-	India	India	India	India		-
Hot-rolled steel coils	-	-	-	-	-	-	-	Brazil	Brazil		-
Steel and zamak handles	-	-	-	-	-	-	-	Brazil	Brazil		-
Cold-rolled sheet	-	-	-	-	-	-	-	Brazil	Brazil		-
Stainless steel sinks	-	-	-	-	-	-	-	USA	USA		-
Steel ropes and cables	-	-	-	-	-	-	Brazil	Brazil	-		-
Blenders for domestic and commercial use	-	-	-	-	-	-	Brazil	Brazil	-		-
Steel plate in sheets	USA	USA	-	-	-	-	USA	USA	-		-
Galvanized carbon steel wire mesh	-	-	-	-	-	-	Brazil	Brazil	-		-
Pencils	-	-	-	-	-	-	India	India	-		-
Blankets of synthetic fibres	-	-	-	-	-	-	Brazil	Brazil	-		-
Seamless steel tubing	Italy	Italy	USA	Brazil	Brazil	USA	USA	USA	-		-
Ceramic and porcelain dishware and loose articles	-	-	-	-	-	Colombia	Colombia	Colombia	-		-
Radio guide	-	-	-	-	Brazil	Brazil	-	-	-		-
Graphite electrodes for electric arc furnaces	-	-	-	Brazil	Brazil	Brazil	-	-	-		-
Amoxicillin trihydrate	-	-	-	-	-	-	-	-	-		-
Denim fabric	-	-	-	Turkey	IN, TR	-	-	-	-		-
Nuts of carbon steel, black or coated	-	-	-	Brazil	-	-	-	-	-		-
Valves without caps and plastic atomizers	Argentina	Argentina	Argentina	-	-	-	-	-	-		-
Type I steel beams	-	-	-	-	-	-	-	-	-		-
Door knob locks	Venezuela	Venezuela	-	-	-	-	-	-	-		-
Natural, synthetic or mixed hog bristle paint brushes	VE, ID	VE, ID, IN	-	-	-	-	-	-	-		-
Conventional electrodes	USA	-	-	-	-	-	-	-			-

This table is prepared with the help of Semi-annual

reports submitted by Mexico to the WTO Committee on Anti-Dumping Practices.[34]

The selection of India and Turkey for textiles and clothing products, and India for bicycles, testifies the industry-specific approach employed by UPCI in selecting a surrogate country. Moreover, the selection of the US and Brazil for majority of the AD investigations against steel imports from China confirms this observation further as the steel industries in Brazil, the US and China are well-organized gigantic business sectors and share a lot of features in common. However, there seem to be other reasons behind their frequent selection as surrogates by UPCI. China occupied first position as the biggest steel producer in the world in the year 2017, wherein the US occupied the fourth position and Brazil the ninth position in the world. Japan and India rank higher than the US and Brazil in terms of their share of steel production in the world, and hence are closer to China's ranking. Hence, it is puzzling as to why other countries (like India and Japan) have not been preferred as surrogates in investigations against Chinese steel products.

A reason to explain this could perhaps be the ease involved in collecting information. The empirical findings suggest that these decisions can also be taken on a more practical basis by looking at the countries you could conveniently fetch information on costs and prices from.[35] The petitioners are expected to gather and supply this information, and more than often, they gather this information through independent market research with the help of their trade partners in third countries. Selection of a neighboring trade partner, the US, in many investigations can be seen as an example evidencing this point. Selection of Brazil, an important trade partner for Mexico from Latin America, as the most frequently used surrogate country can also be seen as strengthening this observation. The practice dictates that the initial onus of choosing a substitutable surrogate country is put on the petitioner; however, the petitioner's recommendations can be rejected if the UPCI officials find the proposed country not reasonably substitutable or if the petitioner has failed to provide sufficient evidence of proposed surrogate's substitutability.

The Mexican approach of choosing a surrogate country has been controversial. The UPCI has mostly based its decisions on industry-specific factors, but it has on certain occasions

[34] The time range covered is from 1 January 2007 to 30 June 2017. The data records original investigations only. Review and subsequent proceedings are not taken into account. No information is provided on the use of surrogate country for most of the investigations reported in the semi-annual reports for the years 2007 and 2008. Hence, information relating to those investigations is deleted from this table. World Trade Organisation, *Notifications by individual members on anti-dumping (1 Jan. 2007-1 Jun. 2017)*, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=@Symbol=%20g/adp/n/*%20and%20%20@Symbol=%20mex&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true.

