THE ROLE OF UNFAIR COMMERCIAL PRACTICE REGULATIONS IN THE ECONOMIC INTEGRATION OF THE AMERICAN CONTINENT

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I. INTRODUCTION

Unfair commercial practices, particularly the creation of a competitive advantage through subsidies and dumping, adversely affect

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the free flow of products between countries. Such practices should be prohibited and subject to sanctions by the international trade community. Strong sanctions are necessary to guarantee the application of free market principles, such as those embodied in the General Agreement on Tariffs and Trade (GATT).[1]

Proof that commercial practices create a situation of unfair advantage, however, requires an analysis of elements subject to the discretionary power of national administrative entities. Moreover, any measures and corrective sanctions applied to unfair commercial practices impose additional trade barriers. Failure to recognize and regulate the application of measures and corrective sanctions will cause the laws and regulations concerning unfair commercial practices to become a monumental barrier to international trade. This oversight could impair, if not completely destroy, the process of economic integration both worldwide and on the American Continent.[2]

This article calls attention to one of the gravest disruptions to the process of economic integration of the American Continent: unfair commercial practice regulations. It starts by asking the reader to consider the following scenario: A company from Country A produces auto parts and exports its product to Country B. Country B's domestic auto parts industry immediately reacts by filing a complaint with its domestic trade authorities to initiate an investigation on the grounds of subsidy, dumping, or violation of an international trade agreement. After gathering information, most of which must be provided by the domestic industry that initially complained, Country B determines that the subsidy

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1. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT]. After turbulent negotiations, the GATT Uruguay Round of Multilateral Trade Negotiations was successfully completed in December 1993. *See* Exec. Summ. Prepared by the Dep't of Comm. on the Results of the GATT Uruguay Round of Multilateral Trade Negotiations, 58 Fed. Reg. 67268 (1993). The results of the Uruguay Round are embodied in the "Final Act." OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, UR-93-0246 (1993) [hereinafter FINAL ACT]. The Final Act will enter into effect after being adopted at the Marrakech Ministerial Meeting in 1994 and is expected to enter into full force around July 1995. Although some of the chapters in the Final Act drastically change the previous GATT Anti-Dumping and Anti-Subsidies Codes, this does not affect the validity of this paper's conclusions. Therefore, when mentioned throughout this paper, GATT refers to the body of international regulations currently in effect and adopted by the majority of the international community.

2. The Americas or the American Continent throughout this document refer to the geographic American Continent which includes North, Central and South America and the Caribbean.

granted by Country A to its auto parts industry gave that industry an unfair advantage in the marketplace. Consequently, Country B imposes a countervailing duty on the imported auto parts which adversely affects their price in Country B's markets. In retaliation, Country A's auto parts industry provokes an investigation of Country B's countervailing duty. The result is a finding that the duty imposed on auto parts from Country A by Country B's government creates a situation of unfair advantage. Ultimately, the free flow of auto parts between Country A and Country B is impeded by their restrictive commercial practice regulations. This disruption is the result of a subjective and unilateral analysis of economic factors.

This article reviews the models of unfair commercial practice regulation offered by GATT,[3] domestic legislation, and treaties between parties on the American Continent.[4] These models were not designed to prevent retaliatory penalties. Concepts such as "subsidy," "dumping," "unfair advantage," and "material injury" are ambiguously defined or undefined altogether, thereby encouraging a subjective application of the rules. Such application is dangerous, especially in an economic climate already charged with a "protectionist mentality."[5] In the previous hypothetical, for example, Country A and Country B might have different conceptions what constitutes of a subsidy. Thus, the inconsistent use of terminology and the subjective procedure used to determine whether an unfair commercial practice exists may lead to conflicting interpretations of the same phenomenon. The ultimate result is an increased number of trade barriers.

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3. GATT, *supra* note 1.

4. *See* Ley sobre Practicas Desales del Comercio Internationale, Gaceta Oficial, June 18, 1992 (Venez.) [hereinafter Ley de Practicas]; Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. §§ 1301-1677 (1988)) [hereinafter Tariff Act of 1930]; Reglamento a los Artículos 10 y 11 de la Ley de Proteccion y Desarrollo Industrial, No. 2426, del 3 de setiembre de 1959, La Gaceta, May 6, 1988, No. 87 (Costa Rica) [hereinafter Ley de Proteccion y Desarrollo Industrial]; Special Import Measures Act, 1984, R.S.C., ch. 25, § 1 (1985) (Can.). *See also* North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; Andean Group, Decision 283: Norms to Prevent or Correct Competitive Distortions Caused by Dumping or Subsidies, Mar. 21, 1991, 32 I.L.M. 143 (1993) [hereinafter Decision 283]; Treaty Establishing a Common Market, Mar. 26, 1991, 30 I.L.M. 1034 [hereinafter Mercosur Agreement]; United States-Canada Free Trade Agreement of 1988 (implemented at 19 U.S.C. § 2112 (1988)); Convenio Sobre el Regimen Arancelario y Aduanero CentroAmericano, La Gaceta, May 16, 1985, No. 92 (Costa Rica).

5. *See* Ewell E. Murphy, Jr., *The Andean Decisions on Foreign Investment: An International Matrix of National Law*, 24 INT'L LAW. 643 (1990).

