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Trade policy within *the context of the* World Trade Organization

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This study looks at the main obligations arising from the World Trade Organization and their repercussions on the design of trade policy. First of all, the study analyses the content of the world trade system and the problems it raises, and highlights the fact that, as the number of questions considered expands and an ever-increasing number of policies are brought under international scrutiny, the delicate balance between trade policy and negotiations must be adjusted more and more exactly. It is pointed out that the commitments entered into within the context of the WTO indicate the direction but not the depth of trade reforms in Latin America. Closer analysis of the obligations arising from the WTO shows that they offer substantial leeway. The new international rules will have different effects in the long and short term with regard to the leeway available in the domestic market, compared with the external market, and in the region as a whole compared with each country taken separately.

I

Introduction

A necessary condition for growth today is the achievement of competitiveness and a more dynamic presence in international markets. Because of this condition and the changes which have taken place in international markets, there has been a fundamental turnaround in the trade strategies of the countries of the region, and the same has occurred with their international negotiating strategies.

Many governments of the region consider that, if properly applied, some of the limitations on economic policies indicated to in the course of the international negotiations could be useful for overcoming longstanding shortcomings in public policies. Thus, for example, the agreements of the World Trade Organization (WTO) oblige countries to display greater transparency and predictability in many areas of trade policy (Rodrik, 1995). They oblige countries, for example, to give advance notification of changes in their rules regarding their import systems and subsidy programmes. At the same time, the processes of consolidation of the tariff universe help increase the credibility and predictability of reform and deregulation programmes.

In broader terms, the WTO provides the possibility of assuring the direction (although not the degree) of trade reforms. The economic authorities can do this through consolidation processes, safeguard agreements, subsidies, etc. In other words, the WTO can be used as a multilateral anchor of economic policy, useful for indicating to the private sector what the new rules are and taking care of the possible political pressures that a change of course might cause.

The WTO is different from the new regional agreements such as the North American Free Trade Agreement (NAFTA) and the European Union, which involve greater policy harmonization. The WTO gives the economic authorities considerable latitude. Unlike NAFTA, in which a private individual can set in motion

the system for the settlement of disputes, it does not give rise to any obligations or rights for private individuals.

In the area of services, for example, NAFTA provides for the liberalization of all services, with very few exceptions; the WTO, in contrast, following the past practice of GATT regarding goods, liberalizes only the services offered as a result of the negotiations effected. Consequently, in the WTO there is the possibility of maintaining discretionality simply by not enrolling a services sector within the structure of the General Agreement on Trade in Services (GATS). Even in the consolidated sectors, the main commitment is non-discrimination between different suppliers. Provision of the same treatment as that accorded to a country's nationals is not obligatory, but is a matter for negotiation. In the course of the negotiations, national treatment is only arranged for a few sectors, none of which include all the forms of this benefit. The GATS also permits the revocation of this commitment by negotiation with the countries affected.

The aim of the present study is to analyze the main obligations involved in the WTO and their repercussions on trade policy design. Section II deals with the content of the trade system and the problems raised in general terms. The WTO agreements have a dual significance. On the one hand, they represent a new trade programme in its broad lines, while on the other hand they indicate the possible formulas that could be applied to promote future trade negotiations. The analysis highlights the way in which, as the number of questions considered increases and an increasing number of policies are brought under international scrutiny, each time it becomes necessary to adjust the delicate balance between trade policy and trade negotiations more precisely.

Section III moves on from a general description to a more detailed analysis. First it describes the changes in special and in differential treatment. It then looks at an example of deep harmonization: the case of intellectual property rights. Finally, it considers trade measures proper, subsidies and safeguard measures. In all these cases, the costs of the new system and the leeway left open are studied.

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Any errors or omissions are, of course, the sole responsibility of the author.

Section IV shows how the general and specific questions analyzed in the preceding sections come together. Some institutional repercussions of WTO for the countries of the region are described. Finally, the implications that the new international

rules are likely to have are analyzed from three standpoints: in the long and short term; with regard to the domestic and external leeway they leave open; and their implications for the region as a whole and each country separately.

II

Progress in regulation under the new international trade system

The programme of international trade negotiations has become increasingly broad as trade integration has become deeper, or, what amounts to the same thing, as the old programme of superficial integration has been completed. Robert Lawrence (1993) defined "shallow integration" as the reduction of border barriers, including the reduction of tariffs and quantitative restrictions. The concepts of shallow integration and deep integration are equivalent to the concepts of negative and positive integration in the traditional theory of Customs Unions (Johnson, Wonnacot and Shibata, 1986).

The Uruguay Round marked the end of the negotiations centered on trade policy as applied at the national border level. As tariffs went down to lower and lower levels, it was natural that trans-border instruments should assume growing importance. As a result of this process, and as the different economic systems came into closer contact with each other, the question of disparities between regulations and their effects on trade have been acquiring increasing importance.

A turning point has thus been reached in economic integration, in which questions relating to public policies have increasingly become a matter for negotiation. The Uruguay Round marked an important step forward in this direction, since it went far beyond negotiation on border measures (Tussie, 1994), by incorporating into the negotiations such matters as intellectual property rights, investment measures and the provision of services.

This evolution changed the whole concept of trade policy, which is now increasingly all-embracing. It now includes a mass of domestic policy measures and instruments of each country which were previously outside the scope of international negotiations. By eliminating the outer layer of protection, govern-

ments are now obliged to account for their measures in a larger number of spheres. A set of measures which would previously have been considered as having only indirect effect on trade policy are now seen as distorting trade. According to the World Bank Manual, non-tariff barriers are considered to be all public regulations and government practices which introduce unequal treatment between domestic goods and foreign products which are identical or similar to them. To use a broader definition, they represent "the most important obstacle to the growth of international trade" (Olechowski, 1989, p. 121).

In short, as trade integration has become deeper, the range of public policies which are considered as having a possible effect on trade relations has become wider. Thus, the conventional distinction between trade policy and economic policy has been wiped out, obliging governments to discuss a growing number of domestic policies with their trading partners.