[35] Interview with government officials (details withheld).

taken into account purely country-specific factors in making this determination.[36] For example, in the recent investigation of *Polyester short fiber* imports from China, the US was selected as a surrogate on the grounds of similarity between the quality, production process and cost, and level of production of the product under investigation in the US and China.[37] On the other hand, in the case of *Bicycles for Children (China)*[38], the petitioners proposed the use of Taiwan or India as surrogate countries based on the similarity of industries and the levels of economic development in these countries. The UPCI accepted India as the most reasonable substitute to China on the grounds that the level of economic development in India is similar to the economic development in China.[39] They based their economic development similarity analysis on country-specific economic indicators including comparisons of gross domestic product, per capita income, price inflation and country's overall level of trade intensity (share of exports and imports of goods and services to country's GDP).[40] Hence, the approach employed in this case was very different to the one employed in *Polyester Short Fiber* case.

The diverse category of countries (as shown in Figure 5 above) Mexico has chosen as surrogates for China, ranging from highly developed to low-income developing countries, contradicts the country-specific approach used in the *Bicycle* case. The government officials have argued that this change or contradiction in approach from one case to the other is a result of procedural evolution and that the UPCI officials have preferred to employ micro-level factors in the more recent years.[41] Nevertheless, it is possible to argue that the use of either industry-specific or country-specific factors on a case-by-case basis can possibly allow Mexican investigating authority or petitioners some room for choosing a country that enables them to calculate the maximum amount of margin.[42]

[36] Interview with government officials (details withheld).
[37] Notice for Initiation: Polyester short fiber (China) 197-212 (Secretaria De Economia, Feb. 6, 2018), (Mex.), http://www.contactopyme.gob.mx/upci/paginas/3187.pdf.
[38] Notice for Initiation: Bicycles for Children (China) (Secretaria De Economia, Mar. 5, 2012), (Mex.). http://www.contactopyme.gob.mx/upci/paginas/1611.pdf.
[39] *Id*., ¶ 43.
[40] *Id*., ¶ 42.
[41] Interview with government officials (details withheld).
[42] International Bar Association, *Report on Anti-Dumping Investigations Against China in Latin America*, 13 INT'L B. ASS'N, (Feb. 29, 2018) https://www.ibanet.org/ENews_Archive/IBA_Jan_2010_ENews_AntiDumping_investigations_against_China.aspx.

10.5. Changes post 12 December 2016: The Increase in Burden of Proof on Petitioners

The WTO Members should treat all Member States equally in AD investigations, failing which they can potentially violate the core non-discriminatory obligations provided in GATT 1994. This might create difficulties for importing countries to achieve price comparability to determine dumping allegations, especially in cases of exporting countries or industries wherein prices cannot be relied upon to calculate the normal value of the product in question. To avoid a potential WTO challenge for the alleged violation of GATT 1994 from China, the Member States at the time of China's accession negotiated Section 15 of the Protocol of Accession. Section 15 allowed Members to continue to treat China as an NME and employ special methodologies in investigations against Chinese imports. China signed the Protocol of Accession as its "ticket for entry" into the WTO club.

Section 15(a) allows a WTO Member to reject and replace the home-market prices and costs for price comparison in AD investigations against Chinese imports and use special methodologies. However, Section 15(d) provides for an expiry clause of Section 15(a)(ii) after 15 years from the date of China's accession (i.e., on 12 December 2016). This has caused an intense debate and discussion among WTO members. China has filed WTO consultation requests with the EU and the US on the very date of the expiration of Section 15(a)(ii), i.e., 12 December 2016.[43] China in these consultation requests claims that with the expiry of Section 15(a)(ii), the WTO members should revert to the application of normal methodology against Chinese imports. China argues that after 12 December 2016, normal AD provisions for determination of normal value provided in Anti-Dumping Agreement and the GATT 1994 must apply to the imports from China and that Chinese imports should no longer be subject to special methodologies including the surrogacy system.