The success of the economic integration of the Americas is closely related to the level of communication and understanding of trade matters among the countries, especially unfair commercial practices. If successful, economic integration will create a free trade area extending from Alaska to Tierra del Fuego, including the countries of the Caribbean.[6] The American Continent forms the basis of the United States' "Enterprise for the Americas" plan, launched by the Bush Administration on June 27, 1990.[7] The Enterprise for the Americas promotes the unification of this area by using market-oriented reforms to improve the economic and social conditions of its inhabitants.[8]

Until recently, two different and sometimes antagonistic worlds existed within the American Continent: the developed nations of the United States and Canada and the underdeveloped nations of Latin America and the Caribbean. Over the past decade, most Latin American countries have adopted stabilization policies and structural reforms, thereby drastically altering their social and economic systems. In the past, the economic policies embraced by these countries were directed at the protection of weak domestic industries from the destructive competition of industries from developed countries.[9] Strict foreign investment regulations were raised as walls against the influx of what was perceived as damaging capital.[10] Trade barriers flourished to protect weak domestic markets from cheaper foreign products.[11] Import regulations and exchange control measures limited the free exchange of

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6. *See* Enterprise for the Americas Initiative, 22 U.S.C. § 2430 (Supp. 1992).

7. *Id.*

8. *Id.* This principle has been recognized in Paragraph 3 of the Preamble to the Mercosur Agreement: "Recognizing the opportunities created by President Bush's Enterprise for the Americas Initiative, particularly in encouraging market-oriented government policies that will result in increased trade and investment between the South American Parties and the United States of America." *See* Mercosur Agreement, *supra* note 4, pmbl..

9. *See, e.g.*, Andean Foreign Investment Code 1976: Decision 24, Régimen Común de Tratamiento de Inversiones Extrajeras, Marcas, Patentes, Licencias y Regalías (Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties), Nov. 30, 1977, 16 I.L.M. 138 [hereinafter Decision 24]. Decision 24 was the basis for the adoption of strict anti-foreign investment regulations in Andean Countries, *e.g.*, Decreto de Inversiones Extranjeras, Feb. 8, 1977, 16 I.L.M. 1531 (Venez.). *See also* Ley de Inversiones Extranjeras of 1976, Aug. 13, 1976, 15 I.L.M. 1364 (Arg.).

10. *See generally* Murphy, *supra* note 5.

11. *Id.*

products and services.[12] For the most part, these policies were justifiable, yet the consequence was the isolation of economies from normal effects of international trade.[13]

Today, most Latin American countries have declared their support of free trade principles and denounced the protective regulations that once governed their economies.[14] The justifications for the adoption of protective measures, however, have not disappeared. Years of protectionist strategies have shaped an economic environment unfavorable to foreign products and services. The general population continues to believe that one of the government's primary obligations is the protection of domestic industries. This belief is prominent even in the United States.[15] Until this perception changes, the delicate balance of economics, politics, and social issues in the Americas will compel the implementation of measures which, although not expressly aimed at protecting the domestic industry, have protectionism as an underlying purpose.

Integrating dissimilar economies, such as those on the American Continent, into one free trade block can only be achieved if economic sectors agree to open economies, eliminate trade barriers, and accept and enforce international and national unfair commercial practice principles.[16]

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12. A clear example of these types of regulations can be found in some of the decisions of the Andean Pact, such as Decision 24, which restricted the importation of non-Andean technology by imposing a complicated system of licenses and red tape. *See* Decision 24, *supra* note 9.

13. *See* Murphy, *supra* note 5, at 643.

14. *See* INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK 17-18 (1991). Paragraph 14 to the Preamble to the Mercosur Agreement recognizes: "the importance of promoting an open and predictable environment for international trade and investment and the significant role this pays in fostering economic growth and development." *See* Mercosur Agreement, *supra* note 4, pmbl., ¶ 14.

15. See BRUCE E. CLUBB, 1 UNITED STATES FOREIGN TRADE LAW § 22 (1991), for a comprehensive summary of the United States legislation protecting United States domestic industries from unfair methods of competition and unfair acts in the import trade. *See also* FRANKLIN R. ROOT, INTERNATIONAL TRADE AND INVESTMENT (6th ed. 1990).

16. This was recognized by the Andean Group in its Decision 283:

> Considering: That in order to achieve the objectives of the integration process in the context of a free market it is appropriate to perfect the subregional norms on competition in view of international experience, so that they constitute efficacious means for preventing or correcting distortions that may arise as a result of dumping or subsidies.

Furthermore, these regulations must be used solely in support of free trade principles and not as a substitute for protectionist measures.

II. UNFAIR COMMERCIAL PRACTICES UNDER GATT

Historically, an objective determination of which commercial practices are "unfair" has been difficult to ascertain. Market efficiency has been identified as the principle delineating the difference between fair and unfair international commercial practices.[17] Market efficiency results "when free trade allows each country to specialize by exporting those goods that it can produce most efficiently and import those goods that it can produce only at a higher cost."[18] Implicit in market efficiency is the concept that natural influences such as supply, demand, and scarcity should determine price and resource allocation. Accordingly, unfair trade laws are based on the understanding that domestic producers should compete only with foreign products manufactured, distributed, and transported under similar competitive market constraints.[19]

Market efficiency embraces the law of comparative advantage, the basic premise of the free trade theory.[20] Consequently, an international trade practice identified as disturbing market efficiency is considered unfair and is subject to sanctions. Sanctions are enacted to remedy inequities created by the unfair conduct. Yet, by increasing the final price of the products in the importing country, sanctions affect not only the foreign manufacturer or exporter, but also consumers who must pay a higher price for the affected foreign products.