The inclusion of domestic policy matters in international discussions is not aimed solely at avoiding the appearance of substitutes for the tariffs abolished in the past. It also means broadening the field of the WTO's competence and potential scrutiny. "The long process of reduction of trade barriers could thus be compared to the draining of a lake which finally reveals mountain peaks, or, more prosaically, to the task of peeling an onion" (Kahler, 1993, p. 8).

In the past, increasing trade openness usually only applied in practice to items of the tariff nomenclature. The interested parties exchanged concessions regarding particular products, without questioning domestic rules. The only domestic commitment was to give national treatment to products once they had crossed the border and the tariff had been collected. Today,

however, the negotiations deal less and less with products subject to the principle of national treatment and more and more with the policies determining conditions for competition.

It is considered that the conditions for competition are affected when inter-country costs differ by more than a certain amount: a threshold which is hard to define precisely but is considered as a standard by the country (or countries) defining the terms of the negotiations. This difference in costs may be affected by subsidies, policies designed to protect intellectual property, labour standards or environmental regulations. When the differences in costs between countries are considerable, there will be pressure to avoid or reduce the competition between their regulations. In the Uruguay Round, these pressures were felt particularly strongly when discussing the question of intellectual property. Although in the negotiations on services and trade-related investment measures (known as TRIMS) the idea was to seek some harmonization, this did not lead to a reduction in competition between regulations.

The pursuit of the harmonization of regulations can take place to different degrees: shallow harmonization (or negative harmonization according to Johnson, Wonnacot and Shibata, 1986), or deeper harmonization (termed positive harmonization in the traditional terminology). Shallow harmonization means that the harmonization is only of a corrective or preventive nature, to prevent damage to a process of openness compromised by the effect of non-tariff barriers. In this sense, the Uruguay Round tried to specify the circumstances in which countervailing or anti-dumping tariffs, technical or sanitary regulations

or customs procedures could be applied, in an attempt to prevent these measures from being used as tariff substitutes.

In deep or positive harmonization, in contrast, efforts are made to apply common policies in certain fields. The problem is: what domestic policies is each country willing to place on the negotiating table? —a problem which already arose in the Uruguay Round negotiations on intellectual property rights and which will be of crucial importance in the definition of the programme of environmental and labour standards. If such negotiation becomes a condition for gaining access to markets, then instead of deep harmonization we will be facing a risk of fragmentation or “imperial harmonization” (Lawrence, 1993).

This tendency towards the convergence of economic policies has two effects. On the one hand, the consolidation of certain policies within the framework of the WTO serves to mark the general course of economic reforms and legitimizes the direction taken by economic policy. On the other hand, if taken beyond certain limits, it could become an obstacle to continued outward-oriented growth. International obligations gradually reduce the leeway for active participation in international trade. Freedom of action has been limited compared with the past, though it has not disappeared completely.

The new trade negotiations must fit within these limits. On the one hand, there is the need to maintain a certain amount of leeway for the application of active development policies; on the other, there is the need to strengthen external solvency, for which purpose there may be advantages in adopting self-imposed restrictions instead of seeking unlimited leeway for action.

III

The new WTO rules and the degrees of freedom they allow

1. The nature of special and differential treatment

Special and differential treatment was conceived as a means of making up for differences between national income levels. It was applied in two ways: as a form of protection for economic development, including bal-

ance of payments problems, and as a way of gaining preferential access to international markets. The first way is provided for in Article XVIII of GATT-1947. The second way was put into practice through the Generalized System of Preferences (GSP). The two ways were fused in the Enabling Clause adopted at the Tokyo Round of multilateral negotiations, which

marked the high point of special and differential treatment. The GSP was never a contractual obligation, however, so that access to preferential forms of treatment was always granted discretionally by the industrialized countries.

The Uruguay Round marked a turning-point in the evolution of special and differential treatment and its underlying philosophy. The developing countries were more willing to enter into commitments, and they pressured the relatively more developed countries to renounce the benefits they received from special and differential treatment.

Two major categories of countries have been established: the developing countries, and the least developed countries (47 countries, as identified by the United Nations), plus the low-income countries (those with a per capita GDP under US\$ 1,000).¹ Under the new agreements, the least developed countries usually have a period of grace for fully assuming all the obligations agreed upon, while the low-income countries are allowed to fulfill the obligations less strictly (ECLAC, 1994 and Weston, 1995).

Special and differential treatment takes the following forms:

- a) postponement of the fulfillment of some of the obligations contained in the agreements,
- b) exemptions from the fulfillment of some obligations for the least developed countries. For example, they are exempted from the commitments on the reduction of subsidies for agriculture (Article 16 of the Agreement on Agriculture),
- c) *de minimis* arrangements apply where the volume of exports is only small and the amounts of subsidy or dumping are also small,
- d) flexible application of procedures. In cases of dispute settlement, when these have been brought by developing countries, account will be taken not only of the trade affected but also of its repercussions on the economy of the country concerned.

Some degree of differential treatment has also been maintained with regard to consolidated tariffs. The countries of the region have consolidated all their tariffs, with ceilings of between 30% and 35%. This level is higher than those offered by the developed countries.

In short, special and differential treatment only amounts to the granting of longer periods of adaptation to international rules and minor concessions to mitigate the effects of the adjustments that the countries of

the region must make to comply with the higher standards imposed on them by the new obligations. In matters of intellectual property, special and differential treatment has been seriously reduced.

2. Intellectual property

The Agreement on Intellectual Property, known as the TRIPS Agreement, is the best example of deep or positive harmonization. The result of this harmonization is extra-territorial protection of intellectual property rights and the progressive integration of this Agreement into the body of international economic law (Reichman, 1997). Before the Uruguay Round, only the principle of national treatment had to be fulfilled in matters of intellectual property. This principle obliges the countries to comply with some rules with regard to the form of protection granted, but they still remain free to decide what sectors to include and the levels of protection to grant. This approach is similar to that of a European Union directive: it lays down minimum standards for government action. The countries of the region are seriously prejudiced by the extension of patents to almost all fields of technology. The only exception granted to the developing countries is a longer period for the fulfillment of obligations.

