TOWARDS A FREE TRADE AGREEMENT BETWEEN MEXICO AND THE UNITED STATES: LEGAL IMPLICATIONS

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The authors discuss the implications of a free trade agreement between Mexico and the United States by analyzing the legal characteristics of such an agreement, and the protectionism which would be encountered.

The authors then describe what is usually contained in free trade agreements and discuss their role as international treaties *vis à vis* other treaties, such as the GATT.

They analyze Mexico's vulnerabilities regarding a trade relationship with the United States, and the mechanisms which would be necessary in dealing with protectionism, tariff and non-tariff barriers.

Les auteurs présentent les diverses implications d'un accord de libre échange entre le Mexique et les États-Unis, et analysent les aspects juridiques ainsi que le protectionnisme auquel il fera face.

Ils décrivent ensuite le contenu habituel de ce genre d'accord ainsi que son rôle par rapport à d'autres accords internationaux de même type, tel que le GATT.

Les auteurs soulignent la vulnérabilité du Mexique dans le contexte de relations commerciales avec les États-Unis. Ils analysent les mécanismes nécessaires face au protectionnisme et aux barrières tarifaires et non tarifaires.

The authors continue by discussing the agreement as an instrument against protectionism.

They conclude by suggesting that rules and procedures be adopted in order to guarantee the enforcement of such an agreement.

Ils analysent ensuite l'Accord en tant qu'instrument contre le protectionnisme.

Les auteurs concluent en proposant que des règles de procédures soient adoptées afin de garantir l'application d'un tel accord.

This paper seeks to show the meaning and implications of a free trade agreement between Mexico and the United States, in light of the recent developments of international commercial law. Specifically, it addresses and analyzes two aspects: the legal characteristics of a modern free trade agreement, and the specific possibilities of using an agreement of this nature to face the new manifestations of protectionism.

THE AGREEMENT AS AN INTERNATIONAL TREATY

A free trade agreement is, legally speaking, an international treaty. As such, it implies an agreement between two or more sovereign States by virtue of which they assume certain obligations and acquire certain rights. The binding nature of an agreement of such a type rests in its belonging to the body of international law, but it lacks impartial institutional agents which can make it effective through the use of force. As other international agreements (the GATT, for example), it is sustained by the degree of acceptance it has from the party

States themselves, and, on occasion, by the capacity of powerful parties to force the others to comply with its prohibitions through the use of reprisals. Thus, the force of international agreements rests both in their international law character, as well as in their inclusion in the domestic or internal legislation of States.

It has been pointed out, that the importance of the free trade agreement lies in the fact that it constitutes a form of recognizing and formalizing the silent integration process undergone by our economy with the North American one. It is said that an agreement would make the process more rational. However, we must underscore that not only will the agreement give the silent integration process more rationality, but the latter process itself also makes the agreement rational. The outstanding traits of a free trade agreement, are not the acts of governments or of private parties which it governs, but rather the activities of private parties that it allows. The activities that the Free Trade Agreement regulates are the activities of traders as well as the activities of the governments of the involved party States. This fact adds an especially important dimension to an agreement, which is the effectiveness or interaction with reality of an international trade agreement with an economic content. Thus, effectiveness does not lie solely in compliance of the parts (*i.e.* the States), nor in the sanctions it establishes; because it cannot penalize the lack of participation from traders; but in the fact that the involved parties perceive economic advantages which are derived from it, or that they derive greater ad-

vantages than they would by not becoming a party to the treaty.[1] This can explain the relative failure of Latin American agreements; it is more difficult to create a trade flow, than to recognize one which already exists. The Free Trade Agreement between Mexico and the United States would be designed to have a greater effect on reality than a trade agreement with any other country in which this natural trade flow and investment do not exist.

The goal of this type of agreement is the creation of a free trade area, article XXIV of the GATT defines it as: "a group of two or more territories among which custom duties and other restrictive regulations of commerce are substantially eliminated from all trade between the constituent territories on products coming from those territories".[2]

Clearly, this definition is rendered obsolete in light of recent agreements which include not only goods but services, as well as other areas not included under the concept used by the GATT.

THE NEW FREE TRADE AGREEMENTS

The content of a free trade agreement generally refers to the elimination of restrictions on international trade among the countries which sign it. However, the instruments to achieve this have changed

1 See Witker V., Jorge, *Códigos de conducta internacional del GATT suscritos por México*, México, UNAM, 1988, pp. 10-12.