The respondents, the US and the EU have resisted this claim as they maintain that their right to reject and replace the home market prices and costs survives even after the expiry of Section 15 (a)(ii). They have argued that Article VI:I of GATT 1994, read with Section 15(a)(i) of Accession Protocol and Articles 2.1 and 2.2 of Anti-Dumping Agreement, confirms that the Member States may find an alternative, market-determined normal value

[43] Request for Consultations from China, *European Union-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/R (Dec. 12, 2016); Request for Consultation from China, *United States-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/R (Dec. 12, 2016).

for the purposes of making price comparisons for AD investigations if the economy or an industry or sector of an exporting country does not generate comparable and market-determined prices and costs. They also argue that the surviving provision of Section 15(a)(i) of Accession Protocol requires an importing member to use Chinese prices and costs only when the domestic producers under investigation can clearly establish that market economy conditions prevail over the Chinese industry in question. This can also be interpreted as meaning that where the market economy conditions do not prevail, the industry's prices and costs in China cannot be comparable and hence cannot be used in investigation.[44]

Mexico's relation with China in trade remedy matters deserves a special mention as it has changed over the years. Before China joined WTO as a member, Mexico had imposed a number of AD duties on Chinese imports. However, in order to avoid facing a possible WTO litigation against its AD duties from China once it joined the WTO, Mexico negotiated a 'peace clause' and the same was inserted in China's Protocol of Accession.[45] The clause provided that the existing Mexican AD duties 'shall not be subject to the provisions of either the WTO Agreement or the AD provisions of this Protocol' for a period of six years after China's WTO accession.[46] When this peace clause expired in 2007, China and Mexico found another mutually acceptable solution for the (apparently) WTO-inconsistent Mexican AD measures still in force against Chinese imports by signing the Mexican-Chinese Agreement on Commercial Remedies.[47] In compliance with the Agreement, Mexican authorities closed a series of review cases, made decisions on the gradual phase-out of AD duties until December 2011, and eliminated remaining duties which used to be covered by the Peace Clause until 15 October 2008. On the other hand, Mexico secured its right to impose transitional measures on certain 'sensitive' products such as textiles, footwear and toys (as these Mexican products were facing fierce competition from Chinese imports) until December 2011. Post the expiry of this

[44] EU submissions: Request for Consultation, *European Union-Measures Related to Price Comparison Methodologies*, 9, 33, WTO Doc. WT/DS516/R (Dec. 12, 2016), http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156476.pdf, http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156401.pdf; United States Third Party Legal Interpretation document, *European Union-Measures Related to Price Comparison Methodologies*, 38, WTO Doc. WT/DS516/R (Dec. 12, 2016), https://ustr.gov/sites/default/files/enforcement/WTO/US.Legal.Interp.Doc.fin.%28public%29.pdf.

[45] Chinese Accession Protocol, *supra* note 25, Annex 7: Reservations by WTO Members.

[46] International Bar Association, *supra* note 42, at 25.

[47] Acuerdo entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de la Republica Popular China en material de medidas de remedio comercial (Jan. 29, 2009), (Mex.), https://www.gob.mx/cms/uploads/attachment/file/50842/A497.pdf.

Agreement in 2011, the AD proceedings between Mexico and China are solely governed by FTL and its Regulations.

As regards the issue of how the expiry of Section 15(a)(ii) should impact future AD investigations against Chinese imports, Mexican authorities took over a year to clarify their standpoint. For the last two years, Mexican officials have been involved in discussions with several foreign investigating authorities on this subject. Some authorities, together with Mexico, have argued that the complete non-acknowledgment of the expiration of a provision of the Accession Protocol could lead to violation of WTO laws. Others, such as the US, have expressed divergent opinion.[48] However, when seen in practice, Mexican authorities' approach post 12 December 2016 is not entirely different from the US and the EU's approach, though it may not be an exaggeration to say that the Mexican approach is more proactive and explicit.

Post this date, the Ministry of Economy has explicitly changed its approach.[49] It recognizes that post the expiry of Section 15(a)(ii), the legal presumption of NME has ceased to exist and hence the Mexican industry petitioners are required to submit sufficient evidence to establish a legal presumption of prevailing NME conditions. Before this date, the petitioners could use the legal presumption provided under Section 15(a) (ii) of Accession Protocol of China to base their claim that NME methodologies should be used against Chinese imports. However, the practice dictates that the petitioners post 12 December 2016 in AD investigations against Chinese imports have been required to provide concrete evidence to argue that NME conditions prevail in the specific industry and for the specific product in question. The replacement of the old official format (provided by UPCI to petitioners for solicitation of AD investigations) with a new and modified official template post 12 December 2016 documents this change in approach towards China. In the revised template, the UPCI officials require petitioners to document micro-level industry-specific evidence before they can reject Chinese prices and costs and apply alternate methodologies to calculate the dumping margins.[50] Hence, the threshold for petitioners to argue NME conditions is now higher than before.