As net importers of technology, the countries of the region had different preferences regarding patentability, depending on the sector involved and the learning possibilities it offered. In some cases they preferred to purchase technology abroad; in others, they preferred to obtain it by copying. The pharmaceutical industry was that which was most often excluded. The case of medicines has been one of the most hotly disputed, because this is a sector with high research and development costs but with process technology which is potentially accessible and is of key importance for health policies.

The TRIPS Agreement introduced the obligation to harmonize standards for six types of intellectual property: copyright, registered trademarks, geographical indications, industrial designs, patents and layout-designs of integrated circuits. Directives were also laid down on the adoption of rules to enforce intellectual property rights. The main obligation imposed on holders of patents is that of full disclosure of the information contained in the invention. The TRIPS Agreement does not demand local use of the invention, however (Article 27).

In general terms, it could be said that the Agreement provides for two different types of intellectual

¹ This group includes Bolivia, Guyana, Honduras, Nicaragua and Haiti.

property. Literary and artistic works, computer programmes and databases form part of the first of these categories. They are granted protection for 50 years. In a sense, registered trademarks also come within this group, as they are protected for an almost indefinite period, subject only to the condition that the holders of the trademark must continue to supply the domestic market.

The second category essentially covers industrial patents. Any innovation which complies with the conditions of novelty, inventive activity and capability of industrial application is patentable. Patents must be granted for a term of 20 years. In the field of biotechnology, patents cover microorganisms and artificially produced new plant varieties, but exclude essentially biological procedures for the production of plants and animals and the resulting plants and animals themselves. The provisions of the agreement in the area of biotechnology will be reviewed in 1999.

In order to comply with the provisions of the Agreement, the countries of the region will have to make substantial changes in their own intellectual property regimes. With regard to patents in particular, all the countries of the region will have to extend protection to pharmaceutical and chemical products, which are currently generally excluded from patents systems. Furthermore, countries which already have some legislation on intellectual property will have to make it compatible with the Agreement. Chile, for example, already has a patent system which provides for a validity of 15 years, but it will have to adjust this to comply with the period of 20 years laid down in the TRIPS Agreement. Other countries have exceptions to the period of 20 years which are not provided for in the Agreement, while some of them use a different date for determining the beginning of the patent protection (Primo Braga, 1995). The countries of the region which previously applied requirements for local manufacture in order to promote the establishment of production plants will have to grant patents for products even if they are not manufactured in the country.

With regard to copyright, the TRIPS Agreement classifies software under literary works. Most of the countries of the region do not have any protection at all for software. A few of them do have such protection, but through legal means different from those of copyright. The same is true of the protection of plant varieties, which the Agreement says must be effected through patents and/or a *sui generis* system. Most of the countries of the region exclude this type of protec-

tion, and only three of them (Argentina, Chile and Peru) have systems of their own (Ramassotto, 1997). For its part, Mexico undertook to introduce protection for new artificially produced plant varieties and to comply with the obligations of the Union for the Protection of Plant Varieties (UPOV) within two years of the signing of NAFTA (Primo Braga, 1995).

These examples show that the region must make substantial reforms in its legislation in order to comply with the standards laid down in the TRIPS Agreement. Ensuring compliance with intellectual property standards will perhaps to be one of the hardest tasks for the countries, as they have few administrative resources and their judicial systems are not entirely efficient.

However, the Agreement contains six more areas in which the countries retain quite significant degrees of freedom:

i) There are transitional and grace periods. The purpose of the transitional period is to give affected sectors the time they need to adapt to the new rules that will be applied when the law on intellectual property is adopted. Article 65 of the TRIPS Agreement provides for a total transitional period of as much as 10 years for the entry into force of the standards laid down in it:

- subparagraph 1 lays down that all members have a grace period of one year from 1 January 1995, which is the date of the entry into force of the WTO Agreement;

- subparagraph 2 provides that developing countries can postpone the application of the measures laid down in the Agreement for a further 4 years;

- subparagraph 4 provides that developing countries which are obliged by the Agreement to extend product patent protection to areas of technology not hitherto thus protectable in their territory (the pharmaceutical sector in most countries of the region) can opt to postpone the application of the provisions of the TRIPS Agreement for another 5 years.

The periods of transition are the same for both the developing countries and the least developed countries.²

ii) Under certain conditions, obligatory licences can be invoked (Article 31). "Adequate remuneration" must be given, and the licences can only be granted for reasons connected with public health; nutrition or

² The least developed countries do not enjoy any special exemption except a vague commitment by the developed countries to further the transfer of technology (Article 66): a commitment which does not extend to the developing countries (Article 66.2).

other public interests in national emergencies; public non-commercial use; the correction of anti-competitive practices, or when the holder of the patent refuses to grant a licence on "reasonable commercial terms and conditions".

iii) Patents are not retroactive. Retroactive protection refers to products with patent applications pending, products which are under development, or products not yet on sale in countries which are in the course of transition to stricter patent laws when the legislation is approved. Thus, patents will only be granted in respect of applications presented after the entry into force of the Agreement.

iv) Articles 40 and 41 seek to avoid the creation of artificial barriers to entry. Members are authorized to specify in their national legislation the patenting practices or conditions which "constitute an abuse of intellectual property rights having an adverse effect on competition".

v) The final text of the TRIPS Agreement does not contain a full or coherent interpretation regarding parallel imports. On the one hand, the TRIPS Agreement grants exclusive rights to the patent owner (Article 28). The holder of the rights to a product or procedure can prevent other persons from, without his consent, making, using, offering for sale, selling or importing for these purposes the patented product or any product obtained directly through the patented process. It could be deduced from this article that parallel imports of the patented product are not permitted.

In other articles, however, the Agreement seems to contradict itself on this point. For example, it includes the concept of the exhaustion of patent rights (Article 6). According to the legal definition of exhaustion of rights, the holder of an intellectual property right is the only person authorized to place the protected object on the market and receive compensation on that occasion only. Once the product has been placed on the market, however, the product "flies with its own wings", and the holder of the rights cannot seek fresh compensation or prohibit the protected object from continuing to circulate on the market. Exhaustion of rights permits the free circulation of goods. Without this legal provision, a third person in the marketing chain would always be subject to the obligation to pay compensation to the holder of the patent. Adoption of the principle of exhaustion of rights could be interpreted as accepting the idea of parallel imports: the possibility that a licensee can import an object legally acquired in another market.

