RUSK AWARD

A PROPOSED MODIFICATION OF U.S. IMPORT RELIEF MEASURES IN THE CONTEXT OF A U.S. - CANADA FREE TRADE AGREEMENT: SAFEGUARD, COUNTERVAIL, AND ANTIDUMPING

I. INTRODUCTION

Since the election of Mr. Brian Mulroney as the prime minister of Canada in 1984,[1] both Canada and the United States have expressed interest in concluding a free trade agreement. While a sectoral free trade arrangement was the initial focus,[2] the aim now is to develop a comprehensive free trade agreement consistent with the provisions of article XXIV of the General Agreement on Tariffs and Trade (GATT).[3]

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[1] Mr. Mulroney became prime minister following the September 1984 Canadian elections in which his Progressive Conservative party gained 211 of the 282 seats in the Canadian Parliament. The Progressive Conservative party defeated the Liberal party which had ruled Canada for all but nine months since 1968. Kelly, *Canada Changes Course*, TIME, Sept. 17, 1984, at 36.

[2] *See* DEP'T EXTERNAL AFFAIRS (CAN.), Canadian Trade Policy for the 1980s: A Discussion Paper (1983). *See generally The Legal Aspects of Sectoral Integration Between the United States and Canada*, 10 CAN. - U.S. L.J. 1-257 (1985) (where the entire issue consists of conference proceedings on sectoral free trade).

[3] General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A11, T.I.A.S. No. 1700, 55 U.N.T.S. 194. The term GATT refers both to the original agreement and to the institutional framework created by that instrument. That framework has provided the structure for subsequent rounds of negotiations aimed at eliminating tariffs and non-tariff barriers. The text of the GATT instrument is reprinted in 3 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1958) [hereinafter BASIC INSTRUMENTS]. Article XXIV of the GATT states:

> 4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary arrangements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.
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> 5. Accordingly, the provisions of this Agreement shall not prevent, as between territories of contracting parties the formation of . . . a free trade

Article XXIV provides that countries may conclude regional free trade arrangements without violating the most-favored nation requirements contained in Article I of the GATT.[4] Article XXIV defines a free trade area as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories."[5] Since duties, or tariffs, were the major barrier facing international trade at the time the GATT was drafted in 1947,[6] it is not surprising that they are specifically mentioned in the definition. Due to the great success of the GATT and subsequent negotiations conducted under its framework, however, tariffs are no longer a significant barrier to trade.[7]

Nowhere is this liberalization more evident than in trade between the United States and Canada. By 1987, when the two countries have fully implemented their commitments made in the Tokyo Round of GATT negotiations, ninety-five percent of Canadian exports to the United States and eighty-five percent of United States exports to Canada will pass duty free or with duties of less than five percent.[8] As the United States Senate noted in 1979, however, "[a]s average tariff rates . . . became progressively lower, the effects on trade of

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> area or the adoption of an interim agreement necessary for the formation of. . .a free trade area . . . .

Id. at 47-48. *See generally* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 575-624 (1969) (providing an overview of regional trading arrangements and their compatibility with the GATT). *See also* K. DAM, THE GATT: LAW AND INTERNATIONAL ORGANIZATION 274-95 (1970).

[4] Article I provides that "any advantage, favour, privilege or immunity granted by any contracting party to . . . any other country shall be accorded immediately and unconditionally to . . . all other contracting parties." BASIC INSTRUMENTS, *supra* note 3, 4. *See generally* JACKSON, *supra* note 3 at 249-79 (discussing the most-favored nation clause).

[5] BASIC INSTRUMENTS, *supra* note 3 at 49 (art. XXIV(8)(6)).

[6] *See generally* C. WILCOX, A CHARTER FOR WORLD TRADE (1972) (for a detailed account of the negotiations which resulted in the original GATT instrument and the background against which those negotiations took place).

[7] Seven major rounds of trade negotiations have taken place under the GATT framework (including the negotiations for the original GATT). The first six rounds concentrated primarily on tariff reduction, although the Kennedy Round from 1962-67 attempted to deal with non-tariff barriers as well. The seventh round, or Tokyo Round, dealt primarily with the problem of non-tariff barriers. This emphasis was due to the significant reduction in tariffs as barriers resulting from the previous six rounds. J. JACKSON, J. LOUIS & M. MATSUSHITA, IMPLEMENTING THE TOKYO ROUND 11-12 (1984).