It is important to note that the domestic legislation does not impose a legal obligation on the petitioner to provide evidence with respect to NME conditions. This seems fair, because it might be unaffordable or otherwise impossible for domestic industries to gather the required information and evidence to establish the presumption. However, an implicit

[48] Interview with government officials (details withheld).
[49] Interview with government officials (details withheld).
[50] The revised and the old official templates are on file with the author.

interpretation of Article 5.2 of Anti-Dumping Agreement read with Section 15(a)(i) of the Accession Protocol of China (which are self-executing in Mexico under its Constitution) has allowed the UPCI officials to impose such evidentiary requirements on the petitioners in the revised format required for the solicitation of AD investigations.

The UPCI has launched three AD investigations against Chinese imports since 12 December 2016 (holds true until the date of writing this chapter which is 26 March 2018).[51] In *Polyester short fiber* case[52], the petitioner proposed that market economy conditions do not prevail in the industry under investigation, and hence the UPCI should use the US as surrogate country to calculate the normal value of Polyester short fiber imports from China.[53] UPCI accepted these arguments.[54] Petitioners successfully established the legal presumption of NME in this case by providing sufficient evidence to prove that the government had some control over the production of the product under investigation.[55] On this basis, UPCI decided to employ the surrogacy method. They justified the selection of the US on the grounds that the like product in the US has similar characteristics and quality, there is similarity between the production process and capacity, and that the levels of production of the like product in the US are similar to the levels of production of the product in question in China.[56] This practice conforms to the industry-specific approach employed by UPCI officials in selecting surrogate countries for AD investigations. This also confirms that post the expiry of Section 15(a)(ii), there is an observable change in the UPCI's treatment of Chinese imports in AD investigations as the petitioners have a much higher burden of proving the existence of NME conditions post 12 December 2016.

In *Micro-wires for Welding (China)*[57], the petitioners argued that the Micro-wire industry in China operates under NME conditions. To prove this argument, they presented a market study that analyzed the industry's structure, production methods and costs. The petitioners

[51]Notice of Initiation: Polyester short fiber (China), DIARIO OFF. (Secretaría de Economía, Feb. 6, 2018), http://www.contactopyme.gob.mx/upci/paginas/3187.pdf.; Notice of Initiation: Metallic Plastic Balloons (China), DIARIO OFF. (Secretaría de Economía, Jun. 26, 2017), (Mex.), http://www.contactopyme.gob.mx/upci/paginas/3158.pdf; Notice of Initiation: Micro-wires for Welding (China), DIARIO OFF. (Secretaría de Economía, Aug. 10, 2017), (Mex.), http://www.contactopyme.gob.mx/upci/paginas/3173.pdf.

[52] Notice of Initiation: Polyester Short Fiber (China), DIARIO OFF. (Secretaría de Economía, Feb. 6, 2018), (Mex.), http://www.contactopyme.gob.mx/upci/paginas/3187.pdf.

[53] *Id.*, ¶ 24.

[54] *Id.*, ¶¶ 187, 196, 212.

[55] *Id.*, ¶ 24.

[56] *Id.*, ¶¶ 197-212.

[57] Notice of Initiation: Micro-wires for Welding (China), DIARIO OFF. (Secretaría de Economía, Aug. 10, 2017), (Mex.), .http://www.contactopyme.gob.mx/upci/paginas/3173.pdf.

provided information to prove that the micro-wire's cost of production does not even cover the cost of the raw material used in its manufacturing, and hence it does not reflect its actual value.[58] The petitioners also supplied information and arguments to demonstrate that NME conditions prevail in that industry and hence surrogate prices should be used in this analysis[59]; however, these arguments were rejected by UPCI as being insufficient to raise a legal presumption.[60]

The UPCI found that the information provided by the petitioners did not sustain the presumption that the concerned enterprises in China do not have the costs and prices determined by market principles. Hence, they rejected petitioner's proposal to use the surrogate method for calculating the normal value in this case.[61] As a consequence, in consonance with Article 31 of FTL, UPCI employed the constructed value method to calculate the normal value of the product in question.[62] In calculating the value, they took into account various industry-level economic factors including the cost of raw materials and the international prices of wire, the prices of the supplies that were used by the producing companies in Mexico, the labor cost and other administrative expenses including energy and taxes.[63] This, to some extent, confirms the argument that the threshold for petitioners to argue NME conditions is now higher than before and the UPCI in the future cases will require strong and compelling evidence from petitioners to use the surrogate method in an investigation against Chinese imports.

