UNFAIR TRADE PRACTICE IN THE UNITED STATES, CANADA AND MEXICO

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The autor discusses unfair trade practices in the United States, Canada and Mexico. He mainly refers to dumping techniques or price discrimination, and subsidies. He describes the potential damages resulting form these practices.

He compares dumping to government subsidizing, and analyzes the counteracting techniques of each, namely anti-dumping and countervailing duties.

The autor then explains the legislation surrounding these practices in the three countries, and the administrative structure of the trade sector in these countries.

L'auteur traite des pratiques commerciales déloyales aux États-Unis, au Canada et au Mexique. Il se réfère principalement aux techniques du *dumping* des prix et des subventions. Il décrit les conséquences dommageables qui en résultent.

L'auteur compare la pratique du *dumping* à celle des subventions gouvernementales et il analyse les techniques qui permettent d'y remédier: les droits *anti-dumping* et les droits compensateurs.

Il analyse également la législation concernant ces pratiques dans les trois pays, ainsi que la estructure administrative du secteur commercial de ces pays.

The autor concludes by suggesting that Mexico harmonize itself with the administrative structure and the internal legal structure of its partners in the area of unfair trade practices.

L'auteur termine en proposant que le Mexique harmonise sa législation nationale ainsi que sa structure administrative avec celles de ses partenaires dans le domaine des pratiques commerciales restrictives.

I. INTRODUCTION

Admittedly the concept of unfair practices in quite broad, because it includes a set of commercial activities, private and public, that are carried out to distort markets and seek to imbue products and services in foreign markets, with an artificial competitiveness, thus damage to producers of identical or similar goods. The use of parallel trademarks, under invoicing, the transactions between related enterprises (transnationals) conform some of the alluded practices. Howover, this presentation, refers exclusively to dumping and subsidies, institutions, which have undergone important developments in the body of international commercial law.

As it is known, dumping is a practice carried out by private enterprises when a product is sold in a foreign market at a price below the market price in the country which produces it. This price discrimination, must be coupled with a significative import increase in the injured country, imports which result in a cause and effect link that injure or threaten to injure or damage national producers of identical or similar merchandise.

On the other hand, subventions or subsidies are practices carried out by states and governments, who

grant tax, financial, exchange, and credit incentives to export products, which can then be sold in the foreign markets at depressed prices. These sales, should in addition cause injury or damage or threaten to damage foreign producers of identical or similar goods.

In case dumping occurs there is a remedy or defense mechanism, which the affected parties can demand from their respective governments, and which is technically known as antidumping duty.

On the other hand, regarding subventions and subsidies there is a similar sanctioning mechanism contemplated, which is the countervailing duty that performs the function of equalizing the prices reestablishing a fair competition between exporters and domestic producers.

It is important to point out, that both dumping practices as well as subventions or subsidies practices can take place in a two-way path. In other words, Mexican products can be denounced either in the United States, or in Canada for dumping or subvention. Likewise, the North American or Canadian products can be charged in Mexico as being imported at unfair prices.

Within this context, we find that there are three legislations which in their own internal markets regulate these practices with their respective national authorities wo will enforce this legislation using subjective criteria which are not necessarily transparent and neutral.

Before presenting a brief description of these legislations, it is convenient to mention the efforts, which at an international level, have been carried out by the GATT in the subject matter. Indeed, an Antidumping Code accorded in the Tokyo Round of

the GATT, regulates dumping practices, and the three countries of the future trilateral trade agreement have subscribed it. Therefore, this normative framework should in general serve to in part neutralize nationalistic inclinations which usually surface in these type of controversies.

In the area of subventions or subsidies, there is another legal text known as Code on Subsidies and Countervailing Duties which to date has been subscribed by Canada and the United States. Mexico despite its commitment to subscribe it in the Protocol of Adhesion to the GATT in 1986, has not done so dealing with the problem of subventions or subsidies through an Agreement or Proof of Damage, of a bilateral character which is in force in the United States of America. We believe this omission should be addressed as soon as possible, due to the fact that the Code as is true in Canada's case, offers greater possibilities in the area of regional subsidies than the Agreement with the United States, currently in force.

Notwithstanding the latter, the regulation of unfair trade practices, continues to be governed fundamentally by the internal legislations on the subject in question. The bilateral agreement between the United States and Canada, currently in force, addresses it in chapter 19 which be expounded on with more competence by doctor Debra Steger.