[8] 3 STANDING SENATE COMMITTEE ON FOREIGN AFFAIRS (CAN.), CANADA - UNITED STATES RELATIONS: CANADA'S TRADE RELATIONS WITH THE UNITED STATES 26 (1982) [hereinafter CANADA - U.S. RELATIONS].

national laws and policies other than tariffs, 'non-tariff barriers' (NTBs), became more apparent.''[9] Non-tariff barriers come in a variety of forms. They may be as understandable as import quotas or they may be as vague as technical standards and government procurement policies.[10] All non-tariff barriers, however, exert a restraining effect on efforts to liberalize international trade. Although these measures may not be designed to be protectionist devices, for there may be legitimate and beneficial reasons for their existence, they should be examined to determine if the benefit derived from them is worth the cost.

The purpose of this paper is to look at three of the major statutory import relief measures available to United States manufacturers — safeguard, countervail, and antidumping — in the context of a Canada-United States free trade agreement. Each of these measures will be examined to determine whether they are consistent with the goals of such an agreement. Where there is a conflict, a modification of the existing legislation will be suggested.

As used in this paper, the concept of a free trade agreement is the creation of a single economic market between the two separate, though interdependent, markets of Canada and the United States. The extent of this interdependence is illustrated by the fact that the United States and Canada are each other's largest trading partners. Three-quarters of Canada's total foreign trade is done with the United States, while the province of Ontario alone imports more United States goods than any other country in the world.[11] The statistic presenting possible problems, however, is that Canada has a population of 25 million compared to 240 million for the United States.[12] This difference in size will lead to disproportionate effects both in terms of the negotiation and operation of the free trade agreement.

II. SAFEGUARD ACTIONS

Section 201 of the Trade Act of 1974 provides that United States industries seriously injured by imports may obtain temporary relief

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[9] S. REP. NO. 249, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 387.

[10] *See generally* L. GLICK, MULTILATERAL TRADE NEGOTIATIONS: WORLD TRADE AFTER THE TOKYO ROUND (1984) (for a discussion of some of the major non-tariff barriers and the effect of the Tokyo Round on those barriers).

[11] *Namerica, Namerica*, ECONOMIST, Apr. 6, 1985, at 15.

[12] 1 MINISTER OF SUPPLY AND SERVICES CANADA, REPORT: ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA 300 (1985) [hereinafter MINISTER'S REPORT].

from all imports of a particular product.[13] The relief granted, which may be in the form of quotas, supplementary duties, or tariff-rate quotas,[14] must be nondiscriminatory in its application to different countries.[15] The period for which relief is given may not exceed five years, although that initial period may be extended for an additional three years.[16]

To obtain relief under section 201, the International Trade Commission (ITC) must determine that a United States industry has suffered or is threatened with serious injury substantially caused by increased imports.[17] If this injury test is met, the ITC recommends the type of relief the President should grant.[18] The President, who has sixty days in which to make his decision, has absolute discretion in determining whether or not to grant relief and the form the relief may take.[19]

In its report on the Trade Act of 1974, the Senate Finance Committee stated:

> The rationale for the "escape clause" has been and remains, that as barriers to international trade are lowered, some industries and workers inevitably face serious injury, dislocation and perhaps economic extinction. The "escape clause" is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition.[20]

The phrase "escape clause" is used as a synonym for the word "safeguard." An escape clause in the strict sense relates only to relief

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[13] Trade Act of 1974, Pub. L. No. 93-618, § 201, 88 Stat. 1978, 2011 (1974) (codified at 19 U.S.C. § 2251 (1982)).

[14] 19 U.S.C. § 2253(a) (1982).

[15] Safeguard relief is authorized by Article XIX of the GATT, which contemplates that the relief granted will be applied on a most-favored nation basis consistent with Article I. JACKSON, *supra* note 3, at 564. Article I provides for most-favored nation treatment "[w]ith respect to custom duties and changes of any kind . . . and with respect to all rules and formalities in connection with importation and exportation." BASIC INSTRUMENTS, *supra* note 3, at 4 (art. 1(1)).

[16] 19 U.S.C. § 2253(h)(1), (3) (1982).

[17] *Id.* § 2251(b)(1).

[18] *Id.* § 2251(d)(1)(A).