Each country will react differently to the same international trade conduct regardless of whether the country's legislation and business practices embrace the principle of market efficiency. The potential for disparate reactions must be recognized in order to minimize the consequences of incompatible domestic interpretations. Otherwise, the unrestricted use of sanctions to retaliate against allegedly unfair

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Decision 283, *supra* note 4.

17. Robert F. Hoyt, *Implementation and Policy: Problems in the Application of Countervailing Duty Laws to Nonmarket Economy Countries*, 136 U. PA. L. REV. 1647, 1647 (1988).

18. *Id.*

19. *See* COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS OF THE UNITED STATES, U.S. LAWS AND REGULATIONS APPLICABLE TO IMPORTS FROM NONMARKET ECONOMIES COULD BE IMPROVED 6 (1981).

20. *Id.*

commercial practices will become the strongest hindrance to international trade.[21]

A. *The GATT Model of Free Trade*

The struggle between communism and capitalism, a significant influence on the original GATT discussions, has eased. The absence of this ideological struggle, however, has not eliminated the substantial differences in approaches to trade matters among GATT members. Indeed, both GATT-related and regional efforts to integrate economies are being conducted in an atmosphere that is far from easy and open.

Most of the countries on the American Continent are GATT members, meaning that these countries have reached some agreement concerning acceptable international trade conduct.[22] In fact, GATT principles provide a starting point for domestic legislation and regional trade agreements.[23] The parties to the North American Free Trade Agreement (NAFTA) have declared the creation of a free trade area consistent with GATT provisions,[24] and affirmed their existing rights and obligations under GATT.[25] NAFTA's impact as a comprehensive agreement on domestic and regional trade confirms the influence GATT has had on regional legislation.

GATT members have adopted two codes of trade conduct to confront and regulate unfair commercial practices, particularly dumping

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21. This has been recognized as a problem in Latin American markets: "The Brazilians have also been concerned as Argentina, worried by its large trade deficit, has been increasing tariffs on a case-by-case basis, or using antidumping legislation against Brazilian products. . . . The Argentines have initiated antidumping procedures against 28 imported Brazilian products, including steel plate and electrical equipment." 11 LATIN AM. MONITOR (SO. CONE) 1 (1994).

22. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1993, at 334-35 (1993).

23. For example, in the presentation of the Ley de Practicas to the Venezuelan Congress, the Minister of the Investment stated that the law was drafted in accordance with the provisions of GATT and Decision 283 of the Cartagena Agreement. *See* Exposición de Motivos al Congreso Venezolano de la Ley de Antidumping y Subsidios, 1992 (Venez.).

24. NAFTA, *supra* note 4, art. 101.

25. *Id.* art. 103.

and subsidies.[26] These codes represent the first attempt to define and regulate unfair commercial practices at an international level.[27] They are, however, far from being a complete and exhaustive code of conduct. Much is left to the discretion of each GATT member.[28] Such a general and indeterminate approach creates conflicting interpretations and will empower countries to use domestic legislation for retaliatory and protectionist purposes.

B. *Government Subsidies Under GATT*

Subsidies are policy instruments employed by a government in an attempt to promote political, social or economic goals.[29] Subsidies are not defined in the GATT Subsidies Code.[30] GATT and some domestic regulations, however, list examples of what is considered to be a subsidy.[31] Yet, these regulations do not provide an exhaustive list of the types of subsidies. Some domestic legislation defines subsidies as the direct or indirect granting by a foreign government of incentives, bonds, subsidies or any type of assistance to manufacturers, distributors or

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26. The GATT Subsidies and Anti-dumping Codes were adopted during the Tokyo Rounds of Negotiations. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, 1186 U.N.T.S. 2 (entered into force Jan. 1, 1980); Agreement on Interpretation and Application of Articles VI, XVI and XXII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 186 U.N.T.S. 204 (entered into force Jan. 1, 1980). These codes were modified as a consequence of the Uruguay Rounds of Negotiations. *See* FINAL ACT, *supra* note 1. These new codes are not expected to come into effect until July 1995.

27. *See* CLUBB, *supra* note 15, § 10.4.

28. *See* MARTINUS NIJHOFF, TRADE POLICIES FOR A BETTER FUTURE: "THE LEUTWILER REPORT," THE GATT AND THE URUGUAY ROUND (1987).

29. *See* Robert H. Mundheim & Peter D. Ehrenhaft, *What is a "Subsidy," in* INTERFACE THREE: LEGAL TREATMENT OF DOMESTIC SUBSIDIES 95 (Don Wallace, Jr. et al. eds., 1984).

30. The new Anti-Dumping and Anti-Subsidies codes resulting from the Uruguay Round define subsidies for the first time as "a financial contribution by a government or any public body which confers a benefit to the exporter." *See* FINAL ACT, *supra* note 1.