2 Art. XXIV (8) b) of the GATT, quoted by Sepúlveda Amor, Bernardo, "GATT, ALALC and the most favored treatment", in Orrego Vicuña, Francisco (coord.), *Derecho internacional económico. I. América Latina y la cláusula de la nación más favorecida*, México, FCE, 1974, p.139.

according to the transformations undergone by the very definition of trade, and *vis à vis* the gradual process which is observed in the liberalization of trade. New subject-matters which appear in the Free Trade Agreement between Canada and the United States: investment, services, intellectual property, dumping, subsidies, safeguards, etc., have gained increasing importance in the modern definition of trade and are to become the distinguishing contents of the free trade agreements of the future, in the same fashion in which the curtailment of tariff barriers and of some non-tariff barriers (of the previous permit type) were the characteristic contents of these agreements in the past. One of the most interesting aspects introduced by the United States-Canada Agreement –and which was not included in the recent agreement signed by Israel and the U.S.– are the mechanisms with which the numerous manifestations of protectionism are to be faced. Thus, it is clear that a traditional agreement cannot be compared with a modern agreement like the one signed by Canada and the United States, not only in so far as the trade volume which it regulates or the level of efficiency in the obtainment of its objectives, but above all regarding the subject-matters which it governs.

The enhancement of the contents of an FTA basically stems from the advancements which international commercial law has undergone as a result of international cooperation and economic integration efforts. Many of the provisions of the new agreements have been taken directly from GATT norms or form their interpretation (especially the

ones related with trade in goods). There are also elements taken from the Stockholm Convention which creates the European Free Trade Association (EFTA) and from the Treaty of Rome which creates the European Economic Community (EEC). Regarding investment and services, the modern agreements feed on and improve the bilateral agreements between the EFTA and the EEC. In addition, recent agreements follow as closely as possible the language contained in the GATT and they are conceived as instruments which are entirely consistent with it. In this fashion, changes in the contents of international agreements rests on previous progress.

FREE TRADE IN THE GATT

The creation of free trade areas is one of the exceptions contained in the GATT to the "most favored nation clause" which is allowed if and when the latter's goal is the creation of new trade channels between the parties and not the deviation of existing trade (which would entail a form of imposing trade barriers of third parties included in the GATT), another requirement would be that the agreement which gives life to the area eliminate all restrictive trade regulation from substantially all trade between the involved parties. Strictly speaking, there is a control procedure within the GATT which determines when a free trade area is constituted as defined in the GATT, however, precedent points out that such control is quite lax because agreements are generally approved, although they do not conform to the GATT definition. On the other hand,

the Canada-U.S., Free Trade Agreement does implement a classical free trade area in the sense contained in article XXIV of the GATT (going beyond what is suggested in this article). Thus, although one can very well point out from other perspectives that the agreement weakens and is contrary to the multilateral spirit of the GATT, from the legal point of view much care was taken to make it compatible with its rules.

THE FREE TRADE AGREEMENT *VIS À VIS* MODERN PROTECTIONISM

Mexico is vulnerable in its trading relationship with the United States. Its vulnerability had been traditionally identified with the concentration of its trade with the latter country. In other words, Mexico was weak because it was exposed to acts from the United States. Efforts in past decades to achieve trade diversification were not successful. Currently, as was the case then, 70% of our trade is directed towards the United States. However, during a long period of time that exposure did not have great consequences due to the country's liberal attitude regarding international trade. Since the seventies, the latter situation is increasingly less true in light of the new protectionist measures which the U.S., has recently adopted. The new protectionism is not always easily identifiable or typified, trading barriers are increasingly sophisticated and coexist with a decreasing framework in the most evident protections (tariffs). In this essay, we will pause to explain the mechanisms with which an FTA can face contemporary protectionism. Most of these mechanisms involve the analysis of international, North American and

Mexican legal aspects. These legal mechanisms were perceived by Canadians as one of the fundamental achievements, and undeniably the most original, of their Free Trade Agreement with the United States. This aspect of the agreement links it closely with the subject of sovereignty, because in so far as a trade treaty serves to counteract the vulnerabilities of our trade, it will render us more sovereign. In this sense, the Free Trade Agreement can protect us more against the actions of the United States than the supposed independence which is derived form the absence of clear rules between both countries.

NEO-PROTECTIONISM

The elimination of tariffs achieved in the last decades within the GATT framework has done much to allow the flow of international trade, but has not been successful in guaranteeing said trade flux. Neo-protectionism has acquired renovated vigor and force in the international arena under new guises. Import quotas assigned unilaterally according sector and country, voluntary restriction agreements, antidumping or countervailing duties applied in an abusive fashion, prohibitive technical norms, safeguards applied without compensation and new, more restrictive legislations are some of the new non-tariff obstacles which are applied or could be applied in the future to our exports.[3] Modern protec-

3 A classification —and a more exhaustive list— is contained in the *Informe sobre el Desarrollo Mundial 1987, Banco Mundial, 1987,* p. 162. It includes, in addition to the mentioned barriers, consumer taxes, price control measures, import supervision (including automatic licensing) State monopolies, etc.

tionism is to a great extent the result of a series of trading laws which grant North American organisms greater discretion to decide in matters of trade policy. North American discretion in the trade area enables its government to use commercial policy as a negotiation instrument to obtain concessions from other countries through the "administration" of trade barriers. In light of the fact that we are dealing with an "administrative protection" of fundamentally liberal laws, it is the poor application of those norms –and not necessarily the norms themselves– which can be defined as protectionist. Modern trade provisions are not inspired in the protectionist philosophy. The case of laws on dumping and subsidies which establish rules against unfair competition in the area of international trade or of the technical provisions which seek to guarantee health in the importing country or the quality of merchandise imported, are examples of objectives which would be perfectly compatible with free trade if used correctly.