[19] *Id.* § 2252(b). The statutory language states that "[w]ithin 60 days . . . after receiving a report from the Commission containing an affirmative finding . . . the President shall . . . determine what method and amount of import relief he will provide, or determine that the provision of such relief is not in the national economic interest of the United States. . . . *Id.*

[20] S. REP. No. 1298, 93d Cong., 2d Sess. 119, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7263.

which permits a country to temporarily "escape" from trade concessions previously granted.[21] This relationship between injury and concessions, however, is not present in section 201. In fact, the Trade Act of 1974 eliminated a former requirement that the increased imports complained of result "in major part" from trade concessions.[22]

Section 201, therefore, is not an escape clause. Instead, it is a statutorily-imposed measure for determining what is an unacceptable level of imports. Although discretionary, it nonetheless permits the nullification of a concession without any evidence that the alleged injurious imports can be attributed to that concession. In essence, this result amounts to a "reversion to protectionism under the guise of an 'escape' from a concession."[23]

If one of "[t]he main purpose[s] of a free-trade agreement's guarantee of market access . . . [is] to create positive incentives for the parties to undertake industrial restructuring . . . the continued availability of safeguard protection to firms injured by imports would substantially undermine the economic goal of the signatories."[24] Under a free trade agreement, companies now producing a broad range of products for a limited market would move to concentrate their resources on a limited number of products designed to compete in the expanded market. The goal is for each manufacturer to concentrate in those areas where it has a comparative advantage, realizing the lower costs created by the expanded economies of sale. The continued availability of safeguard protection would, therefore, have an inhibiting effect by creating the possibility that a manufacturer, after rationalizing its production, could be precluded from effectively competing in the expanded market.

A possible solution to this problem is found in the safeguard provisions of the Australia-New Zealand Closer Economic Relations-Trade Agreement (Australia-New Zealand Trade Agreement) con-

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[21] *See generally* JACKSON, *supra* note 3, at 553-73 (concerning United States escape clause development and its impact on article XIX of the GATT).

[22] Section 301 of the Trade Expansion Act of 1962 provided for escape clause relief when "as a result *in major part* of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, material injury to a domestic industry." Trade Expansion Act of 1962, Pub. L. No. 87-794, § 301(b)(1), 76 Stat. 872, 884 (1962) (emphasis added) (current version at 19 U.S.C. §§ 2251-53 (1982)).

[23] Metzger, *The Escape Clause and Adjustment Assistance: Proposal and Assessments*, 2 LAW & POL'Y INT'L BUS. 352, 366 (1970).

[24] MINISTER'S REPORT, *supra* note 12, at 315.

cluded in 1983.[25] The objectives of that agreement include the development of closer economic relations through the expansion of free trade between the two countries and a gradual and progressive elimination of barriers to trade.[26]

Article 17 of the Australia-New Zealand Trade Agreement deals with the application of safeguard measures between the two countries.[27] It provides that safeguard action is available only when no other solution can be found and only during the transition period.[28] The transition period is defined as the time when tariffs, quantitative import restrictions, tariff quotas, performance-based export incentives, and measures for stabilization or support imposed by the agreement remain in force.[29]

To activate the safeguard mechanism, a party must make a written request for consultations when, in its opinion, "goods originating in the territory of the other Member State . . . are being imported in such increased quantities and under such conditions as to cause, or to pose an imminent and demonstrable threat to cause, severe material injury to a domestic industry producing like goods."[30] Additionally, those increased imports must result from measures taken pursuant to the agreement or other government measures affecting trade in the two-country area.[31]

Safeguard measures may be applied if there has been an opportunity for consultation and the countries have not reached a mutually acceptable solution after ninety days.[32] These measures may be applied provided that:

> (a) They shall be the minimum necessary to allow the fullest possible opportunity for trade to continue consistent with amelioration of the problem; and
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> (b) if involving quantitative import restrictions or tariff quotas they shall be applied only in the most extreme circumstances and where other safeguard measures would prove insufficient amelioration of the problem and shall not be regarded as a means of

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[25] Australia - New Zealand Closer Economic Relations - Trade Agreement, *reprinted in* 22 I.L.M. 946 (1983) [hereinafter Australia - New Zealand Agreement].

[26] *Id.* at 948-49 (art. 1).

[27] *Id.* at 967 (art. 17).

[28] *Id.*

[29] *Id.* (art. 17(1)(b)).

[30] *Id.* (art. 17(2)).

[31] *Id.* at 967-68 (art. 17(2)(b)).

