Free trade breeds new concepts of national sovereignty

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Concepts of international law, domestic law and national sovereignty, differ between Anglo and Latin America. This was underscored by the recently adopted US-Canada and Mexico-Chile free trade treaties. They are particularly relevant to Canadian-US-Mexican negotiations for a North American Free Trade Agreement as prelude to a future single hemispheric trading bloc.

Canada and the US have charted an interesting but dangerous course in Article 1904.1. of their 1988 Agreement, which provides for the replacement of judicial review of final anti-dumping and countervailing duty determinations, by bi-national panel review. Mexico views the initiative with interest, for its possible bearing on the integrity of its own judicial review, when the North American Free Trade Agreement becomes law.

Under chapter 19 of the Canadian-US pact, either party may request bi-national panel review, based on administrative record and final anti-dumping or countervailing duty determinations by competent investigating authority on either side, to determine whether such resolution was in accordance with anti-dumping or countervailing duty law. This consists of relevant statutes, legislative history, regulations, administrative practice and judicial precedent, to the extent that an importing party's court would rely on them in reviewing a competent investigating authority's final determination.

According to the same rule, within 30 days of publication of a final anti-dumping or countervailing duty determination, either party may request a panel of five nationals of both countries (two appointed by each and the third elected from either roster). The panel's decision shall be binding on the parties and shall not be subject to judicial review. Neither party shall provide for appeal from a panel determination in its domestic legislation.

The view of this procedure as dangerous, though innovative, stems not from the existence of a bi-national panel, but the willingness of governments to forego the basic principle of judicial review by domestic courts for themselves and their subjects. In this sense, national sovereignty is seriously challenged, because neither state is exercising supreme power in its own territory and in regard to residents and citizens being judged by foreigners.

Though the issue of anti-dumping or countervailing duty determinations seems narrow, it should be remembered that in a free trade treaty, normal tariffs are eliminated at some point, so the only protection remaining to the importing state in cases of unfair trade practices lies in the statutes that punish dumping and subsidization, by either commercial or government exporters. It is, therefore, an issue of major importance as precedent in the legal structure of member states of free trade areas.

Article 3 of the US constitution situates judicial power in a Supreme Court and in such lower courts as the congress may determine. Judicial power extends to all cases in law and equity arising under the Constitution, the laws of the United States and the treaties made by their authority. Furthermore, the 4th and 5th Amendments, establish the inviolability, without provable cause, of person, home, papers and effects and the non-deprivation of life, liberty or property, without due process of law.

At issue is whether any Court of Justice may be deemed *Supreme* if, as it appears, the US government has renounced the right to judicial review in matters of anti-dumping or countervailing duties on the importation of merchandise. There is also the matter of individual rights embodied in the 4th and 5th

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Amendments to the Constitution. Can due process of law be understood out of the context of domestic courts? The New York Bar Association pronounced the renunciation of judicial review by the terms of a treaty as unconstitutional.

Mexico has been much more conservative in matters of anti-dumping and countervailing duties. Chapter 16, article 33, of the recent Economic Complement Agreement, signed with Chile on September 22, 1991, ratified by Mexico's Senate and promulgated by the President on December 22, commits an affected party, wishing to use the avenue, to a flawed arbitration procedure. It is not exclusive and specifically excludes anti-dumping and countervailing duty law from such arbitration.

The matter is dealt with in Chapter 6, article 17, of the agreement and the basic principle is the application of domestic law in anti-dumping and countervailing duties. The fact that the so-called arbitration procedure is not imposed in lieu of judicial review and the preeminence of domestic courts over international trade obligations with Chile, guarantees that the Mexican government has protected the supremacy of the judicial power embodied in articles 90, 103, 104 and 107 of the Mexican Constitution. This includes Mexico's *Habeas corpus*, the *Juicio de Amparo*, as well as the principle of due process and inviolability, embodied in articles 14 and 16 of the Constitution.

It may, therefore, be said that while the US has partially abandoned the concept of sovereign power by virtue of its trade treaty with Canada, Mexico has restated that traditional concept in its economic agreement with Chile. In the first instance, the creation of similar bi-national panels includes express renunciation of judicial review by domestic courts, whereas in the second, citizens, residents or transients in Mexico, must apply to domestic courts in matters of anti-dumping and countervailing duty law, as well as any other trade issues with Chile. They may choose between arbitration or resort to normal judicial review, including Mexico's cherished *Habeas corpus*.