II. GENERAL LEGAL PANORAMA IN THE THREE COUNTRIES

The subject of unfair practices in the American legislation, remits us in a first instance to the Tariff

Act of 1930, which was updated in its VII title, by the Multilateral Trade Agreements Act of 1979, which incorporate the GATT Conduct Codes mentioned above. Subsequently, the Tariff Act of 1984 incorporated new modifications to this legal system, producing secondary modifications int the 1988 act, known as Omnibus Trade Act. In this panorama, we must not omit the Antidumping Act of 1921, which in this specific subject matter is reproduced in section 731 of the aforementioned Tariff Act of 1930.

With regard to Canada, the legislative panorama is more precise and well defined, since only one act, known as the Special Import Measures Act of 1984 (SIMA), regulates all unfair trade practices. This act, governs both dumping as well as subsidies, and in general we can state that it closely follows the GATT Codes' provisions on the subject.

In Mexico, our legislative panorama is quite simple, formally speaking, because dumping and subsidies are regulated under the Foregn Commerce Law of January of 1987, its regulations or bylaw regarding Unfair Practices in International Commerce of November of 1987, complemented with the Antidumping Code which under the hierarchy of an international treaty is regarded as positive Mexican law.

Of the three legislations before mentioned, the one which produces more problems because of a lack of transparency and clarity is the North American legislation, which in addition to being presented in a scattered form, has undergone successive amendments which have impressed it with evident protectionist characteristics.

III. THE ADMINISTRATIVE STRUCTURE IN THE THREE COUNTRIES

In the United States, with the Multilateral Trade Agreements Act of 1979, authority was deplaced from the Theasury Department to two different administrative authorities, the International Trade Administration (ITA), which is subordinated to the Trade Departament, is in charge of the evaluation and determination of the existence of dumping (comparing the prices of products which are imported to the United States) and the subvention or subsidy identifying its existence and assessing the amount of support of given by foreign governments to products imported to the United States.

On ther other han, the International Trade Commission (ITC) is the other agency in charge of evaluating and determining the damage or injury that the aforesaid unfair imports can cause the domestic American producers.

Regarding Canada, the Deputy Minister is in chrge of determining the existence of dumping and subsidies, while the Canadian International Trade Court calculates the material damage or injury that said imports cause domestic producers of identical or similar goods.

With regard to Mexico, the administrative system concentrates all powers in the Ministry of Commerce and Industrial Promotion, a branch of the executive which evaluates dumping, subventions, and the damage, or threat of damage. In addition, we have an Intersecretarial Commision known as the Foreign Trade and Control Commission, which participates in

a very supplementary fashion at the moment of establishing a final countervailing duty for unfair imports.

From these administrative structures we can draw some conclusions. The division of functions existent both in the United States, as well as in Canada, renders the task of the administrative authority more objective, due to the fact that two technical bodies, independet from each other, analyze and decide on the two hypothesis which are presented in the cases of dumping and of subventions or subsidies. In the determination of injury or damage or threat of damage, the American ITC, even receives the opinions of Congressmen, unions and other parties with a stake in the problem. On the other hand, the Canadian Trade Court in exercising its evaluative function in determining the damage, has regulatory and statutory autonomy to operate separately from the administrative authority. In contrast, the SECOFI monopoly within the Mexican framework has shown deficiencies, due to the fact that the destiny of Mexican producers affected by foreigners' unfair practices is left practically in the hands of second level officials who under macroeconomic pressures act in a unilateral and arbitrary fashion. In our Mexican legal system, only SECOFI determines the luck or the outcome of a complaint regarding an unfair trade practice.

IV. THE PARTIES INTERESTED IN ACTIVATING THE PROCEDURE IN THE THREEE COUNTRIES

In the United States, the interested parties can be the producers, the traders or distributors, the in-

volved unions and other social groups, such as the environmentalists. It is the producers who represent the sector, who can activate the procedure against an unfair practice.

In Canada there are no restrictions or requirements for producers, distributors, unions, etc., to trigger proceedings, the practical requirement being that they have a minimun representativeness.

In Mexico the parties with standing are the producers who represent at least 25% of the national production of the goods affected by unfair imports. The producers' chambers or associations, also have procedural standing. No other parties have express standing to activate the procedure under Mexican law.

However, since the law contemplates the possibility of SECOFI acting without a complaint, our opinion is that unions, cooperatives and other entities from the social sector can lodge a complaint without further requirements.

Within this context, we believe that the right to activate the procedure, is broader in the American and Canadian legislations, since in these jurisdictions unions are expressly recognized and given a procedural standing which is justifiable, because we are dealing with producers affected by unfair import under the conception that workers are also producers.