[32] *Id.* at 968 (art. 17(5)).

> extending the date for the elimination of quantitative import restrictions or tariff quotas . . . .[33]

When safeguard measures are imposed, they are limited to a two-year time period.[34] At the end of this period, tariff levels, tariff quotas, and import restrictions revert to the levels at which they existed immediately prior to the implementation of relief, and liberalization of trade pursuant to the agreement continues.[35] Finally, "[i]n the event of severe material injury or demonstrable threat thereof arising from the operation of [the agreement] . . . occurring after the transition period," the parties must consult under the general consultation and review mechanisms of the agreement to determine whether remedial action is appropriate.[36]

The phased elimination of safeguard actions found in the Australia-New Zealand Trade Agreement can serve as a model for the Canada-United States free trade agreement. For those areas in which free trade already exists, the availability of a safeguard action should be eliminated. Safeguard protection, however, should be available in those areas where tariffs and other barriers exist. As these barriers are eliminated over the transition period of the agreement, safeguard protection also should be eliminated. Additionally, as in the Australia-New Zealand Trade Agreement,[37] a true escape clause should be included in the agreement.

The reason for retaining an escape clause and delaying the complete elimination of safeguard measures lies with the adjustment costs of trade liberalization. Under traditional economic theory those domestic resources idled by import competition will move to other products that have a better competitive position.[38] This theory assumes a static model with perfect mobility of capital and labor.[39] Experience has shown, however, that there is no perfect mobility. The result, instead, is short-term costs of liberalized trade which take the form of unemployment, increased welfare payments, under-utilized resources, relocation expenses, and intangible individual burdens.[40]

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[33] *Id.* (art. 17(6)).
[34] *Id.* at 969 (art. 17(7)(a)).
[35] *Id.* (art. 17(7)(b), (c)).
[36] *Id.* (art. 17(11)).
[37] *See supra* note 36 and accompanying text.
[38] *See generally* JACKSON, *supra* note 3, at 567-73 (detailing the concept of market disruption and the policy of escape clauses).
[39] H. GRAY, INTERNATIONAL TRADE, INVESTMENT, AND PAYMENTS 171 (1979).
[40] Barcelo, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257, 259 (1980).

Additionally, the benefits derived from freer trade may accrue over a long period of time, or be spread out over a large number of consumers who may not be as well-organized as those business firms and labor organizations negatively affected by increased trade.[41] The cost of adjustment thus becomes both an economic matter and a political one. This adjustment cost necessitates the consideration of "not only economic costs and benefits over a period of time, but also the short-term balance of costs and benefits and how those relate to the political forces which play a role in international trade."[42]

The continued availability of safeguard actions up until the time when the barriers are eliminated, as well as the presence of an escape clause, provide the necessary cushion to absorb many of these costs. An escape clause is necessary because the adjustment time required to restructure may exceed that provided for under the agreement. The length of the adjustment time will vary from industry to industry, as restructuring takes the form of investment for increased efficiency or a gradual shifting of resources into other areas of production.[43]

In those instances where safeguard or escape clause relief is granted under the agreement, that relief should be conditioned upon adjustment measures actually taking place. Precedent for this position is found in the Steel Import Stabilization Act, part of the Trade and Tariff Act of 1984.[44] Under the Steel Import Stabilization Act, the United States steel industry is granted broad relief from import competition for a five-year period.[45] This relief, however, is contingent upon an annual affirmative determination by the President that the steel industry has taken measures designed to improve its efficiency and competitiveness.[46] These measures include the commitment of:

> (i) substantially all of their net cash flow from steel product operations for purposes of reinvestment in, and modernization of, that industry through investment in modern plant and equipment, research and development, and other appropriate projects, such as working capital for steel operations and programs for the retraining of workers; and
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> (ii) sufficient action to maintain their international competitiveness, including action to produce price-competitive and quality-

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[41] JACKSON, *supra* note 3, at 568.

[42] *Id.*

[43] Barcelo, *supra* note 40, at 259.

[44] Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984).

[45] *Id.* § 801, 98 Stat. 3043.

[46] *See id.* § 806(b), 98 Stat. 3046.