31. *See* Ley de Practicas, *supra* note 4; Trade Agreements Act of 1979, 19 U.S.C. § 1677(5)(A), tit. VII, Publ. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of tits. 5, 13, 19 and 26 U.S.C.); Special Import Measures Act, *supra* note 4. The United States provision gives "subsidy" the same meaning as the term "bounty or grant" as the term is used in § 303 of the Trade Act, 19 U.S.C. § 1677(5) (1990).

exporters.[32] Theoretically, a subsidy is granted by a government to provide a beneficiary with goods, services or financing at prices or terms more favorable than those available to other industrial sectors.[33] A subsidy can be a governmental plan to absorb cost, expenses, and taxes normally assumed by the manufacturer or exporter.[34] A subsidy can also exempt certain industries from complying with specific regulations.[35] In addition, a government may penalize foreign governments for granting a subsidy if the subsidy creates a situation of unfair competition that materially injures domestic producers or importers.[36]

Regardless of what form subsidies may take, the effects fall into two categories: the legitimate promotion of internal objectives of national policy; or the distortion of the natural functioning of free, open, and competitive international trade.[37] The new Anti-Subsidy Code of the GATT goes further and identifies at least three types of subsidies: 1) prohibited subsidies; 2) permissible subsidies which are actionable multilaterally and countervailable unilaterally if they cause adverse trade effect; and 3) permissible subsidies which are non-actionable and non-countervailable if they are structured according to criteria intended to limit their potential for distortion.[38] Through the "permissible subsidies" categories, GATT recognizes the legitimacy of domestic subsidies that promote the national interest without being contingent upon export activity or performance.[39] GATT penalizes those subsidies which create an unfair international competitive advantage.[40] A countervailing duty is imposed to nullify the benefits received by a foreign

32. *See* Decision 283, *supra* note 4; Ley de Protección y Desarrollo Industrial, *supra* note 4; Special Import Measures Act, *supra* note 4.

33. 19 U.S.C. § 1677(5)(A)(ii)(I), (IV).

34. *Id.* § 1677(5)(ii)(II).

35. *See* Thomas Plofchan, *Recognizing and Countervailing Environmental Subsidies*, 26 INT'L LAW. 763 (1992).

36. *See* Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1987).

37. *Id.*

38. GATT, *supra* note 1, art. VI.

39. *See* GATT, *supra* note 1, art. VI.

40. *Id.*

manufacturer/exporter through a subsidy that is not equally available to a domestic manufacturer/importer.[41]

The distinction between permissible and prohibited subsidies is evidenced by the effects of such subsidies generated in a country that has not imposed a countervailing duty.[42] Therefore, when a government evaluates the granting of subsidies to domestic manufacturers or exporters it must examine how that subsidy will be perceived by a regulatory entity in a foreign country.

Under GATT, before a countervailing duty may be imposed, a country must first establish that the subsidy benefitted the product being manufactured or exported.[43] This benefit must have caused or threatened "material injury" to the domestic industry or have "retarded materially" the establishment of a domestic industry.[44] GATT, however, fails to define these standards.[45] Therefore, countries are free to determine when their domestic industries are being prejudiced by the introduction of a foreign product. Thus, situations which can support a finding of material injury may be similar to those which justified the imposition of protective measures throughout the American Continent until the 1980s.[46]

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41. *See* Tariff Act of 1930, 19 U.S.C. § 1303(a)(1) (1988); William Lay, *Redefining Actionable "Subsidies" Under U.S. Countervailing Duty Law*, 91 COLUM. L. REV. 1495 (1991).

42. *See* GATT, *supra* note 1, art. VI (6)(a). The United States' position in this matter is: "To the extent that we find government investment to be commercially unreasonable and the government's rate of return on its investment less than the national average rate of return on investment, we consider the investment to provide a countervailable benefit." Preliminary Affirmative Countervailing Duty Determination: Circular Welded Non-Alloy Steel Pipe From Brazil, 57 Fed. Reg. 24,466 (1992).

43. *See* GATT, *supra* note 1, art. III.

44. *Id.*

45. In the United States, "material injury" is defined as a harm that is not inconsequential, immaterial or unimportant. *See* 19 U.S.C. § 1677(7)(A) (1988). This definition is sufficiently abstract to include almost any international trade practice.

46. *See* Murphy, *supra* note 5.

C. *Dumping*

Dumping is the selling of a product for export at a lower price than that charged in the domestic market.[47] GATT defines dumping as the introduction of products into the stream of commerce of another country for less than the normal value of the products.[48] Dumping must cause or threaten material injury to an established industry in the territory of a contracting party or materially retard the establishment of a domestic industry in order to merit retaliatory measures under GATT.[49] Dumping disrupts trade by creating a monopoly for the foreign manufacturer by driving the domestic competitors out of business. The producer may then raise the price without fear of competition.[50] In most cases, this practice is under the control of the foreign manufacturer or exporter and is not protected by a foreign government's policy. The threshold element to determine the existence of dumping is selling below the normal value of the product. Concepts such as "normal value" and "fair value," however, are not defined in GATT.[51] Instead, GATT provisions and the majority of the domestic and regional legislation make reference to factors to be considered when determining fair value in an investigation of an alleged dumping.[52] The domestic price of the same or similar product in the exporting country must be investigated.[53] If a domestic price cannot be determined, the export price is determined with reference to a third country.[54] If no domestic or international sales of the same or a similar product exist, the cost of production plus a reasonable addition for selling

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47. CLUBB, *supra* note 15, § 21.8. "An importation is considered to be at a dumping price when it's export price is lower than the normal value of a similar product intended for consumption or utilization in the country of origin or of exportation in the case of normal commercial transactions." Decision 283, *supra* note 4, art. 3.

48. *See* GATT, *supra* note 1, art. VI(1).

49. *Id.* art. VI(5).

50. *See* CLUBB, *supra* note 15, § 21.8.

51. *See* GATT, *supra* note 1, art. VII.