In *Metallic Plastic Balloons (China)*[64], the petitioners proposed that the industry under investigation operates in NME conditions and that the method of surrogacy should be used to calculate the normal value of the product.[65] The UPCI rejected these arguments because the supporting evidence provided by petitioners was not sufficient to establish the presumption that NME conditions prevail over that specific product in China.[66] UPCI found that this particular industry complies with market economy conditions and

[58] *Id.*, ¶ 21.
[59] *Id.*, ¶ 21.
[60] *Id.*, ¶ 91.
[61] *Id.*, ¶¶ 89, 90.
[62] *Id.*, ¶ 97.
[63] *Id.*, ¶¶ 57-59.
[64] Notice of Initiation: Metallic Plastic Balloons (China), DIARIO OFF. (Secretaría de Economía, Jun. 26, 2017), (Mex.), http://www.contactopyme.gob.mx/upci/paginas/3158.pdf.
[65] *Id.*, ¶ 18.
[66] *Id.*, ¶ 59.

requirements mentioned in Article 33 of FTL and Article 48 of Regulations.[67] As a result, UPCI used the product's home-market prices for calculating normal value in this case.

The acceptance of home-market prices and costs for Chinese imports in this investigation reinforces Mexico's change in approach. It also reaffirms Mexico's commitment towards and respect for its multilateral trade obligations. These developments do not suggest that Mexico cannot reject or replace home-market prices and costs against Chinese imports on a case-by-case basis; it can and it might use NME methodology against Chinese imports in the future. Mexico has not granted a change of status to China so far. However, the change in approach reflected in these latest investigations against China strongly suggests that there is an increase in burden of proving NME conditions on Mexican petitioner(s) post 12 December 2016. From the point of view of Mexican industries, this is a very significant change which has increased the cost and complexity of requirements they have to fulfill as a petitioner against Chinese products in AD investigations.

10.6. Concluding Remarks

This work has brought to light the treatment of NMEs (particularly China) by one of the most heavy-weight Latin American users of AD procedures. Other countries can learn from the immensely rich Mexican trade remedies experience that dates back to 1980s. Its infrequent use of constructed value method, a predominantly industry-specific approach for selection of surrogates, and a mixed approach for determination of market economy conditions codified in the form of six mandatory factors can prepare a 'menu' of methods that other countries can chose to employ. Other member countries can employ the broad, discretionary approach employed by Mexico for choosing surrogate countries, or they can choose to employ an approach that is based on assessing macro-level similarities between the surrogates and exporting countries. Other countries can also learn from the subtle and at the same time progressive change of approach noticed in the Mexican practice of dealing with Chinese imports post 12 December 2016. The approach is subtle, because Mexico has not granted a change in status to China and retains its right to use alternate methods; however, the approach is progressive because the documented requirement of establishing legal presumption of NME conditions imposed on domestic petitioners shows a progressive development in favor of China.

Politics play a major role in AD law as AD investigations can have significant repercussions for domestic industries of member countries. This makes the granting of

[67] *Id.*, ¶ 59.

market economy status to China (post 12 December 2016) quite a sensitive and politically charged issue. WTO Members are conscious of the direct competition their domestic industries can face from low-priced Chinese imports if they are made to accept China as a market economy in the future. Hence, the automatic acceptance of China as market economy by other WTO Members that have not granted China a market economy status does not seem plausible in the future. This could change if the WTO Panel decides in favor of China and clarifies that with the expiry of Section 15(a)(ii), the US and the EU (and other WTO members) have lost their right to reject and replace the home-market prices of China for price-determinations in AD investigations. However, it seems very unlikely that the WTO Panel would make such a determination, especially in these times when the very existence of WTO and its adjudicatory mechanism is being challenged.

It is likely that the Panel will rule that the NME methodology can still be applied by WTO Members post 12 December 2016 based on the surviving provisions of Section 15 of the Accession Protocol; however, it may suggest investigating authorities to require a higher standard of proof for applying NME methodologies against Chinese imports. As seen in the latest AD investigations in Mexico against China (discussed in the previous section), such an outcome will have significant repercussions for domestic petitioners as it will increase the evidentiary requirements they have to fulfill in a petition against China. However, this seems to be a plausible outcome as it can balance China's expectations for its exporters to receive a favorable change in treatment on one hand and on the other hand Member States' reluctance to provide unqualified non-discriminatory treatment to China in future AD investigations.