

GATT provisions allow the American authorities too much flexibility and room for manoeuvre. Too often the "domestic industry," on the basis of which the representativeness of the complainants and/or the alleged injury is determined, is a very diffuse concept that can change from one investigation to another. As a result, by taking advantage of all the ambiguities and loopholes, a "domestic industry" can end up in some cases representing only a small fraction (around 20 percent) of domestic production. Therefore, an approach like the one that has been approved in multilateral agreements leaves too much scope for unilateralism, and hence reliance on such provisions for essentially protectionist ends.

Canada should attempt therefore to have countervailing duties covered by a definition that is precise and without loopholes, like the definition of emergency measures in NAFTA. In Chapter 8, Article 805 of NAFTA, the expression "domestic industry" is defined as "the producers *as a whole* of the like or directly competitive good operating in the territory of a Party." Officials of the U.S. International Trade Commission do not seem to like definitions as clear and circumscribed as this because it does not allow them much room for manoeuvre. This has even induced them to attempt to expand the definition unilaterally in their Statement of Administrative Action that accompanies the American legislation implementing NAFTA.<sup>51</sup>

The NAFTA partners should finally attempt to make obligatory a GATT clause suggesting that the amount of a *countervailing duty should be less than the total value of the subsidy* if this lesser duty suffices to remedy the injury caused to the domestic industry.<sup>52</sup> In addition, the parties to NAFTA should agree on recognizing that the injury must be evident and demonstrable and result in a considerable distortion of trade. Furthermore, this injury should be largely due to one or more *assistance measures*, that is to say, they should be *the main cause and not just one of the causes of the injury*. In the case of the magnesium dispute, the Quebec ministry of international affairs pointed out that the financial difficulties of the American company that requested countervailing duties were due to its own inefficiency and not to exports by Norsk Hydro.<sup>53</sup>

---

<sup>51</sup> Confidential interview.

<sup>52</sup> This was stipulated, in substance, in the provisions of Article 4:1 of the 1980 Subsidies Code, which were taken over into the 1993 Agreement, Article 19:2, which came out of the Uruguay Round.

<sup>53</sup> *La Presse*, January 28, 1994, p. B5.