In this respect, therefore, national legislations remain free to define the rules on exhaustion that they deem appropriate. Thus, for example, whereas the Chilean and Mexican legislation prohibits parallel imports, the legislation approved by the Argentine Congress in October 1995 permits them. Under the law currently in force in Brazil, imports from voluntary licensees of the patent holder are permitted.

vi) Since the Agreement forms an integral part of the WTO, which has established comprehensive machinery for the settlement of disputes, it will henceforth be legitimate to take reprisals against non-fulfillment in this field which restricts access to the goods market involved.

The use of trade sanctions has transferred a principle of the United States Trade Law into international law, albeit in a mitigated form. Under the WTO, reprisals are a last resort: the third in a three-step procedure under the new dispute settlement machinery.

In theory, justified reprisals give the countries of the region the possibility of using them to deny protection to the intellectual property of a developed country which illegally or unilaterally prevents their goods from having access to its market (Reichman, 1997). In practice, this possibility is limited by the possibility of side payments provided for under the Generalized System of Preferences (GSP) or the hemispheric negotiations currently underway. Although the Agreement settled the main differences on this question in favour of innovating countries, this has not put an end to bilateral and plurilateral pressures, mainly originating from the United States. These pressures arise above all in connection with the possible margins of leeway referred to earlier. There have even been threats of trade sanctions, especially exclusion from the benefits of the Generalized System of Preferences not consolidated in the WTO, and, hence, the imposition of conditions on access to markets whose possibilities of being defended in the WTO are uncertain.

In Argentina, for example, the legislation under consideration had to be amended several times to adapt it to the United States' suggestions. This resulted in long haggling between the Legislature and the Executive and to uneasiness among the legislators on account of the intervention of the United States Embassy at key points in the negotiations. The Bill was put to the vote three times because the Executive vetoed it in part and continued to request amendments.

The effort to secure its approval was the longest and the most complex legislative action in the two-year period from 1995 to 1996. Finally, in early 1997 the United States announced the removal of Argentina from the GSP.

3. Subsidies

The Agreement on Subsidies and Countervailing Measures is an example of negative harmonization, as it only covers trade measures proper. It is the longest text adopted by the WTO, reflecting the current importance of this issue and the discrepancies aroused by an active policy of seeking access to foreign markets. Economic authorities will gradually have to abandon some government promotion policies and adapt the systems they use for countervailing measures. The result is some restriction of the leeway for such countervailing measures.

Article 27 of the new Agreement recognizes that subsidies may play an important role in economic development programmes (previously incorporated in Article 14 of the Tokyo Round Code); but apart from this general endorsement, restrictions have been imposed on subsidy programmes of the size, variety and intensity displayed by those applied by Taiwan and Korea at the beginning of their outward-oriented industrialization.

The Agreement contains two "trigger" clauses which are quite restrictive in terms of the graduation of the countries of the region. Firstly, the developing countries will be graduated when they reach a level of export competitiveness defined as a share of at least 3.25 per cent in world trade for a given product for two consecutive calendar years. A product is defined as a (four-digit) section heading of the Harmonized System Nomenclature. When there is a high level of aggregation, this makes the probability of reaching the threshold more remote.

Secondly, a very strict indicator has been established: all countries with a per capita GDP over US\$ 1,000 must assume the same obligations. Five countries are excepted from this in the region, either because they have a lower per capita GDP or because they have been identified by the United Nations as a least developed country: Haiti (least developed), and Bolivia, the Dominican Republic, Guatemala and Guyana (per capita GDP below US\$ 1,000).

The agreement goes far beyond the previous Tokyo Round Code on various matters which are of

importance for development policies. For the first time, a definition has been reached of the concept of a subsidy, although it is still too generic. Thus, a subsidy is defined as any form of financial contribution by a government or income or price support mechanism which gives some kind of advantage to companies or branches of production. The disciplines provided for in the Agreement only apply to specific subsidies granted to particular companies, industries or groups of companies. With the aim of establishing an order of subsidies (and hence of the circumstances in which countervailing measures can be taken), subsidies are classified in three groups: prohibited, actionable and non-actionable.

Subsidies contingent upon the use of domestic inputs or inputs explicitly destined for exports are prohibited.³ The developing countries must eliminate the first-named in five years and the second in eight years, which may be extended to ten years by the Committee on Subsidies and Countervailing Measures set up to supervise the Agreement. Applications in respect of countervailing measures may be presented during the transitional period, however. The least-developed countries listed in Annex VII of the Agreement are exempted from this prohibition, provided their per capita GDP is not over US\$ 1,000.

Non-actionable subsidies cannot be the subject of countervailing measures. These subsidies are those of a general nature which do not have a direct impact on prices: for example, those applied to activities such as basic research and development, pre-competitive development, assistance to disadvantaged areas, or assistance to comply with new environmental regulations or standards. These subsidies are permitted within certain limits, although any country can complain to the WTO if it considers that a subsidy which is in principle non-actionable is doing it harm.

Actionable subsidies are all specific subsidies (that is to say, those granted only for certain industries or companies) which influence export prices.

³ It should not be forgotten that temporary importation (duty-free importation of goods, parts or components for subsequent export) and drawback arrangements (reimbursement of duties paid on imported inputs used in exports) are not considered as subsidies, nor are they prohibited. The maximum periods of time for claiming drawbacks are not regulated at the international level, so that each country can make its rules in this respect as loose or severe as it sees fit. In the United States, for example, drawbacks can be obtained up to five years after the importation of the goods in question.

They can give rise to countervailing measures if it is shown that they are having harmful effects on national production. The Agreement lays down quite a restrictive procedure for determining whether there is serious prejudice and calculating the level of the subsidy. It is generally assumed, however, that there is serious prejudice when subsidies exceed 5% of the value exported. When a developed country wishes to take action against a country of the region, it must provide proof of the harm suffered. This gives the countries of the region more leeway than the developed countries in the case of countervailing measures, because the burden of proof is reversed for the developed countries and they are responsible for proving that they are not causing harm.