However, the complex procedures followed in these cases leave open spaces for the use of discretion by authorities and for negotiation between the parties.[4] This has lead to their being defined as not being impartial enough because they are subject to internal pressures and are applied in

4 Sales S., Carlos L., *American Trade Protectionism towards Mexico. 1980-1986.*, ITAM, LL.B., thesis, 1988, p. 175. The author suggests that a solution to the problems presented by these mechanisms is the use of lobbying, in other words, he suggests countervailing (local) pressure with other pressures (foreign). However that avenue does not take into account that American laws can be useful if they are correctly applied, especially because we have the same type of barriers and it is in our own best interest that they are properly enforced as they were designed and not as a result of pressures.

an opportunistic fashion. Incorrect enforcement of these laws generates a "contingency protection" mechanism which is used in order to help North American industries when foreign competition endangers their competitive position. It is meaningful –in Mexico's case– that there is a relation between increases of more than 50% in the exports of a product in the previous year and the initiation of investigations to apply countervailing duties to them. The same relationship is apparent in the case of technical norms applied to the most dynamic exports of Mexican fruits and vegetables to the United States.[5] The latter seems to confirm the use of these mechanisms to give contingent protection to North American products. The fact of the matter, is that whether they are impartial or not, their use has increased so disproportionately in the past decades that it has lead several researchers to question to what extent the existence of trade rules which seem to shield neo-protectionism behind their good intentions, is healthy.[6]

5 *Cfr.*, Sales S., C., *op. cit.*, p. 84 and pp. 114-116.

6 An example of the growing importance of these new methods can be seen in the exponential increase of the application of countervailing duties by the United States: from 1897 to 1930 they were applied 12 times, from 1930 to 1939 34 times, while only in 1979 they were used 37 times. Hufbauer, G.C. and Shelton Erb, Joanna, *Subsidies in International Trade,* Institute for International Economics, 1984, p. 15. In September of 1987 (shortly before the signing of the Free Trade Agreement) there were 5 countervailing duties, 7 antidumping duties, and 2 safeguards applied by the United States against Canada; and 17 antidumping duties, one safeguard and one countervailing duty applied by Canada to the United States, p. 770, No. 21. Mexico does not escape this tendency: to June of 1988 there were 25 proceedings currently enforced in our country against foreign products for dumping practices. Witker, Jorge, *Curso de derecho económico,* UNAM 1989, p. 300.

NON-TARIFF BARRIERS AND THE DEVELOPING WORLD

The behavior of the United States during the last decades can illustrate the uneven growth of one of the non-tariff barriers: From 1970 to 1974, it only imposed countervailing duties eleven times, while from 1975 to 1979 they applied 104, and 171 from 1980 to 1985. In the same time period a tendency was observed regarding exports from developing countries which were increasingly affected until they represented almost 2/3 of the total.[7] These mechanisms seem to constitute an obstacle to trade which particularly affects developing countries. The reason for this lies in the fact that non-tariff barriers are "porous" barriers which can be overcome by enterprises or businesses through the use of costly litigation. In light of the fact that the cost of a trial cannot be financed by smaller enterprises, there is a bias in these mechanisms which favors larger enterprises of developed countries.[8] To the latter, we must add the fact that the protectionist pressures to which these mechanisms are subject stems largely from the less dynamic branches of the economy in developed countries. In other words, precisely those sectors which compete with exports from the developing countries.

NEO-PROTECTIONISM AGAINST - AND IN - MEXICO

The enforcement of these rules affects our trade on a daily basis. Specifically regarding the case of

7 The data is from the World Bank. *Cfr., op. cit.,* p. 186.
8 *Cfr., ibid.,* pp. 186-187.

countervailing duties (antisubsidies), between 1980 and 1986, 27 investigations were initiated against Mexican products in the United States. Mexico was the country against which the United States directed the highest number of investigations during this period. In April of 1990, 9 were still in force.[9] Complaints from Mexican businessmen and industrialists demonstrate that these cases have ceased to be a matter for specialists and have now occupied their place in the array of governmental preoccupations. According to Carlos Sales, the percentage of Mexican non-oil exports affected by diverse non-tariff restrictions varied between 12.2% and 21% from 1980 to 1986. This level, without being excessive compared with the one which the United States applies to other trading partners or with the one applied to Mexico in other markets, can be reduced through an agreement. On the other hand, Mexico has enforced similar laws affecting 15 North American products exported to our country. The problem of the use of non-tariff protection mechanisms already involves both parties in the bilateral relationship and presents problems for trade among the two countries.

