LEGAL ASPECTS OF THE FREE TRADE AGREEMENT

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The author discusses the legal aspects of the Free Trade Agreement between Canada and the United States from a Mexican point of view. He explains how it will be indispensable for Mexico to carefully analyze the Free Trade Agreement between Canada and the United States before formally adhering itself to the Agreement as the document will become the legal basis for the regulation of the trade area. He emphasizes that Mexico is negotiating its participation in an already existent free trade area between the United States and Canada, and not in the creation of a new area with the United States alone.

L'auteur analyse les différents aspects juridiques de l'Accord de libre échange entre le Canada et les États-Unis. Il souligne l'importance pour les mexicains d'analyser cet accord car il servira de modèle pour les négociations futures, et que le Mexique entre dans ce marché déjà créé par cet accord.

L'auteur examine ensuite les problèmes constitutionnels que peut soulever l'Accord de libre échange. Ainsi, il souligne que les procédures pour son adoption sont différentes au Mexique de celles qui existent au Canada et aux États-Unis.

The author then describes the Mexican constitutional procedure for the implementation of the Agreement while comparing it to Canadian and American procedures, maintaining that the Mexican procedure is in reality fundamentally different.
The autor concludes with an analysis of the Agreement's "Grandfather Clause", and how this clause would not greatly benefit Mexico as it has less force than in Canada or the United States.

Il termine en soulignant que l'application de la "clause grand-père" prévue par l'Accord n'aurait pas la même force au Mexique qu'au Canada et aux États-Unis.

INTRODUCTION

The formation of a free trade area with the participation of the Canadian, American and Mexican markets, has produced so much information that, eventually, all the subjects related with this process have been mentioned.

It is to be noted however, that there is an absence of legal opinions regarding the signing of an agreement for the formation of a free trade area between the United States and Canada. Mexican lawyers have behaved themselves during this process in a cautious and reserved fashion.

It is necessary that the different sectors which integrate the countries' civil society express their opinions regarding such a delicate question, with so much transcendence for our immediate future.

Mexico has informally initiated the international negotiations that will lead it to adhere itself to the

North American free trade area formed by the United States and Canada, and embodied in an agreement signed by both governments and in force for almost three years to date.

It is considered indispensable for this reason, to submit the free trade agreement subscribed by both governments to a careful analysis, because formally, said document is the legal basis that regulates the operation of the trade area.

This analysis stems from the affirmation that Mexico is not negotiating a bilateral agreement with the United States for the creation of a free trade area. The free trade area has already been constituted by the United States and Canada. Mexico is negotiating its participation in that area and not the creation of a new area with the United States, which obviously would result contrary to the interests of Canada.

To embark upon the legal analysis of an agreement of this nature, it is convenient to begin by reviewing the constitutional provisions which constitute the legal basis for all international treaties or covenants which are subscribed by the Mexican government. Article 133 of the Federal Constitution, in general, regulates this subject-matter. It is therefore convenient to recall its text:

> This Constitution, the laws of the Union Congress which emanate from it and all the treaties which agree with it, and which are to be subscribed by the President of the Republic, with Senatorial approval, will be the Supreme Law of the Union. Judges from each State will act according to this Constitution, its laws and treaties in spite of the provisions which might contradict it in the local constitutions or the laws of the states.

Complementing said provision, is article 89, section X, of said Constitution, which establishes the President's powers and duties, grants this high official a monopoly in the conduction of international negotiations, establishing as the only limitation compliance with the Federal Constitution, and congruency with ordinary legislation.

On the other hand, according to the contents of article 76, section I of the Constitution, it is the Senate of the Republic which, within the procedure which regulates international negotiations established by the Federal Constitution, is entitled to approve international treaties and diplomatic conventions subscribed by the Union Executive, as long as no provision of the Federal Pact is violated. Approval by the Senate of an international treaty signed by the Executive, has as an effect, once it has been enacted, the elevation of the contents of the treaty to the category of a national law of the highest hierarchy.