The Agreement also includes other exceptions for countries of the region in the rules on special and differential treatment, which could be beneficial for small or new exporters.

The *de minimis* provision included in the free trade agreement between Canada and the United States and subsequently transferred to the WTO means that any investigation for the application of a countervailing tax against a country of the region will be closed if the subsidy involved is only small. In order to benefit from this clause contained in Article 27.9, the level of subsidy granted by a developing country must not exceed 2% of the unit value of the product (3% in the case of the countries listed in Annex VII). The *de minimis* provision also applies if the export in question accounts for less than 4% of the total volume of imports of the product, provided that all the developing countries together do not account for more than 9% of imports of that product.⁴ Another clause in the Agreement which also permits some leeway is that which provides that countervailing duties will not be applied in respect of condonation of debts or direct subsidies applied in order to cover the social costs connected with privatization programmes,

provided that both the programme and the subsidy are limited in time and that the programme results in the true privatization of the company in question. This provision could serve to encourage subsidies connected with the inflow of foreign direct investment in connection with privatization processes.

The limitations on the countries from which the main import flows come, and which already have a highly visible presence in world markets, offer another opportunity. These countries cannot introduce new subsidies and will have to eliminate their present export subsidies within a period of ten years. For the countries of the region which are at an earlier stage in the development of their exports, this measure has positive effects on two fronts. On external markets, it leaves open a certain space for increasing their shares. Furthermore, as small exporters, their own freedom of action is broader. The *de minimis* provision (in its sense of staying under 4% of the total volume of imports of the product concerned) also gives some scope for growth. On the domestic market, the legitimate possibility of checking to some extent the activities of the countries which are most active in international trade heightens the sustainability of the developing countries' own openness. The countries of the region must now complement their openness and deregulation processes with the adoption of flexible mechanisms compatible with the WTO for the application of countervailing duties (as well as effective safeguard mechanisms) in order to sustain the trade reforms which have been made.

In short, the WTO leaves open some possibilities for applying sound policies to forestall countervailing measures. The countries must now concentrate their subsidy policies on correcting obvious market flaws or situations where there are big hidden costs. The market suffers from serious flaws with regard to the dissemination of information on outside markets, and especially on foreign consumer preferences, marketing channels, changes in design, compliance with technical standards, environmental labeling and quality requirements. There are no restrictions on market studies (and the acquisition of information on foreign markets in general) financed by governments through their export promotion departments. In these aspects, there are important possibilities to be explored, as is already being done by PROCHILE in Chile, EXPORT.AR in Argentina, and PROEXPORT in Colombia (ECLAC, 1995).

⁴ This clause means that countries must avoid giving support to products in which the exports of the developing countries are heavily concentrated, which are normally considered sensitive products on international markets. In order to avoid crossing this threshold it will be necessary to have information on the shares of the competing countries in each market. The regional organizations could play a leading role in centralizing and circulating the necessary information, in order to avoid subsidies which are counterproductive or subsidies on goods with little export future.

By way of pre-competitive support, the public sector can and should provide ample support to reduce the entry cost that the private sector must pay in order to introduce the international quality management standards developed by the International Organization for Standardization (ISO). The private sector will need increasing support in this area for the acquisition of the goods it needs to obtain more quality certificates. ISO certification is a master key for gaining access to international markets. Without it, export firms have to carry out long and costly formalities in order to sell their products. As well as facilitating access to markets, compliance with ISO standards helps to reduce hidden costs within only a couple of years (Sykes, 1995).

There are also possibilities in the area of direct support. Thus, for example, consideration could be given to the establishment of a system for returning indirect taxes both in respect of products actually exported and vital inputs and components. It is permissible to use any mechanism that places exporters on an equal footing with their international competitors and gives them access to international interest rates, and it is even permissible to give a certain degree of subsidy in conformity with the guidelines of the corresponding OECD agreement.

Subject to compliance with the requirements of transparency and notification, subsidies can be granted to ensure that industrial processes comply more fully with environmental requirements, as long as they are limited to 20% of the cost of adaptation and represent a one-time, non-recurrent measure. It is well known that this type of restructuring helps to improve the efficiency of enterprises.

Finally, a support programme can be established for infant exports, with modest and temporary export subsidies which can be eliminated when the exports reach a certain level (fixed in terms of their value or their percentage of total export income) and thus cease to be of an infant nature. Such subsidies are not completely permissible in the case of countries with a per capita GDP of over US\$ 1,000, but they should nevertheless be borne in mind, as they could be considered as pre-competitive measures. Moreover, as long as these lines of exports are small and keep their market share under 4%, they will not be subject to countervailing measures (unless the total market share of the developing countries exceeds 9%).

With respect to this same category of infant exports (or exports which can be kept below levels that

would give rise to countervailing measures), consideration could be given to the introduction of subsidies for all companies which, together, export products coming under a given tariff heading in amounts which are below a predetermined ceiling to be decided by each country. Since such a subsidy would be granted to all companies, it could not be classed as a specific subsidy and there is therefore no reason why it should be prohibited. Chile, for example, operates the "simplified export drawback system", which consists of the reimbursement of up to 10% of the value of goods exported as partial repayment of taxes entering into the cost of the corresponding inputs, provided that the annual amount exported exceeds a certain level.⁵ This type of support can be defended under the *de minimis* provisions.

In addition to the active utilization of this leeway for adopting measures to gain access to international markets, there are other positive elements in the reduction of the degree of discretionality of countervailing action. The use of this clause has a further three limitations. First, there is the "sunset" clause, whereby all countervailing duties must be eliminated within five years, except when the investigating authorities determine, on the basis of a new investigation, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury to domestic producers. Second, a single company alone can no longer make an application for the adoption of countervailing measures; such an application can only be made by or on behalf of the group of domestic producers of the good in question. An application for countervailing measures will be considered to be made by domestic producers "if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support or opposition to the application" (Article 11.4). Third, for the first time the procedures give all the interested parties the right to present evidence (not only domestic producers, but also importers, consumers and industrial users of intermediate products).