> competitive products, to control costs of production, including employment costs, and to improve productivity . . . .[47]

In sharp contrast to these provisions are the actions of General Motors (GM) during the four years in which the Voluntary Restraint Agreement (VRA) was imposed on Japanese automakers. The purpose of the VRA, which the ITC estimated to have cost consumers $15.7 billion in higher prices,[48] was to give United States automakers with low productivity time to become competitive.[49] GM, however, made the following decisions during those four years: it abandoned plans to produce its small S-car in the United States; it made equity investments in Isuzu, Suzuki, and Daewoo as elements of an agreement wherein those firms would supply vehicles to GM; and, it established a joint venture with Toyota.[50] Additionally, GM purchased Hughes Aircraft Co. and Electronic Data Systems for more than $7.5 billion.[51] Thus, the excess profits extracted during the period of the VRA went not to increasing the competiveness of the domestic industry, but to diversifying out of the auto industry and to more closely aligning the domestic industry with its foreign competitors.

As previously noted,[52] the granting of relief under section 201 must be nondiscriminatory in its application to different countries. This raises the possibility that relief granted to a domestic industry complaining about imports from countries other than Canada also would restrict Canadian exports of that product. Although the GATT requires the application of safeguard measures on a most-favored nation basis, exempting Canada from that rule would likely be consistent with the GATT article XXIV requirement that free trade areas eliminate substantially all "restrictive regulations of commerce."[53]

III. COUNTERVAILING DUTIES

The United States can impose countervailing duties on imported merchandise subsidized by foreign governments or other foreign ent-

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[47] *Id.* § 806(b)(1)(A), 98 Stat. 3046.

[48] Pine, *Quotas on Autos From Japan Said to Lift Prices*, Wall St. J., Feb. 14, 1985, at 3, col. 2. The ITC study estimated that the restraints raised prices on United States-made autos an average of $78 a car in 1981, $170 in 1982, $426 in 1983, and $659 in 1984. For Japanese-made cars sold in the United States, the respective figures are $185, $359, $831, and $1300. *Id.*

[49] Schnapp, *When a U.S. Industry Got a Chance to 'Catch Up'*, Wall St. J., Sept. 25, 1985, at 30, col. 4.

[50] *Id.*

[51] Brody, *Can GM Manage It All?*, FORTUNE, July 8, 1985, at 22.

[52] *See supra* note 15 and accompanying text.

[53] *See supra* note 5 and accompanying text.

ities.[54] The duty is equal to the amount of "net subsidy" as determined by a Commerce Department investigation.[55] For some countries, including Canada, there is also an injury requirement.[56] The ITC must find that the subsidized imports have caused some actual or threatened "material injury" to a competing domestic industry.[57] The statute defines material injury as "harm which is not inconsequential, immaterial or unimportant."[58]

Subsidies may be divided into two different types: export subsidies and domestic subsidies.[59] An export subsidy is a subsidy conditioned

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[54] *See* 19 U.S.C. §§ 1303, 1671 (1982). The term "subsidy" includes, but is not limited to the following:

> (A) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).
>
> (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
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> (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
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> (ii) The provision of goods or services at preferential rates.
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> (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
>
> (iv) The assumption of any costs or expenses of manufacture, production, or distribution.

Id. § 1677(5).

[55] *Id.* § 1671(a). The term "net subsidy" is defined as the gross subsidy minus the amount of:

> (A) Any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,
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> (B) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and
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> (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

Id. § 1677(6).

[56] There are three categories of countries which have an injury requirement. The first two categories are those countries which have signed the GATT Subsidies Code or those which have signed agreements with the United States committing themselves to obligations similar to those in the Subsidies Code. *Id.* § 1671(b). The third category is the countries who are members of GATT and whose imports in question would otherwise enter duty free. *Id.* § 1303(a)(2). There is no injury test for the products of all other countries who do not qualify under any of the three categories. *Id.* § 1303(b).

[57] *Id.* § 1671d(b)(1).

[58] *Id.* § 1677(7)(A).

[59] *See generally* DAM, *supra* note 3, 132-47 (discussing the two kinds of subsidies, which he defines as production and export subsidies); *see also* JACKSON, *supra* note 3, 365-99 (discussing subsidies in the context of the GATT).

on export of the product or on export performance. Domestic subsidies, however, are benefits granted without regard to output destination. Export subsidies are per se improper,[60] since they are considered to be a direct attempt by the subsidizing government to gain a greater share of foreign markets.