THE FREE TRADE AGREEMENT AS AN INSTRUMENT AGAINST NEO-PROTECTIONISM

International solutions to the problem of non-tariff protections have not emerged —to date— within the GATT. Efforts from this organism to

9 *Cfr.*, Sales, C., *op. cit.*, p. 81, apud, *México en el comercio internacional*, SECOFI, April, 1990, pp. 40-41. The Mexican situation in this sense is worse than the Canadian, because when Canada initiated negotiations for its Free Trade Agreement —underscoring the need to amend these procedures— there were only 5 Canadian products submitted to countervailing duties.

regulate dumping and subsidies through its conduct codes seem to have promoted —not diminished— these problems. It is within some regional agreements, specially the Free Trade Agreement between Canada and the United States, where a greater effort has been carried out to stifle non-tariff protectionism. The legal contributions of the agreement are found in two areas. In the settlement of disputes area, compliance with the agreement's obligations is enforced, in order to avoid their constant renegotiation. Regarding the protectionist enforcement of laws, it seeks to create professional bi-national mechanisms which control arbitrariness at a national level.

We can list six manifestations of modern protectionism which can be addressed by a Free Trade Agreement: *a*) safeguards, *b*) agreements on market performance, *c*) agreements to voluntarily restrict exports, *d*) enforcement of countervailing duties regarding foreign subsidized products and of antidumping duties to products which are sold at a price lower than the fair market value, *e*) technical standards and *f*) amendment of laws.

SAFEGUARDS

Safeguards are the avenue through which a country party to the GATT can legally establish quantitative restrictions on imports. Their infrequent use and the proliferation of negotiated measures outside the procedures of the GATT is one of the signs of multilateralism's decadence. Their strengthening is one of the prerequisites for

any free trade agreement. Safeguards are an answer to the question of when can a country not comply with the agreement's ban on the establishment of quantitative restrictions on trade? They are essentially protective measures allowed by article XIX of the GATT in those cases in which unexpected imports of certain products threaten to cause severe damage to the producers of the affected country. Article XIX is also known as the "escape clause" since it allows the party which invokes it to temporarily escape its commitments under the GATT. In order to be admitted they must not be selective, but applied according to the clause of the most favored nation (non-discrimination), temporarily and awarding compensation or the possibility of reprisal by the affected party. Non selectivity implies that what is attacked is the importation of the product and not certain producing countries. North American legislation contemplates a procedure to apply safeguards in the United States which is congruent with the GATT. This procedure seeks to prove the existence of safeguard requirements, however, once the organism determines, that the safeguard is warranted, its final enforcement is generally subject to the Executive's discretion.[10]

Internationally, safeguards are generally not invoked because the procedures established by the GATT are so informal (the rules are so few and simple) that importing countries have been able to negotiate restrictions outside the GATT with the main

10 *Cfr.*, Sales S., C., *op. cit.*, pp. 58-60.

exporting countries involved. In light of the fact that the possibility of challenging these agreements would not improve the situation of the exporting country (because –among other things– the procedure can be easily blocked or delayed) an international proliferation of safeguards has occurred outside the GATT.[11] Such is the case of market performance agreements, export quotas and voluntary export restriction agreements which we will analyze in the following heading.

Developed countries have severely criticized the current GATT safeguard mechanism because it does not allow them selectivity and they have pressed for a safeguard code which would include this principle as an exception to the clause of the most favored nation. For them it is important to create a safeguard code which enables them to establish the "liability" of certain suppliers of a product for its sudden abundance. In this fashion, exports from the "delinquent suppliers" could be limited, leaving the exports of the older suppliers untouched. This would entail the possibility of discriminating between exporters to whom safeguards could be applied. Needless to say, this principle implies unfavorable conditions for the producers whose exports have increased more dynamically in the past years (often developing countries). Selectivity is sought by developed countries because on occasion it is not convenient for them, due to political considerations or fear of the response potential from the other

11 "Since 1978 the cases of voluntary limitation of exports have exceeded safeguard measures in a proportion of 3 to 1." World Bank, *op. cit.*, p. 180.

party, to affect –via safeguards– all of the producers of a good. Until 1986, the United States had implemented 15 safeguards, although it had only received authorization to implement 30.[12] The fifteen which were not implemented demonstrate the extent to which it can be useful for the latter country to obtain the selectivity that it seeks.

An alternative to reduce the risks inherent in safeguards would be to follow the route traced by article 5 of the Free Trade Agreement between Israel and the United States. They contemplated the possibility of using selectivity in their favor in the case of safeguards; if in the opinion of the Trade Representative of the United States, excess imports from Israel are not the cause of the damage caused to North American industry, the North American President can exempt Israel from their safeguard measures. The Isreali option represents a way to turn the principle of selectivity –which in essence seems to be unfavorable to developing countries– into a favorable one.[13]

The Free Trade Agreement between Canada and the United States follows quite a different path. Instead of accepting the principle of selectivity it addresses the cause for the inefficiency of safeguards, which is the lack of a formal binding procedure, because it forces parties to follow a series of previous steps in order to reach an agreement, and, if it is not reached, to submit the disputes to binding arbitration regarding the use of safeguards. On

12 *Cfr.*, Sales S., C., *op. cit.*, p. 60.