52. *Id.* art. VI(1)(a). *See* Ley de Practicas, *supra* note 4, arts. 8-10. Decision 283 defines "normal value" as "the amount truly paid or to be paid for a product similar to that imported in the Member Country when sold for consumption or utilization in the domestic market of the country of origin or of export in normal commercial transactions." Decision 283, *supra* note 4.

53. *See* GATT, *supra* note 1, art. VI(1)(a).

54. *Id.* art. VI(1)(b).

cost and profit is used.[55] The domestic authority then determines the first element of the dumping equation: the export price as compared to the domestic price. Only if a difference exists between the domestic and export price for the same or similar product can a sanction in the form of an anti-dumping duty be calculated.[56] A reliable internal price is sometimes difficult to ascertain.[57] If a reliable price is unascertainable, the determination is left to the discretion of a domestic authority.[58]

Not every finding of dumping will be subject to anti-dumping penalties. Only dumping which materially harms or threatens to materially harm a domestic industry or the establishment of a domestic industry will be subject to sanctions.[59] When imposed, however, these penalties may entail prohibiting a product from entering into a foreign market or imposing duties on that product.[60] Yet, neither GATT nor domestic regulations addressing dumping provide either a definition or a description of what constitutes material injury.[61]

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55. Such is the case in the United States when a claim for dumping is brought against a manufacturer in a Non-Market Economy (NME). Due to the absence of information on "market economy" production factors, the U.S. authorities are required to look into values supplied from "surrogate countries" which are considered to be "at a level of development comparable to" the NME under analysis. *See* Initiation of Antidumping Duty Investigations: Certain Cased Pencils From the People's Republic of China and Thailand, 58 Fed. Reg. 64,548 (1993). In fact, United States authorities have developed a standard under which they decide whether the manufacturer is within a "Market-Oriented" or a "Non-Market" oriented economy. *See* Preliminary Determination of Sales at Less Than Fair Value: Sulfanilic Acid From the People's Republic of China, 57 Fed. Reg. 9,409 (1992). All of these determinations (NME, MOE, Surrogate Country) are made by a domestic entity which decides whether its domestic industry is entitled to a remedy consisting of the imposition of antidumping duties.

56. *See* GATT, *supra* note 1, art. VI(1)(a).

57. *Id.*

58. In the United States, "United States price" means "the purchase price or the exporter's sales price of the merchandise, as appropriate." Antidumping Duties, 19 C.F.R. § 353.41 (1993). In Venezuela, the "Export Price" is the price paid or to be paid for the product in Venezuela, without taxes, discounts or other reductions actually granted and directly related to the transaction. *See* Ley de Practicas, *supra* note 4, art. 11.

59. *See* GATT, *supra* note 1, art. VI(1)(a); Ley de Practicas, *supra* note 4, art. 11

60. *See* Ley de Proteccion Industrial y Desarrollo, *supra* note 4, art. 11.

61. Before a determination that the product materially injures domestic industry, the exporter can be penalized if it is found that the "normal value" of production is higher than the price to the consumer. *See* Notice of Preliminary Determination of Sales at Less Than Fair Value; Silicon Carbide from the People's Republic of China, 58 Fed. Reg. 64,549 (1993) [hereinafter Silicon Carbide]. In Silicon Carbide, the International Trade Administration requested that, in accordance with § 733(d)(1) of the Tariff Act of 1930,

The drafters of GATT recognized the difficulty in strictly applying anti-dumping regulations to the myriad of situations presented in international trade. Therefore, GATT recognizes that, in the case of imports from a country which has a complete or a substantially complete monopoly on its trade and where all domestic prices are fixed by the state, special difficulties may exist in determining the foreign price.[62] In such a case, a strict comparison with domestic prices may not be appropriate to determine the foreign price. Concepts such as "complete monopoly" are too vague, however, to serve as the framework for worldwide, unified dumping principles.

III. SOLUTIONS TO PROBLEMS OF DUMPING AND COUNTERVAILING DUTIES

Anti-dumping and countervailing duties are sanctions imposed on imported products that affect the international price of the product.[63] A country finding the price of an imported product to be affected by subsidy or dumping may raise the price of the imported product, thereby affecting the product's competitiveness. Moreover, most American countries regulate unfair commercial practices with the protection and development of domestic industry as a primary goal. Therefore, the sanctions imposed under such legislation are protectionist.[64]

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19 U.S.C. §§ 1301-1677(g), United States Customs is to "suspend liquidation of all entries of silicon carbide from the PRC from the date of publication of the preliminary determination." *Id.* To allow the entry of the product, the exporter will have to post a cash deposit or bond with Customs equal to the estimated amount by which the fair market value exceeds the United States price. This is before the International Trade Commission determines that material injury to the United States industry exists. Silicon Carbide, *supra*.

62. "Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability." GATT, *supra* note 1, art. VI(1)(a).

63. *See* GATT, *supra* note 1, art. XI(1). "The contracting parties can adopt measures that will affect products being introduced into the Central American Region, if these measures aimed at offsetting the effects of commercial practices that injure or threaten to injure the Central American production, especially when the product is imported at a price lower than its normal value or with the benefit of export subsidies." Convenio Sobre el Regimen Arancelario y Aduanero CentroAmericano, *supra* note 4, art. 25.

64. *See* Kevin C. Kennedy, *The Canadian and U.S. Responses to Subsidization of International Trade: Toward a Harmonized Countervailing Duty Legal Regime*, 20 LAW & POL'Y INT'L BUS. 683 (1989).