Before the *Michelin Tire*[61] case in 1973, the United States had never imposed a countervailing duty against a domestic subsidy. In *Michelin Tire*, however, the Treasury Department found that certain payments and benefits made to the Michelin Company to induce it to build a plant in Nova Scotia constituted a countervailable subsidy.[62] Following that decision, the Treasury began countervailing actions against other domestic subsidies.[63]

Congress codified this move toward imposing duties on domestic subsidies in the Trade Agreements Act of 1979,[64] which contains the present countervailing duty law. A key question is whether the benefit is generally available to all businesses in the country or whether it is conferred on a particular business or industry.[65] If the benefit has been granted to a specific business or industry, a subsidy probably will be found. Additionally, the benefit given is examined to determine whether it is expected to produce the type of return that a private investor would expect.[66] If it is not expected to produce such a return, the Commerce Department may recognize it as a subsidy.

The problem with the present countervailing duty law under a free trade agreement is as follows:

> a vigorously applied U.S. countervail system could have an inequitably heavier impact on the effectiveness of Canadian industrial development policies when contrasted to any parallel countervail action Canada could take against the United States. This is because

[60] *See* 19 U.S.C. § 1677(5)(A) (1982).

[61] X-Radial Steel Belted Tires from Canada, 38 Fed. Reg. 1,018 (1973).

[62] *Id. See generally* R. Guido & M. Morrone, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 LAW & POL'Y INT'L BUS. 237 (1974) (criticizing the decision in the Michelin case).

[63] *See, e.g.*, Certain Optic Liquid Level Sensing Systems From Canada, 44 Fed. Reg. 1,728 (1979) (research and development grant); Certain Fish From Canada, 44 Fed. Reg. 1,372 (1979) (regional grants to fishing industry).

[64] Trade Agreements Act of 1979, Pub. L. No. 96-39, 1979 U.S. CODE CONG. & ADMIN. NEWS (93 Stat.) 144 (1979) (codified in scattered sections of 19 U.S.C.).

[65] *Id.* § 771(5)(B), 1979 U.S. CODE CONG. & ADMIN. NEWS (93 Stat.) 177 (codified at 19 U.S.C. § 1677(5)(B) (1982)).

[66] *Id.* § 771(5)(B)(i), 1979 U.S. CODE CONG. & ADMIN. NEWS (93 Stat.) 177 (codified at 19 U.S.C. § 1677(5)(B)(i) (1982)).

> such a relatively large percentage of Canadian production is exported while in the United States the major portion of production is for the internal market. Any subsidization of Canadian industry could be seen as involving an encouragement of production for export purposes and would accordingly run the risk of U.S. countervail. By contrast, subsidization of a firm in the United States would be directed mainly toward encouraging production for the U.S. domestic market and would only involve the risk of a Canadian countervail for the very small percent of products which it might export.[67]

As noted in the introduction, a free trade area will result in the creation of a single economic market of 265 million people out of the two existing markets of Canada and the United States.[68] Assume a hypothetical example wherein a United States firm is given a subsidy by a federal or state agency and a Canadian firm is given a similar subsidy by a federal or provincial agency. Both firms produce a product which is marketable to all 265 million people. Because of population differences, application of each of the countries' respective countervailing duty laws would result in the potential imposition of duties on ninety percent of the Canadian firm's potential output while the United States firm would face a countervailing duty on only ten percent of its potential output. Thus, although each firm received a similar subsidy, the impact on the Canadian firm would be more severe.

A possible solution to this problem would come from the introduction of the equitable doctrine of "clean hands."[69] Under this doctrine a United States firm would be unable to file a countervailing duty petition against a benefit received by a Canadian firm if the United States firm received a similar benefit. This modification does not contemplate the elimination of the countervailing duty law, for there may be instances where it should be applied to remedy unfairly subsidized competition. The modification is designed, however, to soften the mechanical method now used to determine which subsidies are countervailable.

Along with the introduction of the "clean hands" doctrine, the President needs discretionary authority to determine whether or not

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[67] CANADA - U.S. RELATIONS, *supra* note 8, at 12.

[68] *See supra* note 12 and accompanying text.