13 *Cfr.*, Lande, S. L., and VanGrasstek, C., *The Trade and Tariff Act of 1984. Trade Policy in the Reagan Administration*, Lexington Books, 1986, p. 63.

the other hand, because we are dealing with a bilateral agreement, a stumbling block –the discussion of selectivity which the safeguards could or could not entail– is sidestepped because there would be a specific mechanism (the agreement) available that would protect our rights, even if the future GATT Code allowed a discriminatory safeguard to be directed against Mexico. With the existence of an impartial procedure the United States would loose the broad possibilities that the current provisions afford them to negotiate in these matters. In other words, the agreement would bring the trading relationships closer to the scope of rules and would distance them from the naked power of the parties.

AGREEMENTS ON MARKET PERFORMANCE AND AGREEMENTS ON VOLUNTARY RESTRICTIONS OF EXPORTS

Through market performance agreements, the United States has established quotas on the export of certain products which other countries can carry out to the United States when it is considered that said imports are causing damages to the North American industry. These agreements are based on North American law and constitute a form of safeguard outside the GATT mechanisms, in light of the fact that these agreements introduce quantitative restrictions on im-

ports and they are generally made in a discriminatory fashion, which implies a violation of GATT provisions.[14] In order to enforce them, the United States has obtained permission from the GATT and has been forced to award compensation to its members in other areas or to allow the possibility of reprisals. Generally speaking, agreements are entered into with the main suppliers of the product and they are enforced jointly with a series of unilateral measures –which are not systematized– that determine the quotas of the smaller suppliers. Mexico has been submitted to agreements on market performance in the steel and textiles sectors; and to quotas regarding products such as sugar and chocolate. The voluntary agreements on restriction of export are agreements through which a country commits itself not to export more than a given percentage of its production of certain products to another country. Differing from the market performance agreements, the importing country (the United States) does not apply any measure seeking to enforce the agreement which depends only on the exporter's self-restraint. Naturally, the "voluntary" restriction is only accepted by the exporting country in order to avoid the risk of the imposition of a non-voluntary restriction and in order to formally respect the GATT ban on quantitative barriers.

If the Free Trade Agreement were to be signed these barriers could be attacked in two fashions:

a) An exemption could be sought for the agreements

14 Article XI of the GATT bans the use of quantitative restrictions and article XIII points out that when they are applied they must not be discriminatory. *Cfr.*, SECOFI, *op. cit.*, p. 86.

enforced between Mexico and the United States. Canada obtained it regarding the agreement on voluntary restrictions in the steel sector when it negotiated its Free Trade Agreement with the United States. This avenue is not exempt from risks since it can function in the opposite direction. An FTA includes, in principle, a substantive part of the trade carried out among the involved parties giving way to a presumption in favor of the elimination of all the existing restrictions. However Israel was forced to negotiate –simultaneously with its Free Trade Agreement– a specific bilateral agreement on textiles in order to give in to the demands of the North American producers who were afraid that the Free Trade Agreement would imply the complete liberalization of this sector.[15]

b) The risk of similar agreements could be eliminated or diminished in the future. The agreements on market performance would become difficult once the Free Trade Agreement was signed, because they would be typified as safeguards and could be remitted, to binding arbitration, if the parties do not reach an agreement. Voluntary restrictions regarding exports would also disappear since the threat of restrictions would be inexistent with arbitration, in other words, restrictions would entail compensation. Both manifestations could be converted into safeguards and would be resolved according to the rules which govern them. It is possible that this type of agreement will not disappear completely as a consequence of a free trade agreement, because per-

15 *Cfr.*, Lande, S. L., and Van Grasstek, C., *op. cit.*, p. 62.

haps a future negotiation will lead the exporting country to accept restriction of its exports. However, the provisions of the agreement would enable it, in case it did not want to comply during the negotiation, a final option which it does not have under the framework of the GATT: binding arbitration. Through the revitalization of safeguards and the ensuing elimination of quantitative restrictions an FTA would overcome the continual renegotiation of trade regulations which has characterized these aspects to date.

TECHNICAL OBSTACLES TO TRADE

Technical standards are necessary to gain access to the global market and refer as much to the characteristics of a production process as well as to the quality that products must have. They generally imply provisions on health, safety, environmental protection or consumer protection, which means that their establishment is a matter which falls within the scope of the sovereign decision-making of each country. In light of its importance to access world markets, Mexico's search must bear in mind the need to harmonize our technical standards with those in force in the markets targeted by our products (70 percent of our products are aimed to the North American market). Part of the work has already been carried out with Mexico's signing of the relative GATT Code, *i.e.*, the Agreement on Technical Obstacles to Trade, and through the enactment of the Law on Weights and Measures which enforces it.[16]

16 The Code was signed on July 24, 1987 and approved by the Senate on December 4, of the same year. The Law enforcing it was published in the Official Gazette on January 26, 1988. *Cfr.*, Witker, Jorge, *op. cit., supra* note 1, p. 108.