There is however another constitutional provision which will have to be taken into consideration to guarantee a correct interpretation of the constitutional legislative process to which international treaties are subject. Namely: article 72, clause f), which establishes:

> Article 72. All bills or decrees, whose resolution is not exclusive of any one of the chambers, will be debated successively in both of them, according to the debate bylaw regarding form, intervals and ways of proceeding in debates and voting;
>
> F) The interpretation, amendent or repeal of laws or decrees follow the same proceedings established for their enactment.

In other words, even if the Head of the Executive Power is constitutionally entitled to enter all kinds of conventions or international treaties, said powers cannot be extended to the extreme of considering that the President of the Republic is entitled to make international agreements that result contrary or contradictory with ordinary national laws, due to the fact, that it is an exclusive power of the Union Congress to draft and enact said laws, only the legislative body is entitled to modify or repeal them, not the Head of the Federal Executive.

The proposition that some jurists have formulated sustaining that international commitments assumed by the Head of the Federal Executive, once approved by the Senate of the Republic, have repealing effects regarding the ordinary laws which oppose it, is incorrect. Those who formulate this thesis, in fact, are accepting that the President become a sort of irregular one-man legislature whose activity would be contrary to the principle of the separation of powers enshrined in article 49 of the Federal Pact. The only case in which the President of the Republic can act as a legislator, is foreseen by the Constitution itself in article 131, in dealing with tariff and non-tariff modifications necessary to regulate Mexico's foreign market or the economy of the country.

Consequently, when dealing with international economic negotiations, the President of the Republic can undertake commitments with tariff contents without subjecting himself to the rule requiring previuos modification of the ordinary legislation that regulates this subject. In this case, we would be facing the exercise of extraordinary powers to legislate granted to the Head of the Federal Executive Power by article 49 of the Federal Mexican Constitution.

Based on the commentaries which we have expressed, we wish to propose some considerations based on the constitutional texts invoked and, with the former, we will attempt to carry out a legal analysis of the free trade agreement which our government is preparing to subscribe.

First. According to the Federal Pact, the responsibility of entering international negotiations which eventually lead to the incorporation of Mexico to the North American free trade market, is exclusive of the President of the Republic.

Second. Once international negotiations are concluded and Mexico's participation in the North American free trade area is formalized, the Head of the Executive Power must submit the corresponding treaty to the Senate of the Republic for its approval, and, once approval is obtained, it should enact the decree whereby its enforcement is declared obligatory throughout the national territory.

Third. The President of the Republic will supervise and insure that the contents of the agreement is congruent with and respectful of the the Mexican Political Constitution, and, in any case, of the ordinary national legislation, due to the fact, that if international obligations that are contrary to the ordinary legislation are accepted, the legal consequence would be the violation of the contents of article 72, clause f), of the Constitution.

Fourth. The Free Trade Agreement subscribed by the United States and Canada, surpasses to a great extent, commercial subject-matters, and it could be considered more like the initiation of an economic integration process rather than a trade agreement.

Among the important subjects which were negotiated by both governments, in addition to the strictly commercial ones, are the following:

- Customs provisions and rules of origin;
- Technical obstacles (technical, sanitary, phytosanitary, health, safety, environmental, and consumer protection norms, etc.);
- Agriculture;
- Energy;
- Governmental procurement;
- Trade services, including financial services;
- Foreign investment, including the right to incorporate, national treatment and precise rules regarding expropiation and nationalization;
- Access to resources;
- Monopolies;
- Intellectual property, basically in the subject-matter of patents and trademarks;
- Unfair practices, including the application of countervailing measures and activity of binational panels for the settlement of disputes.

From the latter list, it can be inferred that the subject-matters to be negotiated, and the commitments which our country will enter into with its adhesion to the North American free trade area, undoubtedly require the participation of the Chamber of Deputies during the entire negotiation process, and not only of the Senate, which, as we have pointed out, manifests itself in an act of approval which is *a posteriori.*

The latter consideration rests on the fact that, each and every one of the subjects or themes men-

tioned, have a legal framework in Mexico which regulates their functioning and treatment on the part of the administrative authorities. Obviously, the legal framework was designed, drafted and enacted by the Union Congress, in use of its exclusive powers contained in article 73 of the Federal Pact, and only the Union Congress is entitled to amend or repeal said legal framework. According to this line of thought, the President of the Republic is not entitled to assume international commitments which are contrary or contradictory with the national laws, such as, those contained in the Free Trade Agreement which the Mexican government has been invited to subscribe.