⁵ For more details see ECLAC, 1995.

In order to take full advantage of these possibilities, the countries of the region must give increasing consideration to the establishment of active contacts with consumers' associations or intermediate users of their export products, as an integral part of their export strategies. Within this field, consideration should be given to the possibility of establishing joint information and liaison offices with these associations, under the auspices of the regional organizations. This could be a very important element for supporting export growth and reducing the vulnerability of market access.

Notwithstanding these opportunities for greater freedom of action, however, it should be borne in mind that in bilateral negotiations many countries of the region have committed themselves not to introduce new subsidies and to gradually eliminate their existing subsidy programmes, so that the introduction of new programmes could give rise to protests at the bilateral level. Furthermore, conflicts of jurisdiction have already occurred with regard to investigations begun before the WTO came into force but completed later. In other words, the Agreement is not retroactive. Subsidies granted in the past may be subject to countervailing measures under the looser rules of the Tokyo Round Code. It should also be borne in mind that in the United States subsidies are actionable for 15 years from the date they are granted.

As importers, the countries of the region must adapt their legislation to the stricter and more precise conditions of these commitments, which reduce the leeway for discretionary administrative decisions and increase the need to give decision-making processes greater transparency (Guimares and Naidin, 1994). Perhaps the greatest advantage of the commitments assumed lies in the possibility provided for acting as an important anchor for the regional integration processes underway, which could otherwise be subject to advances and setbacks and to the uncertainty from which they suffered in the 1960s.

Whatever the limitations involved in these commitments, however, the stage of the indiscriminate massive application of fiscal incentives for exports is over. Quite apart from the weight of the fiscal restrictions which exist in most of the countries of the region, there are other reasons too which explain this evolution. Firstly, the trade policies of the countries of the region have reduced or even done away with their traditional anti-export bias and with the incentives used in other periods with the aim of offsetting the

harmful effects of the restrictive trade practices of transnational enterprises reluctant to produce goods for competing on international markets. The rapid process of globalization and the increasing tendency to orient foreign direct investment towards external markets also make it less necessary (and in some cases superfluous) to support exports through fiscal transfers. In this respect, the Agreement legitimizes price agreements as a means of solving and sometimes interrupting investigations on subsidies. The authorities of the region should be alert to this possibility, for if price compensation proves successful there can be no doubt that the need for subsidies disappears and it would therefore be highly advisable to end unnecessary transfers to exporters.

Today, competition in respect of incentives takes place mostly in connection with the race to influence decisions on the orientation of investment flows (UNCTAD, 1995). The Uruguay Round made only very timid progress in this field. The TRIPS Agreement only contains two obligations: to eliminate incentives aimed at increasing the degree of national integration or maintaining a positive foreign exchange balance (Sauvé, 1995).

4. Safeguards: Articles XVIII.b and XIX

The safeguard measure most used by the developing countries in order to defend their markets has been the use of article XVIII.b. This article (added to GATT in 1955) has given the developing countries significant leeway for imposing quantitative restrictions with the declared object of protecting their balance of payments and maintaining an adequate level of reserves.⁶ In the past, this exception was used not only for this purpose, but also in order to apply import substitution programmes without any major obstacles or opposition.

The understanding reached at the Uruguay Round does not involve new obligatory commitments, nor does it reduce this leeway significantly. Import quotas have not been prohibited. Subject to negotiation, the developing countries are authorized to use tariffs to

⁶ It is well known that quantitative restrictions have distortionary effects, but in view of the delayed effect of tariff increases on the balance of payments, quotas have more often been used instead (Stewart, 1989).

deal with balance of payments problems. At the same time, they undertake to give due notification of the measures and consult with the Committee on Balance-of-Payments Restrictions. Thus, the degrees of freedom retained under the WTO can be quite important in the future.

In view of the precarious financial situation and the ever-present threat of external crises, these degrees of freedom to defend the balance of payments are essential in order to retain a capacity for immediate reaction to adverse effects. The consolidation of tariffs at higher levels than those previously applied also permits temporary balance-of-payments protection without the need for compensation. In the present international economic environment, however, it is much more difficult to use this exception to protect the domestic market, as frequently happened in the past.

A good example of the new restrictions on the use of this means is the resistance encountered by the motor vehicle quotas imposed by Brazil because of its growing trade deficit in June 1995. South Korea, the United States and Canada all came out against this measure. These countries threatened to demand compensation on the grounds that Brazil's reserves were too high to justify such a quota under the exception provided for in article XVIII.b, since they amounted to US\$ 47 billion: enough to finance 12 months of imports. Although two-thirds of those reserves were of a short-term nature, this precedent shows the difficulties that will be encountered in trying to justify quotas which do not have the clear objective of defending the balance of payments.

The use of safeguards (article XIX of GATT) has had a stormy history in the GATT negotiations. The safeguards clause in the 1947 GATT Agreement were designed to act as a safety valve, by permitting countries to apply temporary tariff surcharges in the case of import booms. Thus, under article XIX, higher tariffs could be temporarily imposed on the basis of the most favoured nation clause. Article XIX has rarely been invoked, however, because of its requirement that countries must comply with the most favoured nation principle and must give compensation to the exporters affected.

At the Uruguay Round, a pragmatic consensus emerged in favour of selectively legitimizing import quotas and relaxing the obligation to pay compensation. The new Agreement prohibits the developed

countries from imposing new grey area measures and proposes the elimination of all the existing measures within a period of four years, except for one specific measure per importing country, which must be eliminated by 31 December 1999. Likewise, all safeguard measures adopted under article XIX must be eliminated within a period of eight years from the time of their first application or five years after the date of entry into force of the WTO Agreement, whichever comes later. Moreover, all the measures are subject to a "sunset clause", which lays down a maximum duration of eight years provided the authorities confirm that the measure continues to be necessary and that they can show that an adjustment is being made. At all events, after one year the measure must be gradually liberalized throughout its period of application.

The Agreement also contains *de minimis* provisions, like those regarding the imposition of countervailing (and anti-dumping) tariffs for developing countries. It lays down that safeguard measures shall not be applied to a developing country when its share in the total imports of a product is less than 3% and when the imports from the developing countries together do not exceed 9% of the value of total imports of the product.