Protectionism is displayed in these norms when they are given an arbitrary use, through their enforcement or modification, with the goal of stopping exports from third countries. On these occasions technical standards are actually converted into technical barriers for trade. The solution applied by the GATT Code was to establish the National Treatment principle, through which each one of the signatory parties is bound to guarantee equal treatment to national and foreign products in so far as technical standards are concerned. The latter code establishes the principle which contemplates that technical provisions cannot be created with the goal of lifting trade barriers. The signatories must adopt the international technical norms when they exist and they must notify the changes made to these provisions to the other members. This is one of the areas where the GATT has achieved significant progress and the agreement must strengthen the previous provisions and also seek to standardize technical provisions, North American and Mexican, in order to overcome the costs and obstacles which can result for our trade through this avenue. The search for standardization must not ignore the fact that in the United States a great many measures related with standards are established by private institutions (for example, underwriters laboratory) and therefore this will imply not only coordination among governments but also among private parties.

ANTIDUMPING DUTIES AND COUNTERVAILING DUTIES[17]

Provisions on dumping and subsidies seek to neutralize, at an international level, the most common forms of unfair competition. In this sense, they are necessary to achieve a healthy competition among firms form diverse countries, and they are accepted and used in similar versions by Mexico, Canada and the United States, as well as in the GATT. The adoption of international codes and national laws in these areas seeks to stop the generalized use of dumping and of subsidies in trade.[18] Dumping is the exportation of goods at a price which is lower than its internal price or its production cost affecting the production of similar merchandise in the foreign market. It is a distortion induced by enterprises in the functioning of markets. Governmental subsidies are another form of unfair competition, because they lead to an artificial lowering of the prices of a product and also

17 In Mexico we must translate "countervailing and antidumping duties" as "quotas" and not as compensatory or antidumping "derechos" or "impuestos", because the Mexican Tax Code gives the terms "derechos" or "impuestos" a very specific technical meaning which does not correspond to these "quotas". For this reason, the Foreign Trade Law refers to them as "quotas". For an explanation of the legal nature of countervailing quotas see Witker, Jorge, *op. cit.*, *supra* note 1, pp. 42-43.

18 Antidumping and antisubsidy mechanisms establish barriers to trade allowed by the GATT, which governs them in the Antidumping Code (Agreement on the enforcement of article VI of the GATT) and in the Countervailing duty and Subsidies Code (Agreement on the interpretation and application of articles VI, XVI, and XXII of the GATT). Mexico, in addition to becoming a party to the former Code and having committed itself to sign the latter Code, regulates dumping and subsidies in the Foreign Trade Law and in the Regulations against Unfair International Trade Practices. The United States regulate countervailing duties since 1897, however, their legislation on dumping and subsidies is currently embodied in the Trade Agreement Act of 1979. Mexico as well as the United States follow most of the guidelines established in the GATT Codes.

imply a damage to the domestic industry which competes at a disadvantage. Thus, they are a distortion induced by States in the performance of markets.

The traditional mechanism with which both dumping and subsidies are faced is very similar and it consists in the establishment of quotas upon entry of these products. The quota is fixed at level which suffice to countervail the unfair advantage enjoyed by the foreign product. In other words, an antidumping duty is applied to equalize the price of the merchandise with the price at which it is sold in the market of the exporter. On the other hand, a countervailing duty nullifies the subsidy given to the product. The procedure which determines the application of these quotas is triggered by a petition presented by an affected industry, by a group of producers or by a union before the Department of Commerce. Here an investigation ensues in order to determine the existence either of a dumping practice or of a subsidy (determined by the International Commerce Administration) as well as the existence of a severe damage to the North American industry, caused by the previously quoted factors (determined by the International Commerce Commission). If both elements are proven, then antidumping duty or countervailing duties (antisubsidies) are applied according to the case. In the case of subsidies, proof of damage is only admitted by countries which are parties to the corresponding GATT code or countries which entered an agreement in this regard with the United States. The problem with the North American procedure in the subject-matter of unfair practices is that it does not

provide foreign trade with a neutrality guarantee and it is particularly pernicious for a developing country.

Industries in developing countries which adopt a model based on exports are particularly vulnerable to the use of antidumping or countervailing duties. The reason for this is that the model based on exports requires the production of vast volumes of merchandise in order to be able to attain and sustain competitive prices in the world market. In contrast with industries in developed countries, industries in developing countries generally do not have an internal market which is big enough to absorb these large volumes of production. In this fashion, when quotas are imposed on its products, they affect a large part of their sales. For this reason it is more convenient for us than it is for other countries to avoid the protectionist effects of these mechanisms.

The protectionist nature of these mechanisms stems from their prejudiced application and their susceptibility to political influence. For some authors, criticism of these mechanisms as being inherently protectionist (and therefore illegitimate) is not justified. Rather, it is the arbitrary and unqualified application of quotas which can be defined as protectionist but not the mechanisms in themselves. However, the impact of external influences on the imposition of quotas is not by any means infrequent. In the past interest groups representing North American industries affected by imports have had the capacity to garner the necessary political clout to receive this protection. Support to in-

dustries for political reasons can be countervailed through the use of an impartial entity like the binational panels established by the Free Trade Agreement between Canada and the United States. This entity does not substitute national proceedings or authorities, but it does allow, however, that once the latter are exhausted, decisions can be appealed before professional organisms of a binational nature (panels) instead of the North American judicial organ which traditionally reviewed these cases (the International Commerce Court). The possibility that the decision of the administrative organ can be appealed before a neutral organism must have a chilling effect on the partial application of these laws by North American authorities.

