

IS THE FOREIGN TRADE ACT OF 1993 INCONSISTENT WITH WTO OBLIGATIONS?

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This short paper addresses Mexican reforms in its Foreign Trade Act (FTA) (Diario Oficial dated March 13, 2003) that have been challenged by the Government of the United States.

The original purpose of the FTA reforms consisted in rendering more agile administrative procedures for supporting Mexican producers against unfair international trade practices (dumping and subsidies). Likewise, the reforms were used to adequate and incorporate various provisions contained in the "WTO" into domestic law, which attempts to grant greater legal certainty for the trade remedy system users. Finally, the reforms pretended to adopt certain WTO language. Notwithstanding, the Government of the United States has expressed certain inconsistencies of the FTA reforms with WTO obligations (Antidumping Agreement and Subsidies Countervailing Measures Agreement) and, therefore, requested consultations with the Government of Mexico (June 16, 2003) and finally, requested the establishment of a Special Group under the WTO Dispute Settlement Body (DSB) (September 19, 2003).

TIMEFRAMES IN ADMINISTRATIVE PROCEDURES

The deadlines for publication of a notice of initiation, preliminary and final resolutions, were reduced. There was a total earning of more than 60 working days, between the filing of an investigation petition and the publication of a final resolution. Consequently, the reform was headed to provide that an investigation be concluded within a maximum period of 270 working days since the filing of a petition. To accomplish this, once a notice of initiation has been published, the FTA grants respondents 28 working days (instead of the previous 30 days) to respond to the investigation and submit their response to the official questionnaire.

The U.S. argues before the WTO DSB that the provision which requires interested parties to present arguments, information, and evidence to the investigating authorities within 28 days of the day after publication of the initiation notice appears to be inconsistent with Articles 6.1.1 and 12.1.1 of the AD and SCM Agreements, respectively, which specify that exporters/foreign producers shall be given at least 30 days to respond to questionnaires, and that, as a general rule, the 30 days are to be counted from the date of receipt of the questionnaire.

BEST FACTS AVAILABLE

In order to avoid judicial challenges that had been filed in recent years, the FTA reform granted authority to the "Secretaría de Economía" to determine "all others rates", in accordance with "the facts available" (best information or facts available), for those foreign producers not collaborating in the investigation, those filing incomplete or incorrect information or those that did not shipped during the period of investigation.

The U.S. argues before the WTO DSB that such provision appears to be inconsistent with Article 9 of the AD Agreement, in conjunction with Article 6; and with Article 6.8 of the AD Agreement and Article

12.7 of the SCM Agreement to the extent that it requires the application of facts available rates to exporters with no shipments during the period of investigation.

ADMINISTRATIVE REVIEWS

A transcendental aspect of the FTA reform is that those foreign producers with negative dumping or subsidies margins, will also be subject to the antidumping annual reviews. With respect to administrative reviews, it is provided that in order to demonstrate an export price and be able to demonstrate changed circumstances, the export volume should be "representative."

The U.S. argues before the WTO DSB that such provision appears to be inconsistent with Articles 5.8 and 11.1 of the AD Agreement, with Article 9 of the AD Agreement, and with Articles 11.9 and 21.1 of the SCM Agreement.

Moreover, another provision appears to require that "new shippers" requesting expedited reviews demonstrate that their volume of exports during the period of review was also "representative." Such provision appears to be inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, which require authorities to conduct reviews without regard to such a condition.

RETROACTIVITY

The retroactive clause set forth by the FTA was reformed with a longer period, when due to "their temporality, their volume and other circumstances, it is considered likely that they undermine the repairing effect of the antidumping duty."

The U.S. argues before the WTO DSB that such provision appears to be inconsistent with Articles 7 and 10.6 of the AD Agreement and Articles 17 and 20.6 of the SCM Agreement because it provides for the application of definitive anti-dumping or countervailing duties on products entered prior to the date of application of provisional measures for longer than allowed under the AD and SCM Agreements, and even if not all AD or SCM Agreement requirements for applying such duties are met.

APPEALS AND JUDICIAL REVIEW

The obligation of exhausting the appeal administrative remedy as a prior step for filing a judicial review before the Mexican Federal Court of Fiscal and Administrative Justice continues.

In respect to the judicial review, the U.S. argues before the WTO DSB that certain provisions of the Federal Procedural Code, in conjunction with the FTA appears to be inconsistent with Articles 9 and 11 of the AD Agreement and Articles 19 and 21 of the SCM Agreement to the extent that such provisions prevent Mexico from conducting administrative reviews of anti-dumping or countervailing duty orders while a judicial review of the order is ongoing, including a NAFTA "binational panel". ■