V. SUBVENTIONS OR SUBSIDIES

In the subject matters of subventions or subsidies North American legislation does not contain a univocal concept. It uses four examples to describe subsidies:

1) Provision of capital, loans and securities outside the commercial parameters.
2) Supply of goods and services at preferential prices.
3) Resource concession or write-offs of debt to cover operative losses for a specific industry.
4) The assumption of any manufacturing or distribution cost or expense. In this regard the law remits to the list of examples annexed to the GATT Code in the subject matter.

On the other hand, Canada in section 2 of the SIMA affirms that the subvention includes any commercial or financial benefit which will accumulate or will be accumulated, directly or indirectly, to persons dedicated to the production, manufacturing, processing, purchase, distribution, transportation, sale, exportation or importation of goods, as a result of any scheme, program, practice or thing done, provide or implemented by the government of a country other than Canada, but which does not include any custom duty or internal tax levy imposed on goods by the government of the country of origin or exporting country from which the goods, due to their exportation from the exporting country or country of origin, has been exempted or has been or will be released through reimbursement or drawback.

Summarizing the aforesaid, section 2 (1) of the SIMA determines which government programs will be subject to compensation through subsidy: those which foresee a commercial or financial benefit, and which constitute a cost for the government that supports the program and which are directed.

The subsidized goods are defined in the following fashion in the same section:

a) Goods whose production, manufacturing, processing, purchase, distribution, transportation, sale, export or import, enjoy a subsidy that has been or will be paid, granted, authorized or in any other fashion provide, directly or indirectly, by the government of a country other than Canada, and

b) Goods traded by a government, other than the Canadian, at a loss, and it includes anuy goods regarding which, or in the production, manufacturing, growth, processing or the like of which, the goods described in the paragraphs *a)* and *b)* are incorporated, consumed, used or employed in any other fashion.

In so far as Mexico is concerned, the amount of the subsidy will be that which SECOFI determines with regard to the benefit received and susceptible of being adjusted at a later date through deductions which the interested party request and justifies.

VI. UPSTREAM SUBSIDIES

United States. Upstream subsidies are those which are given to the resources, which confer a competitive benefit or edge and have a significant effect on the cost of the final product. The benefit exists if the producer paid a price for the resource below the normal level. The criterion of the benefit applies according to the percentage of the upstream subsidy, and in based on the following suppositions: that it be more than 5%, less than 1% or of an intermediate range.

Canada. The SIMA defines upstream subsidies in an incomplete fashion, as those subsidized goods which are incorporated, consumed, used, or employed in other goods.

Both the ITA, as well the Deputy Minister are endowed with broad discretionary powers in dealing with a matter related with upstream subsidies.

Mexico. They are not contemplated by the legislation.

VII. REGIONAL PROGRAMS

United States. Regional programs will be subject to countervailing duties in they are preferential, that is to say, if they preferentially grant a benefit to an industry or to a geographic region. Regional programs which do not *de iure* or *de facto* violate the general availability rule will not be subject to countervailing duties.

Canada. SIMA considers the regional programs which benefit a region due to its geographical and meteorological characteristics as non-directed and exempt from countervailing duties and therefore is the only area that could benefit from said program.

The ITA and the ITC agree that programs will be subjected to countervailing duties if they *de facto* or *de iure* violate the rule of general availability.

Mexico. They are not contemplated by the legislation.

VIII. DUMPING

United States. The fundamental rule to reach a determination of dumping is the sale for a value lower than

the fair value. This occurs when the price of the product in the foreign market is higher than the similar product in the United States. In this definition the United States established an ultraprotective measure, since they substitute the international provision of normal value for the price in the United States. However, what the North Americans call technical dumping is not subject to antidumping duties since it is not considered anticompetitive or unfair. As is the case with subsidies, some adjustements will be applicable.

Canada. To determine the dumping practice, the normal value of the goods should exceed the export price, the dumping margin being the difference between the normal value and the export price.

Mexico. Following international guidelines, dumping is determined as the importation of identical or similar merchandise at an price which is inferior to that of its normal value. The dumping margin will also be the difference between the normal value and the importation price.

IX. COUNTERVAILING DUTIES, ANTIDUMPING DUTIES AND COUNTERVAILING QUOTAS

United States and Canada. Countervailing duties are an internationally accepted measure to counteract the injury or damaging effect, which subsidized imports have caused, cause, or may cause the national production of similar goods or products. Countervailing duties are levied in an amount equal to and not greater than the net subsidy (United States) or the amount of the subvention or subsidy (Canada). Antidumping duties

operate under the same principle, but are applied to dumping and are imposed in an amount equal to and not greater than the dumping margin. The investigations carried out are named after these practices.