Anti-dumping and countervailing duties are assessed after an evaluation of complex elements unique to the manufacturing and exporting process of each product. For most countries of the world this entails a bifurcated analysis.[65] First, one must determine whether the unfair commercial practice caused a material injury to the domestic industry.[66] The amount of the damage must then be quantified in order to determine the appropriate trade sanction.[67]

The determination of a foreign subsidy and the degree to which that subsidy benefitted the foreign exporter is made on a case-by-case basis by administrative entities that also evaluate the material injury to the domestic industry. This makes the adoption of general rules to which a foreign country or producer can refer difficult. The same can be said in the case of dumping, where concepts such as "less than the normal value" and "internal price" are not defined. The authorities determining and establishing anti-dumping duties are, in most cases, unaware of the particular economic, political or social conditions of the exporting country.[68]

In both subsidy and dumping cases, material injury to the importing country's domestic industry triggers the penalty. In theory, the concept of material injury can be stretched to include any prejudice to a company or group of companies that compete with a foreign product.[69] Moreover, the unfair trade practice and the sanction to be imposed are assessed based on information provided by questionnaires addressed to foreign producers, foreign governments, and domestic industries.[70] Some information requested is confidential and will not be surrendered by a company fearing disclosure of valuable trade secrets. Consequently, the accuracy of this information is suspect and may present a distorted picture of the economic and business conditions in the foreign country. In the United States, for example, the Department of Commerce determines both the foreign and the internal price of a product based on the response to a questionnaire sent to foreign manufacturers or exporters.

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65. *See* James R. Holbein et al., *Comparative Analysis of Specific Elements in United States and Canadian Unfair Trade Law*, 26 INT'L LAW. 873, 876 (1992).

66. *Id.*

67. *Id.*

68. *See* Investigations of Whether Injury to Domestic Industries Results from Imports Sold at Less Than Fair Value of From Subsidized Exports to the United States, 19 C.F.R. § 207.2(e) (1993).

69. *See id. See also* Ley de Practicas, *supra* note 4, art. 20.

70. *See* 19 C.F.R. § 207.8. *See also* Ley de Practicas, *supra* note 4, art. 52.

If the foreign manufacturer or exporter does not provide the requested information "in a timely manner and in the form required, or otherwise significantly impedes an investigation," the Department of Commerce is authorized to determine whether an unfair trade situation exists based upon "the best information otherwise available."[71]

Attempts have also been made to solve the problems of the strict application of abstract concepts, the lack of definition of the elements required to determine the existence of unfair commercial practices, and the potential for their subjective application by the authority in the importing country in national or binational regulations and treaties.[72] One solution is to insure that before anti-dumping or countervailing duties are imposed, the authorities from the country imposing the sanctions first consult with officials in the exporting country and provide a justification for the sanctions. For example, GATT contemplates a system for the stabilization of the domestic price or for the return to domestic producers of a primary commodity, independent of export price fluctuations.[73] This system may result in the sale of a commodity for export at a price lower than the comparable domestic market price. Therefore, GATT establishes that material injury shall not be presumed unless it is determined by the contracting parties that the system has also resulted in the sale of a commodity for export at a higher price than the comparable domestic market price.[74] To trigger this presumption, the system must effectively regulate production or must not unduly stimulate exports or seriously prejudice the interests of other contracting parties.[75]

Another solution is a system of judicial review of a domestic authority's decision, similar to that of the United States.[76] After a finding of material injury, but before the imposition of duties, the party

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71. *See* 19 U.S.C. § 1677f(e) (Supp. 1992). *See also* Ley de Practicas, *supra* note 4, art. 52. The same authority is granted to the entity in charge of antidumping investigations. In the United States, the Department of Commerce has used the concept of "Best Information Available (BIA)," even when the foreign manufacturer has alleged that responding to the United States questionnaires would have been "extremely costly, time-consuming, and beyond the business reality." *See* Light-Walled Welded Rectangular Carbon Steel Tubing From Taiwan; Final Results of Antidumping Duty Administrative Review, 57 Fed. Reg. 24,464 (1992).

72. *See* Decision 283, *supra* note 4; Mercosur Agreement, *supra* note 4.

73. *See* GATT, *supra* note 1, art. VI(7).

74. *Id.*

75. *Id.*

76. *See* 19 U.S.C. § 1516(a)(1). Venezuela, for example, does not have a judicial review process contemplated in its law. *See* Ley de Practicas, *supra* note 4.

affected by the decision would have access to the judicial system of the country imposing the duty to request a review of the administrative decision. One drawback, however, is that only the judicial system of the importing country is involved, lending a bias to the decision.[77] Recognizing this problem, Canada and the United States included a dispute resolution mechanism in the Free Trade Agreement (FTA) executed in 1988.[78] Through this mechanism, a party affected by the decision of a domestic authority can request a review of the decision by a binational panel of five members, two from each country concerned and one member appointed by agreement of the countries concerned or the four chosen members.[79] The decisions of this panel are final and binding on both countries.[80]

NAFTA also provides for binational panels.[81] A binational panel lessens the sting of a unilateral decision affecting the rights of a foreign manufacturer or exporter. Such a panel, however, must incorporate all possible combinations of international trade that may occur within the

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77. For example, the standard of judicial review in the United States is whether the administrative decision was supported by substantial evidence. *See* 19 U.S.C. § 1516(b)(1). This has been construed as requiring such evidence as a reasonable mind might accept as adequate to conclude in that specific matter. Matsushita Elec. Indust. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984). This is broad enough to encompass almost any decision from the fact-finder that is reasonable. Moreover, the administrative decision is protected by a presumption that it is correct and the burden of proving otherwise is on the challenger. *See* Hannibal Inc. v. United States, 13 Ct. Int'l Trade 202, 710 F. Supp. 332, 337 (1989).