In March 1960, I was privileged to attend a course given at the National University of Mexico by the eminent jurist and head of the Viennese law school, Hans Kelsen. He stated the theory that law is a system of rules that do not conflict, not even between international and domestic law, because, unlike the dual or plural concept of law, his Pure Doctrine of Right propounds a monistic structure of the judicial system. Either international law validates domestic law, or vice versa, but it is impossible to assume the

Domestic and imported goods in a Mexican supermarket.

simultaneous validity of two parallel systems of law regulating human conduct, independent of each other and in contradiction and conflict.

In the pyramid of law, domestic law is supreme. If the validity of international law depends on one state's recognition of international rules as binding on its organs, which must therefore conform to them, then such compliance refers only to the specific content of those rules at the time they are recognized by that state. Thus international rules become part of domestic law by virtue of the validity granted them by the nation state, which thereby ratifies its sovereignty. In this sense sovereignty is the supreme law.

Hence, the opposing notion of the supremacy of international law over domestic law vitiates the concept of the sovereignty of the state. International law can only be considered objectively supreme as either an act of God or because states must behave according to a system of rules created by treaty, and that the intellectual suppositions therein implied are the supreme law. It is axiomatic that international law is concerned with the peaceful solution of controversy and that national law may give way to imperialistic notions.

However, sovereignty is not regulated by force. A weak state may be sovereign by exercising the supreme rules in its domestic legislation, while international law usually obscures the presence of a strong national political unit behind the scene.

Perhaps that is why the US supports the validity of its domestic legislation, on the one hand, by including the so called "grandfather clause" in the treaties it signs, though that legislation may be inconsistent with them, until the treaties are expressly abrogated by the legislative branch, while at the same time embarking on one of the boldest moves to change the concept of sovereignty by means of the very same treaties.

The Canadian-US trade agreement reveals an evident desire to solve controversies by international means. Not because of the bi-national panel review, but more precisely by annulling judicial process by domestic courts. In the Chilean-Mexican pact, however, a similar panel is used as an alternative to normal domestic tribunals and, in the case of anti-dumping and countervailing duty law, not even as a vehicle parallel to domestic courts.

Following Kelsenian thought, it might be said that the US is finding the validity of its domestic right in international law by subjecting article 3 of its Constitution to the supreme mandate of article 1904.1. of the Free Trade Agreement with Canada. Mexico, meanwhile, is protecting articles 90, 103, 104 and 107 of the Mexican Constitution, including its *Habeas corpus*, its principle of due process and its inviolability clause, embodied in Articles 14 and 16, and therefore deriving the validity of chapter 16, article 33 and chapter 6, article 17 of the recent Economic Complement Agreement with Chile, from the basic principle of the supremacy and applicability of domestic law.

In other words, the powerful US has turned international, while less powerful Mexico is maintaining national sovereignty as the supreme rule of a monistic system of law. Our philosophies could not be farther apart on this issue, judging by the differing attitudes embodied in the trade agreements subscribed by the two nations with Canada and Chile.

It is easy to understand, in this context, why one of the thorniest issues to negotiate in the North American Free Trade Agreement is the chapter on settlement of disputes. Loud protests have been raised in the US itself against annulling the validity of constitutional law by the terms of the Canadian treaty.

The superpower can afford to turn international, though not without difficulty and risk, as the matter inevitably approaches its constitutional test in the US Supreme Court, because the content of international law is very much dictated by it, particularly in world economic bodies.

The only defense available to a weaker country is to maintain the primacy of national sovereignty as the ultimate validation of domestic as well as international law. Recent conversations with Mexican trade negotiators lead me to believe there were doubts on this matter.

Nevertheless, the way the Mexico-Chile free trade agreement finally came out does honor to the agencies participating on the Mexican side. The Department of Foreign Affairs did a good job preserving Mexico's national sovereignty. Hopefully it will press for the same solution in the North American Free Trade Agreement.

It will be more difficult but necessary with such partners, as the stakes are higher with the US. Besides, now that Mexico is lobbying in Washington, let it not be forgotten that Mexico has allies defending the principle of national sovereignty, who will probably not countenance a policy that confines the US Constitution to a status beneath the mandate of a treaty.

International cooperation and the rule of law among nations can be obtained and observed. It can be achieved by taking domestic law as origin and validation of a monistic system of rules and not the reverse, thus preserving national sovereignty and the interests of weaker nations, such as Mexico, in a world that breeds new concepts of political science and government theory as free trade and economic integration become more of a reality in the years to come.