The Agreement is a compromise solution. Although it sanctions selectivity, maximum periods have been established for the application of safeguard measures and procedures have been laid down for determining the damage caused. In any case, security of access will not necessarily be improved, since the adjustment of the mechanisms for applying safeguards will cause the diversion of protective measures in the direction of more intensive use of anti-dumping tariffs, the rules for which were only specified in terms of procedures.⁷ The relative ease of resorting to anti-dumping tariffs, together with the non-consolidation of the Generalized System of Preferences, represents the weakest link in terms of access to international markets.

⁷ As is well known, anti-dumping and countervailing measures have proliferated in recent years in spite of the negotiations underway in the Uruguay Round. Anti-dumping legislation is the trade measure most actively used. In proportion as the Latin American countries have liberalized their economies, they have also increasingly resorted to anti-dumping and countervailing tariffs. This could be counterproductive, as intra-regional trade is an important stimulus for growth (Tussie, 1996).

IV

The need for both anchors and leeway: how these objectives come together in the WTO

The international trade discussions are tending towards the achievement of growing harmonization in the long term. The clearest example in the case of the Uruguay Round is the result of the negotiations on trade-related intellectual property measures (TRIPS). The debate on questions of labour rights and the environment is following the same path, but less rapidly. The harmonization of regulations, for its part, is undoubtedly a slow and difficult process, at least at the multilateral level.

In the meantime, the meshes of the net have been widened in the short term: the WTO has left considerable room for discretionality, especially in the domestic market, although the leeway is no longer unlimited, as it was at the height of the period of special and differential treatment. There is still room for some degree of freedom of domestic action in the consolidation of tariffs above the levels previously in force and some looseness (or possible differences of interpretation) with respect to the obligations arising under article XVIII.b.

Comparatively speaking, this leeway in the domestic market is greater than that obtained with regard to measures to secure access to international markets. Initially, the *de minimis* provisions provide some freedom of action for small exporters, but in the long run they will act as a brake on external trade, especially for sectors of that trade which are sensitive or not very dynamic.

Although the *de minimis* provision ensures some opportunities for small exporters individually, it does not do the same for the countries as a whole. The total volume of exports of a given product of the developing countries can very easily exceed the 9% threshold laid down in the Agreements on safeguards and subsidies. Finally, there may well be a resurgence of anti-dumping measures and a general trend towards protective measures in this respect, since in relative terms these are the measures least regulated by the WTO.

On the other hand, the WTO can be used as a general anchor for economic policy. It can serve, for example, to ensure the transparency of incentive policies or improve their targeting, by effectively directing them towards infant export sectors which will not give rise to a reaction in external markets. Thus, the multilateral framework can

be used to avoid a situation where incentives are channeled mainly to highly concentrated sectors with strong lobbying capacity (and even with greater access to international financial markets).

It must be remembered that the linkage between trade policy and trade negotiations is nowadays an increasingly delicate matter, since there may be tension between the export development needs of each country and the tendency towards policy convergence implicit in the new trade system. In order to adapt itself to the new international commitments, the State must have the necessary institutional capacity. It must carry out the reconstruction of institutions needed to permit the application of policy instruments which, although more complex, may be closer to the optimum solutions (Hoekman, 1995).

Since the Uruguay Round, instruments which were hitherto normally part of each country's domestic policy have become central issues for negotiation. Some of the agreements reached involve obligations which go to the very heart of each government's internal management and will be subject to future international scrutiny. The adaptation of national legislation to the TRIPS rules, for example, led in Argentina to a struggle between the Executive, which was negotiating the international agreements, and the Legislature, which was responsible for reforming the laws. The Legislature became an actor in this process, seeking to interpret the various points of the Agreement and legislate on them without always having sufficient information. The amounts of leeway, grey areas or different possible interpretations which exist mean that the Legislature may take initiatives which result in friction with the Executive. In other words, the adaptation of legislation calls for a great deal of domestic political negotiation. A struggle between the different powers may be counterproductive, leading to political and economic instability instead of achieving the modernization and progress which it was hoped that incorporation into the international trade system would bring (Rodrik, 1995).

The Uruguay Round means a whole new set of obligations for the countries of the region. Thus, being

members of the WTO means having to fulfill a dozen collateral agreements with extensive notification requirements. The commitment to give due notification includes the need to inform the WTO of the introduction of import restrictions to protect the balance of payments (or any changes in those restrictions or in the agreed programme for their elimination). The agreements also call for annual notification of changes in legislation and rules. In the case of tariffs, the information required must include details of the type of measure used, the criterion adopted for applying it, the products affected, and its effects on trade.

The notification requirements also extend to the introduction or modification of sectoral incentives, even though exceptions to the commitment to reduce them may have been agreed. It is also necessary to notify changes in sanitary measures and cases of the adoption of standards differing from those internationally agreed. With regard to subsidy regimes, notification must be given of the form of the subsidy (such as loans, tax concessions, etc.); the degree of subsidy per unit, or at least the total or annual amount budgeted for granting the subsidy (including, if possible, the average subsidy per unit in the previous year); the policy objective of the subsidy; its duration; and statistical data permitting an assessment of its trade effects (Agreement on Subsidies and Countervailing Measures, article 25).

Few countries of the region currently have the institutional structure needed to satisfy the notification requirements. Their officials do not always have the technical and administrative training needed to comply with the scrutiny at the microeconomic and subnational level provided for in the new international rules. At the same time, in the context of the progress made towards greater openness, there are already indications that there will be growing domestic demand for the application of countervailing or anti-dumping tariffs. The institutional machinery for dealing with these demands must be adapted to the international requirements for the determination of damage in order to be able to provide proof of dumping or of subsidies and their levels. It will also be necessary to establish facilities for negotiation in order to reconcile the interests involved.