The protectionist nature of these laws is apparent not only in their poor enforcement, but also in the possibility that in the future they will be amended to incorporate intrinsically protectionist demands produced in the American Congress. Protectionist demands have increasingly pressed Congress and have resulted in the enactment of a set of laws whose content is increasingly more restrictive for foreign trade. It is quite likely that these pressures will increase in the future. Canadians faced this problem demanding the obligatory notification of amendments to laws regarding dumping or subsidies, and stipulating in the agreement that it was understood that Canada would be exempted from new laws unless they included an express provision to the contrary.

In the long term, the only valid bilateral option to eliminate the increasing protectionism of American

laws is the establishment of a common set of rules in the subject-matter of dumping and subsidies. It is difficult to reach a consensus regarding common norms in the areas of subsidies and countervailing duties as is clearly shown by the Canadian precedent of not being able to reach an agreement in the matters of dumping, or subsidies in three years. However, the antecedent of the creation of a task force seeking to draft such common provisions to substitute the enforcement of norms from each country with a new corpus of binational norms in the medium term, five to seven years, does exist. The task of drafting a set of common provisions is not an easy one, due to the fact that dumping as well as subsidies are controversial in nature in the trade relations between nations because they imply very precise definitions regarding the limitations of the search for competitiveness and the relation of a State with its industries.

If Mexico were able to obtain in its agreement with the United States a treatment similar Canada's, this would imply eliminating antidumping laws in force in each country and substituting them with common antitrust laws. The difficulty in reaching an agreement in this matter lies in finding a formula so that antitrust laws do not damage the competitiveness of the American and Mexican enterprises in the world market, where the size of the enterprise is very often the cause of its success or failure.

The elimination of countervailing duties implies reaching an agreement regarding subsidies acceptable to both countries in the international trade area. There is an international consensus regarding certain

aspects of subsidies; for example, subsidies to exports are considered a form of unfair competition; likewise, the level of interest rates for export credits (lower than other credits) is fixed according to international standards. However, consensus disappears when dealing with internal subsidies which have implications for foreign trade, with sectorial support, with support for underdeveloped areas –in the case of subsidies which are hard to classify– and with the relation between subsidies and monetary policy, etc.

The United States maintain a most critical and restrictive position regarding subsidies, and this enters into conflict with traditional Mexican practice. Americans have pointed out that subsidies in and of themselves are detrimental for the correct performance of markets in addition to the effect that they have on the local industries. The Europeans –who sustain an equally forceful rival position– point out that subsidies are not evil in and of themselves but only in so far as they affect the industries of other countries. However, the American position as well as the Mexican stand have been moderated gradually through the use of international negotiations. The United States was forced to make concessions in the negotiation which lead to the adoption of the GATT Subsidies Code (it accepted allowing proof of damage), as well as Mexico, when it signed the Bilateral Understanding in the Area of Subsidies and Countervailing Duties with the United States (it adjusted its export credits to international standards). The American tendency in the area of subsidies will be especially severe for Mexico in the case of regional or sectorial subsidies. The adoption by Mexico of American-type provisions

would entail a gradual abandonment of subsidies whose implications for the industrial policy of the country would be important. Their adoption would imply considering support for industries in terms of the overall development of the national infraestructure. On the other hand, the United States would have to approach the Mexican position. In this sense they would be forced to recognize the special necessities of a developing country with evident regional and sectorial disparities. At the level of general abstractions it may be difficult to see the extent to which the different positions could be reconciled, but on the table of negotiations, with sufficient time and will, specific solutions can be found to meet the needs of both countries.

Following a line similar to Canada's in this area seems to be by far a better avenue to follow than the line of the Agreement between the United States and Israel where the Americans' concessions only allowed proof of damage, something very similar to what Mexico already obtained in the Bilateral Understanding on Subsidies and Countervailing Duties of 1985.

ENFORCEMENT OF THE AGREEMENT

The latter considerations show us how the neoprotectionism can be faced in a Mexican agreement which would follow the guidelines established by Canada and the United States in their 1988 agreement. But there still remains a problem; how does such an agreement address the possibility of its noncompliance? In other words; which are the guarantees of the agreement that make it more attractive and trustworthy that the GATT?