Mexico. The countervailing quota is a strictly Mexican concept which operates as a regulatory or restrictive measure for products imported under conditions of unfair international trade practices. It would seem that the Mexican legislator applied the so-called "administrative simplification" policy to obtain two tools for the price of one, since the latter concept encompasses both dumping and subsidies. In contrast with countervailing duties and antidumping duties, countervailing quotas can be temporary or definitive. In a dumping case the countervailing quota will be equal to the difference between the lowest price and the comparable one in the exporting country, and in the case of subsidies it will be equal to the amount of the benefit granted, or both in a joint fashion. However, there is an apparent discrepancy between the law and its bylaw or regulations. While the law states the aforementioned, the bylaw mentions that the provisional countervailing quota will not be greater but rather lower than the dumping margin or amount of the subsidy, but there remains the possibility that they be lower, all of this remains to be considered or judged by SECOFI. Perhaps this discretionally is for SECOFI to take the public interest into account, indirectly.

One must point out the difference with the criterion in the United Sates, which does not take into account the improvement or benefit, but rather the accumulated quantum.

X. MATERIAL DAMAGER, PROOF OF DAMAGE OR INJURY

United States. Proof of damage is determined by the ITC and is the same for the investigations carried out in countervailing duty and antidumping duty cases, however, only the signatory countries of the CSDC or of similar agreement with the United States, benefit from proof of damage, while other countries will not, unless the merchandise in question is free of custom taxes or duties. The factors to be taken into account are the volume of the imports, the effect of national prices, the impact of national producers and the damages presented.

Canada. Proof of damage is applicable to investigations regarding antidumping duties and compensatory duties without regard to the exporting or origin country of the similar goods.

Mexico. Proof of damage is applicable to the countries which allow the presentation of the same proof regarding the merchandises which Mexico exports to those countries. In some manner, this is similar to the criterion applied in the United States.

XI. THE CANADA-UNITED STATES BILATERAL TRADE SYSTEM

In order to face the legal and administrative disparities existing in the North American and Canadian legislations, the bilateral treaty that governs the North American free trade area since January 1, 1989, establishes two fundamental principles: *a)* the commitment on the part of the two countries to establish within a seven year period a common legislation for the area,

which respeals the domestic federal legislation which were briefly described above, and *b)* withdrawal from the internal judicial systems, of the remedies which can be lodged against final resolutions of agencies, *id est*, courts established under the current legislations on the subject.

Indeed, in the latter case, chapter 19 of the agreement foresees a procedure established to submit to the jurisdiction of a binational panel formed with five members from both countries which will review the resolutions taken by the administrative agencies.

The new bilateral system applicable to antidumping and countervailing duties should reduce the costs and delays for private enterprises when challenging decisions taken by international trade agencies through the court system.

The commitment from both countries to work jointly for the development and implementation of a new commercial law system is an importan step for the bilateral trade relationship, as it is with respect to the Uruguay Round on multilateral trade negotiations.

The establishment of new formal channels of communication between the two governments before the enactment of the new commercial legislation will result in an initial alert mechanism for potential conflicts.

The establishment of a Canada-United States Trading Commission with the power to appoint arbitration panels and to issue binding decisions or designate expert panels to arbitrate or solve specific disputes, are a new and important step in the trade relations between Canada and the United States.

Albeit, the dispute settlement mechanisms contained

in the FTA are not perfect, the can evolve into a more permanent bilateral institution with authority in the future. The designing of a set of institutions to administer the new trade agreement and which will solve disputes, requires reaching a very delicate balance between the purpose and the goals of the FTA, and the preoccupations of governments regarding the displacement of sovereignty —in terms of decision-making— to a supranational body.

The FTA, due to its nature, is an evolutionary document. Some of its rules —om amtidumping laws and countervailing duties, intellectual property, trade in services, financial services, governmental procurement, and agriculture, for example— will be subject of future negotiations and development. Political and economic needs will require that rules and institutions be modified as time passes in order to face the ever changing conditions in both countries.

XII. CONCLUSIONS

As we have stated, Mexico, by entering into a trilateral free trade agreement will have to harmonize at different levels, both its administrative structure as well as the internal legislation in the subject matter of unfair trade practices, which as we have seen in the previous paragraphs, are quite distant from the mechanics of its partners, and should, in addition, assume important legal commitments in order to incorporate into Mexico's law the highly original decisions delivered by the binational panels established in the aforementioned chapter 19 of the Canada-United States Agreement.