An important innovation in the WTO has been the establishment of a credible Dispute Settlement Body (DSB). The DSB, which has greatly increased powers, will deal with all disputes arising out of the agreements

contained in the Final Act. Its establishment represents the most important contribution of the Uruguay Round in terms of giving the multilateral trade system greater security and predictability. The DSB will establish special panels, adopt reports, supervise the application of resolutions and recommendations and authorize the suspension of concessions. This is a significant improvement compared with GATT, where the settlement of differences was split up between the GATT Council and the committees set up to administer the Tokyo Round Codes.

Two new aspects distinguish the DSB machinery from previous practice. From now on, there must be consensus on motions against the establishment of special panels or the adoption of their reports, whereas under the previous system there had to be a consensus before a positive decision could be taken. Under the new system, the disputing parties cannot block decisions that go against them for long. Secondly, the decisions of a panel can be appealed to the appellate body.

The establishment of the DSB has not changed the manner of determining possible compensation or penalties: the size of these continues to be subject to the discretionality of the parties in dispute. Furthermore, the DSB has no power to take initiatives itself. Nevertheless, there is an improvement in the automatic nature of the procedures, and it has thus become easier to seek compensation or penalties in the case of trade disputes. The DSB opens up the possibility of a credible multilateral negotiating body, so that increasing use of the dispute settlement system may be expected. As the countries of the region must bear in mind the possibility both that they may be bringing actions and that they may be sued themselves more frequently than in the past, they must become aware of the need to prepare themselves for this.⁸

In short, the new trade policy must be accompanied by an ongoing improvement of negotiating strategies. For this purpose, it is essential that the countries of the region should be aware of the increasing degrees of professionalism required at all levels, and not only in the Executive, which has traditionally been respon-

⁸ All the countries of the region which have appeared before the DSB as defendants (Venezuela, Chile, Peru and Costa Rica) have received favourable decisions. Brazil and Argentina are among the defendants in disputes which are still underway (Tussie and Vásquez, 1996).

sible for international economic negotiations. Deep integration calls for the growing participation of the other powers of the State: the Legislature, because of its responsibility for translating international rules into

national legislation, and the Judiciary, for settling possible differences between the powers and also between private individuals, as a result of the application of the new rules.

V

Final observations

The WTO calls for the fulfillment of various tasks at both the domestic and the external levels. At the domestic level, the challenge lies in changes in procedures, the growing need for information and the improvement of transparency. Sectoral agreements and agreements on specific issues involve the need for the notification of changes, for which the government authorities must be prepared. The WTO's Trade Policy Review Mechanism will also require the ongoing follow-up and periodic review of the trade policies in force.

This mechanism could be used to improve the interested parties' access to information at the national level and increase the transparency of trade policy. The need to centralize information could further the creation of a special body at the national level for monitoring trade policy. The function of this body would be to prepare and publish a regular report on the effects and incidence of the trade and investment policies adopted (Hoekman, 1995).⁹ In this way, for example, efforts could be made to ensure that the subsidies granted do not give rise to a demand for countervailing measures, for which purpose it would be necessary to check their compatibility with the lists of permissible and actionable subsidies or, alternatively, ensure that subsidies remain within the *de minimis* provisions, both with regard to the value of the product and its share in the export market.

At the external level, the concept of graduation still remains to be defined and reformulated. The Uruguay Round agreements were excessively strict, with the establishment of a cutoff line for all countries with a per capita GDP over US\$ 1,000. The traditional bi-

nary division between developed and developing countries is undoubtedly already generally accepted, but the concept of infant industries remains in effect and the threat of precarious financial situations cannot be discounted. The establishment of a system of verification under the auspices of the WTO for the formulation of graduation criteria should therefore be proposed. It will be necessary to reach agreement on whether a country should be graduated with regard to all questions at the same time or, on the contrary, a step-by-step approach should be taken, proceeding issue by issue and sector by sector. It will also be necessary to agree on the authority which is to decide the point or moment at which a country "graduates" from special and differential treatment. It would be of benefit for the countries of the region if a system of supervision were established to ensure that the concessions and periods of transition granted by the agreements are not used to swing the balance in one or another direction at key moments in the negotiations.

In short, the discussions on international trade are tending towards the achievement of growing harmonization in the long term. It may be that they have been over-ambitious, however. In the short term, certain amounts of leeway have been retained in the domestic market. Although these degrees of freedom are no longer unlimited, as they were at the height of the era of special and differential treatment, they nevertheless exist and are by no means insignificant. This leeway is smaller, however, with regard to access to the international market than it is in the case of the domestic market. The *de minimis* provisions may initially serve to provide small exporters with greater leeway, but in the final analysis they may be an external constraint on export growth, especially in sectors of the international market which are sensitive or not very dynamic.

International undertakings form a frame of reference in which trade policies must operate. The WTO

⁹ Mexico, for example, has already taken steps to consolidate its promotion policy by merging the Fund for Exports of Manufactures (FOMEX) with the Mexican Foreign Trade Institute (IMCE), under the National Foreign Trade Bank (BANCOMEXT).

still permits a significant degrees of discretionality, however. At its height, the concept of special and differential treatment provided ample leeway for import substitution policies, without necessarily being a determining factor either in their depth or their intensity, and the same is happening today with the WTO, which points the way for the process of greater trade openness but does not determine its intensity or rate. It should be noted that within the consolidated tariff levels there is still a by no means negligible amount of leeway for the effective protection of activities in line with each country's own priorities.

In terms of general market access strategy, it will be necessary to replace the traditional physical transfers with State support for activities which are marked by heavy externalities or generic activities which enjoy greater freedom from countervailing or anti-dumping measures. An example of this is the support that the State must provide so that the export sector can adapt to the standards and specifications of export

markets. With regard to access to international markets, contacts with associations of consumers, importers and intermediate users will give growing benefits, since the new system of applications for countervailing measures gives these groups the right to put forward their point of view. The countries of the region should establish joint information and liaison offices with those associations. In the future, these access management activities will bear increasing fruits, especially if they are carried out jointly by countries of the region with common interests. It should be borne in mind that the *de minimis* provisions are more restrictive for the developing countries as a whole than for the individual countries.

These broad parameters should shape the design of trade policies. Changes in production patterns will depend mainly on national-level policy options, together with the possible entrainment effect of the growth of international markets.

(Original: Spanish)

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