International agreements can be divided into two types or classes; *a*) those based on rules, and *b*) those based on power. The Canada-United States Agreement was designed as an attempt to build a system that would fall within the first type. In this sense, its mechanisms remit unresolved disputes —through mutual agreement— to professional organs, binational panels or arbitration. In international agreements, the power of parties is manifested in their non-submission to binding procedures, their possibility of blocking existing ones, the absence of professional organs and in their capacity to apply reprisals. The Canada-United States Agreement abandons these features. The most outstanding advantage of the procedure contained in the agreement *vis à vis* the one contained in the GATT is that, although it follows similar steps, it is designed in such a fashion that the procedure cannot be blocked. Notification of measures taken by a country which can affect the agreement is obligatory (not so in the GATT); if one of the parties requests information regarding some measures, the other is bound to present them (not so in the GATT); previous conciliatory consultations are also obligatory. In general terms, the procedure is similar but the modifications in the form seek to attack substantive problems which have been detected in the GATT proceedings, in other words, avoidance of: consensus solutions, blocking, time consuming maneuvers, and political controversies. It cannot however avoid the final resort to reprisals. However, using them against an arbitration award or the recommendation of a panel composed by

people of repute, can result in a moral sanction which is more disagreeable than the simple blocking of a rather informal procedure which is what currently occurs within the framework of the GATT. Thus, the Free Trade Agreement between Mexico and the United States should contain several procedures which without making it a treaty devoid of the power element, nevertheless can steer it toward a relationship which is more based on rules. There aren't any agreements which eliminate power considerations on the part of the signatories, as long as there does not exist an impartial international organ which can guarantee compliance with international law. In the time being, the only ultimate basis for trust and compliance with agreements will be good faith. On the other hand, as we have already pointed out, in so far as the agreement is successful in increasing trade and improving our economies the interest of the parties involved will make them update it and enforce it. In this sense a Mexico-United States Agreement, like a Canada-U.S. Agreement has a significative advantage in insuring its effectiveness and compliance; the existence of natural trade ties.

CONCLUSIONS

An FTA with the United States will bring us closer to these rules of the game and also to the implied problems, which are not small in number but which are also not impossible to solve. These rules are especially valuable for a developing country such as ours, given the special features of the new non-tariff bar-

riers. It is very likely, that Mexico's access to some of these new mechanisms will be hindered as much by the Canadians as by the Americans, who have pointed out on several occasions the specific nature of those rules for their special relation. Access to mechanisms in the area of dumping and subsidies will be especially difficult to accept for the Americans.[19] It will imply accepting that our panelists or arbitrators can pronounce themselves on the legality of their resolutions and collaborate in the future development of their laws. It will imply, naturally, the same considerations for Mexico. However, gaining access to those mechanisms brings the relationship closer to being one based on rules, where the greatest beneficiary will be Mexico. To the extent that fewer Mexican products are affected by non-tariff barriers, Mexico will begin to have greater control over its trade.

BIBLIOGRAPHY

Button, Kenneth R., "The United States-Canada Free Trade Agreement: An Overview and an Assessment for the U.S. Non-ferrous Metals and Forest Products Industries", *Law and Policy in International Business,* Georgetown, D. C., vol. 20, num. 4, 1989.

Casanovas y La Rosa, Oriol, *Casos y textos de derecho internacional público,* Madrid, Tecnos, 1986.

Cline R., William (ed.), *Trade Policy in the 1980's,* Washington, Institute for International Economics, 1983.

19 *Cfr.,* Puri, Tino, *Remarks on a Potential Mexico-U.S., Free Trade Agreement,* McKinsey & Company, Inc., 1990, p. 7.

Cline R., William, Bergsten, Fred, "Trade Policy in the 1980's", *Policy Analysis in International Economics,* Institute for International Economics, num. 3, November. 1982.

Hart, Michael, *A Mexico-Canada-United States Free Trade Agreement: The Strategic Implications for Canada,* mimeo, May 22, 1990.

Hufbauer, Gary C., Shelton Erb, Joanna, *Subsidies in International Trade,* Institute for International Economics, 1984.

Lande, S. L., and VanGrasstek, C., *The Trade and Tariff Act of 1984. Trade Policy in the Reagan Administration,* Lexington Books, 1986.

México. Secretaría de Comercio y Fomento Industrial, *México en el comercio internacional,* April 1990.

Orrego Vicuña, Francisco (coord.), *Derecho internacional económico,* México, Fondo de Cultura Económica, 1974., 2 vols.

Puri, Tino, *Remarks on a Potential Mexico-U.S., Free Trade Agreement,* McKinsey & Company, Inc., 1990.

Sales Sarrapy, Carlos Leopoldo, *Proteccionismo comercial de los Estados Unidos hacia México, 1980-1986,* L.L.B. thesis, ITAM, Mexico, May, 1988.

Smith, James F., "La Ley de Prácticas Comerciales Desleales estadunidense y el Acuerdo de Libre Comercio entre Canadá y los Estados Unidos y la Ley Omnibus de Comercio y Competitividad", en García Moreno, Victor Carlos (coord.), *Duodécimo Seminario Nacional de Derecho Internacional Privado. Memoria.,* Mexico, UNAM, 1988.

Smith, Murray G., *Canada, Mexico and the United States: Pursuing Common Multilateral Interests and Exploring North American Options,* mimeo, 1990.

Witker, Jorge, *Curso de derecho económico,* Mexico, UNAM, 1989.

——, *Códigos de Conducta Internacional del GATT suscritos por México,* México, UNAM, 1988.

——, *El GATT (Acuerdo General de Aranceles y Tarifas),* México, UNAM, 1986.