78. United States-Canada Free Trade Agreement Implementation Act of 1988, Pub L. No. 101-449, 102 Stat. 1851 (codified at 19 U.S.C. § 2112 (1988)).

79. The FTA sets a 5 year deadline for the implementation of rules and disciplines over the use of subsidies and the practice of dumping, with an automatic extension for two more years. Failure to agree to implement a new regime during this time will entitle either government to terminate the FTA on 6 month's notice. *Id.*

80. The first case submitted to the binational panel review was Red Raspberries from Canada; Final Results of Antidumping Duty Administrative Review, 54 Fed. Reg. 6,559 (1989). Canadian producers of raspberries were found to be selling their product at dumping margins. A binational panel was formed in accordance with the FTA. The panel found that the U.S. International Trade Administration's decision was not properly justified and therefore requested the U.S. Department of Commerce to provide the panel with additional rationales for its finding. The end result was that the original dumping margin was reduced from 2.59-9.15 percent to 0-0.12%. At the center of the discussion was the United States ITA's interpretation of "such or similar" merchandise under the United States Antidumping Statute. *Id.*

81. NAFTA, *supra* note 4, art. 1904: "[T]he Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." *Id.*

American Continent. Each of these panels must be empowered with the necessary authority to modify, revoke or affirm decisions taken by domestic authorities. Moreover, these panels must consider the complex political or economic policies important to the countries involved in the controversy.

IV. UNITED STATES TARIFF ACT: SECTION 301 AS A PROTECTIVE MEASURE

In addition to the remedies generally available to combat unfair international commercial practices, United States producers and exporters may also avail themselves of Section 301 of the United States Tariff Act.[82] The mechanisms, procedures, investigations, and sanctions provided in Section 301, although the subject of controversy among GATT members, may be adopted by all countries in the world. If Section 301 is adopted as an international trade accord, the participating countries must objectively investigate claims subject to the protection of Section 301 to avoid unreasonable trade barriers.[83]

Section 301 was originally enacted to provide a United States cause of action against countries that violate GATT commitments.[84] This section, however, has now evolved into a procedure that allows United States producers of goods or services to request that the United States retaliate against foreign countries that engage in any unreasonable and unjustifiable commercial practice.[85] In fact, a specific complaint need not be filed by a United States business entity.[86] The United States Trade Representative or the President of the United States has the

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82. Omnibus Trade and Competitiveness Act of Dec. 1988, §§ 301-06, Pub. L. No. 100-418, 102 Stat. 1107 (codified as amended in scattered sections of 19 U.S.C.). *See* Trade Act of 1974, 19 U.S.C. §§ 2411-2419 (1988). "Section 301" often refers to the trade remedy provided at §§ 301-309. *See* Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series #16: Settling Disputes in the Gatt: The Past, Present, and Future*, 24 INT'L LAW. 519, 525 n.34 (1990).

83. *See* 19 U.S.C § 2411.

84. *Id.*

85. "Unreasonable practice" is defined as any act, policy, or practice which is not necessarily violating or inconsistent with the international legal rights of the United States, but is otherwise unfair and inequitable. 19 U.S.C. § 2411(d)(3). Unreasonable practice is an act, policy, or practice that is in violation or inconsistent, with the international legal rights of the United States. 19 U.S.C. § 2411(d)(4)(A).

86. *Id.*

authority to initiate an investigation into an unfair commercial practice or any other practice which potentially violates GATT provisions.[87]

Section 301 lacks any provision providing for judicial review of administrative decisions. Consequently, the decisions reached and the remedies imposed by the United States Trade Representative are final and nonappealable. The finality of these decisions gives rise to concerns as to the propriety of Section 301's application.

Section 301 is the primary vehicle used by the United States government to combat trade practices that impede the flow of United States goods, services or investments into a foreign country. Furthermore, many United States businesses view Section 301 as a practical and effective means of gaining fair access to foreign markets or obtaining trade compensation for unfair practices undertaken abroad. Given its harsh implications, a Section 301 investigation is generally commenced in response to a specific complaint and is resolved by negotiated settlement between the United States and the foreign country.[88] In its present form, however, the act allows United States authorities to implement retaliatory measures against any foreign country that denies United States businesses fair access to its markets.[89]

Section 301, although originally enacted to sanction GATT violations, is no longer restricted to violations of GATT or other specific trade agreements. It can now be employed in the absence of a specific trade agreement if actions of a foreign government are unjustifiable, unreasonable or discriminatory, and burden or restrict United States commerce.[90] Therefore, foreign countries doing business with the United States must be aware that discriminatory practices will be scrutinized even in the absence of a trade agreement. Unjustifiable and

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87. *See* Judith H. Bello & Allan F. Holmer, *U.S. Trade Law & Policy Series #13: Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197 (1988).

88. *See* 19 U.S.C. § 2413(9)(2).