Fifth. On the date in which the corresponding enactment decree enters into force, the Free Trade Agreement will have the level of a national law of the highest hierarchy and its observance and enforcement will bind authorities, local and federal, executive, legislative and judicial, as well as the civil society in its entirety.

Both in the case of the United States as well as in Canada's case, although technically the Constitutional procedure which guides international negotiations of this type of agreements is similar to Mexico's, there are however, some differences which, eventhough at first glance seem to be subtle or of lesser importance, in reality present a fundamental difference with the Mexican constitutional procedure.

In the first place, both in the United States as well as in Canada, their Constitutions bind their Congress and Parliament, respectively, to intervene in

an essential fashion throughout the entire negotiation process. In fact, it can be stated that the President of the United States has no more negotiating power than that which is granted to him expressly by Congress through the enactment of laws such as the Omnibus Trade Bill and other specific authorizations which are temporary and subject in any case to final Congressional approval, and not only Senatorial ratification.

It is in light of this limited mandate given by the American Congress to the President of the US, that the American negotiators never contract or enter a commitment that could result contrary to its national legislation. The mandate given to the President is scrupulous in this subject-matter. In fact, the United States transfers to international treaties the elements which are already found in its own ordinary legislation, especially, when dealing with mandatory legislation.

Secondly, both the United States as well as Canada, have accorded themselves what in the international argot is known as the "grandfather clause". In reality, this term is used to describe what legally constitutes an important reservation through which the signatory countries agree to the preferential application of their laws of a mandatory nature which are in force at the date of celebration of the agreement. In light of this reservation, the United States and Canada, can apply in a preferential fashion, their own national laws, in important subjects like national safety, health, environment, consumer protection, workers' rights, etc., even in the unlikely case where there would be a contradiction between the laws which regulate said matters and the provisions contained in the international treaty in question.

With respect to this question, the current situation of Mexican laws is unfortunate. In general terms, Mexican laws which regulate economic matters, as well as other questions, have a discretionary nature, more than a mandatory content, in other words, they give the administrative authority broad discretional powers. For this reason, they are not deemed mandatory laws, in the terms of the "grandfather clause", and consequently, could not benefit themselves from this important reservation.

The latter two questions which we have underscored, can result unfavorable for Mexico. It is therefore necessary to establish mechanisms which guarantee the participation of the Union Congress in the negotiation process, especially of the Chamber of Deputies, and to review Mexican legislation which regulates the subject-matters which directly or indirectly are related with the themes incorporated in the agreement in order to determine how advantageous it will be for Mexico to negotiate the "grandfather clause", or to what extent Mexican laws would be affected by the commitments undertaken by the negotiators as a result of Mexico's participation in the North American free trade area.

We believe, given the discretionary nature of our legislation, that the benefits that we could derive from the "grandfather clause" would, indeed, be very limited.

With respect to this subject, it is convenient to recall that the main obstacles which are faced by our exports in gaining access to the American market stem especially from the application of mandatory laws covered by the "grandfather clause", such as

health, sanitation, safety, environment, consumer protection, protection of intellectual property, and labor laws. These legal provisions clearly will not be negotiated by the United States and Canada, and our exports will continue to face technical obstacles, which to date have restricted our access to the American market, in spite of the Free Trade Agreement, unless the Mexican negotiators include mechanisms in the agreement regarding compensation and safeguards, as well as agile dispute settlement procedures which allow an opportune reply to unwarranted restricitve measures which are applied to our trade.

These preliminary conclusions lead us to consider some questions regarding the Free Trade Agreement. Do Mexican negotiators know which Canadian and American laws are covered by the "grandfather clause" ? ; do they know how the enforcement of said laws affects our trade?; have they considered the important legislative amendments which Mexico will have to incorporate to its laws in order to adhere itself to the agreement and participate in the North American free trade area?

Finally, one more question; has it been considered that an agreement of such broad reaching consequences and depth, which will radically change the national development project contained in our Constitution, is a matter which, not prejudging on its soundness or its disadvantages, should be thoroughly discussed by all Mexican social sectors and not only by entrepreneurs, authorities and supposed experts ?