89. Section 301 is broad enough to cover such practices as: 1) Discriminatory Rules of Origin; 2) Governmental Procurement; 3) Licensing System; 4) Quotas; 5) Exchange Control; 6) Restrictive Business Practices; 7) Discriminatory Bilateral Agreements; 8) Variable Levies; 9) Border Tax Adjustments; 10) Discriminatory Road Taxes; 11) Horsepower Taxes; and 12) Other Taxes, that would have the effect of discriminating against United States products and would otherwise have the effect of erecting a trade barrier. *See* 19 U.S.C. § 2411.

90. *See* Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series #10: Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW. 211 (1987).

discriminatory practices under Section 301 include the denial of "most favored nation treatment" to United States exports. In other words, tariffs imposed on United States products will be higher than tariffs imposed on similar products from other countries. Another discriminatory practice is the denial of "national treatment" to United States products. National treatment is defined as the failure to provide equal treatment in the realm of taxes and regulations for United States products vis-à-vis similar domestic products.[91]

A foreign practice is judged on a relative standard to determine whether it is so unreasonable or unjustifiable as to support a Section 301 action. Thus, each country is measured against its progress and the level of economic development realized.[92] Additionally, any country treating United States products, services or investments less favorably than those from domestic or third-country sources is likely to become the object of a claim of discriminatory practice.[93]

Section 301 does not provide for judicial review of the actions taken by the United States Trade Representative. The United States Trade Representative has almost complete discretion in determining which investigations to pursue, the scope of the investigations, the extent of the consultation with the foreign countries, and the retaliatory action, if any, to be imposed.[94]

In order to impose the sanctions provided in Section 301, the United States Trade Representative must find that the practice imposes a burden upon United States commerce, thereby affecting the flow of United States goods, services, and investments.[95] Typically, before retaliatory measures are imposed, the United States Trade Representative will consult the foreign government and attempt to resolve the dispute.[96] This first step is aimed at eliminating any discriminatory trade restrictions. Generally, this can be accomplished through the negotiation

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91. *See* GATT, *supra* note 1, art. III(4).

92. For example, in the past, Brazil has been the subject of unjustifiable practice charges and penalties under Section 301 because it failed to recognize United States intellectual property rights. The Brazilians were, in effect, copying United States pharmaceutical products that had been subject to intellectual property rights recognition and in retaliation for this practice, tariffs against Brazilian products of up to 100% of their value were imposed. These tariffs were eventually eliminated in 1990 after Brazil adopted patent protection legislation. *See* CLUBB, *supra* note 15, § 21.

93. *See* 19 U.S.C. § 2411(c).

94. *See* 19 U.S.C. §§ 2411-2420.

95. *See* 19 U.S.C. § 2411(1)(a).

96. *See* 19 U.S.C. §§ 2413(a), (b).

of a modification of the practice. If these consultations are not successful, however, retaliatory steps can be implemented. These sanctions include: 1) suspending, withdrawing or preventing application of the benefits of trade agreement concessions to the offending country; 2) imposing import duties or other trade restrictions on goods or fees and other restrictions on the services of the offending country; 3) entering into binding agreements with the offending countries to eliminate the offending practice; and/or 4) restriction or denying issuance of any service sector access authorization.[97]

Although Section 301 investigations are typically initiated in response to an interested party's petition, the interested party may approach the United States Trade Representative on an informal and confidential basis.[98] Additionally, the United States Trade Representative can commence an investigation on his or her own motion or at the request of the President of the United States.[99] In order to avoid problems regarding dispute resolution procedures under international trade agreements, such as GATT, Section 301 imposes specific timetables to be met by the United States Trade Representative when undertaking the investigation and bringing matters to a conclusion.[100] Although these deadlines vary depending on the nature of the offending practice, most investigations are concluded within a six to twelve month period.[101]

V. RECOMMENDATIONS AND CONCLUSIONS

The adoption of measures to eliminate or substantially reduce subjective and arbitrary application of national regulations can prevent the use of unfair commercial practice regulations as instruments of retaliation. The first step is to analyze and define the different concepts involved in the determination and sanctioning of unfair commercial practices within the framework of GATT. This effort should aim at developing a workable and comprehensive code of international trade conduct. The enforcement of this code of conduct will require the establishment of

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97. *See* 19 U.S.C. § 2411(d)(5).

98. *See* Judith H. Bell & Allan F. Holmer, *U.S. Trade Law and Policy Series #21: GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301*, 26 INT'L LAW. 795, 799 (1992).

99. *See* 19 U.S.C. § 2411.

100. *See* 19 U.S.C. §§ 2411-2416.

101. *See* 19 U.S.C. § 2420.

procedures that guarantee evaluation by a competent and objective entity. Moreover, in order to render valid and legitimate decisions, the evaluating entity must have access to accurate and complete information. To this end, a multinational committee should be formed with the task of gathering reliable information for consideration by the appropriate authority from countries involved in an unfair commercial practice claim. This same multinational committee should have the authority to oversee the investigatory process and to serve as the last entity to which the parties can present their positions.

These suggestions are not the only possible solutions; further exploration into more pragmatic ways to guarantee the success of the integration of the American Continent into a strong free trade block should be encouraged. The fragile economies of most countries on the American Continent will respond to an effort to understand the principles of the free market and how these principles interact when economies with different levels of growth actively engage in international trade. Otherwise, economic conditions will act to undermine free market principles and may cause incipient domestic industries to perish under the competition of better-equipped manufacturers or exporters. The conditions which justified protectionist policies on the American Continent have not disappeared. It is, therefore, critical that unfair commercial practices regulations are used only to sponsor free and fair competitiveness.