[69] "The equitable principle which requires a denial of relief to a complaintant who is himself guilty of inequitable conduct in reference to the matter in controversy." BALLENTINE'S LAW DICTIONARY 208 (3d ed. 1969). *See generally* 27 AM. JUR. 2D *Equity* §§ 136-44 (1966) (discussing the "clean hands" doctrine).

to impose countervailing duties. Under the present law relief *must* be given if the necessary statutory findings are made.[70] The Court of Customs and Patent Appeals recognized the need for such discretionary authority in *United States v. Hammond Lead Products, Inc.*[71] The court noted the need for "executive discretion to avoid making the United States [look] ridiculous by penalizing imports from foreign countries which have taken reasonable action, action which our own government takes or counsels."[72] The court further stated that "[c]ountervailing duties are strong medicine, well calculated to arouse violent resentment in countries whose trade practices are branded . . . as unethical."[73] Thus, there is a need for discretionary authority to make political decisions; "not necessarily partisan political, but political in a broad sense, legislative or of a policy nature."[74] Such discretionary authority, by focusing its effect, would make the countervailing duty a more effective instrument.

The Canadian economy is much more likely to face the greatest adjustment costs under a free trade agreement.[75] Those costs will encompass the rationalization of product lines and restructuring as industries seek to adjust to the expanded market and the increased competition. This adjustment may require the assistance of the Canadian Government in the form of government-backed loans, research and development grants, accelerated depreciation, or other such measures.[76]

Under the existing countervailing duty law, most of these assistance measures would be countervailable. An exemption may be found, however, in the GATT Subsidies Code,[77] to which the United States

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[70] The statute reads "there *shall* be imposed upon such merchandise a countervailing duty." 19 U.S.C. § 1671(a) (1982) (emphasis added). Contrast this with the discretionary authority given the President under the safeguard legislation. *See supra* note 19 and accompanying text.

[71] United States v. Hammond Lead Products, Inc. 440 F.2d 1024 (C.C.P.A. 1971), *cert. denied*, 404 U.S. 1005 (1971).

[72] *Id.* at 1031.

[73] *Id.*

[74] *Id.*

[75] An "assessment of the economic costs of free trade indicates that Canadian investors and employees are likely to bear relatively larger adjustment burdens than their U.S. counterparts." MINISTER'S REPORT, *supra* note 12, at 316.

[76] *Id.* at 317.

[77] The Agreement on Interpretation and Application Of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade *done at Geneva* Apr. 12, 1979, 31 U.S.T.S. 513, T.I.A.S. No. 9619, *reprinted in* GENERAL AGREEMENTS ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 56 (Supp. 26

and Canada are signatories. Article 11 of the Code recognizes that subsidies, other than export subsidies, may be an important instrument in promoting social and economic policy objectives.[78] Among the subsidies listed as acceptable by that article are those designed "to facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reason of changes in trade and economic policies, including international agreements resulting in lower barriers to trade."[79]

Although article 11 appears to address clearly the acceptability of certain subsidies designed to "restructure" an industry, the recent *British Steel*[80] decision raises new questions. In that case the Court of International Trade found the infusion of equity into the British Steel Corporation (BSC) in the form of loans, capital, and forgiveness of debt, to be countervailable even though some of the funds specifically provided for the closure of redundant facilities and the layoff of unnecessary workers.[81] The court held that such actions constituted funding on terms inconsistent with commercial considerations and thus constituted subsidies under the statute.[82]

In responding to BSC's contention that its actions were a method of restructuring consistent with the Subsidies Code, the court quoted from the subsidy determination findings made by the International Trade Administration:

1980) [hereinafter SUBSIDIES CODE]. The Agreement's main features include the following:

> the coverage of both industrial and primary (e.g., agricultural) products in an agreement designed to insure that the use of subsidies does not adversely affect or prejudice the interests of any signatory to the agreement and that the imposition of countervailing duties do not unjustifiably impede international trade. The agreement establishes an international framework of rights and obligations in using subsidies and in invoking countervailing measures against them and imposes a system of surveillance and dispute settlement to hold each country accountable for its activities.

GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS II - SUPPLEMENTARY REPORT 37 (1980).

[78] SUBSIDIES CODE, *supra* note 77, art. 11, at 532, T.I.A.S. No. 9619.

[79] *Id.* art. 11(1)(b), at 533, T.I.A.S. No. 9619.

[80] British Steel Corp. v. United States, 605 F. Supp. 286 (Ct. Int'l Trade 1985), *aff'd in relevant part on remand*, 632 F.Supp. 59 (Ct. Int'l Trade 1986) (affirming the equity infusion decision).

[81] The court stated that "[t]he apparent purpose of . . . closing obsolete facilities, eliminating excess capacity and laying off unnecessary workers, is to reduce costs and enhance the competitiveness of the remaining enterprise." *Id.* at 293.

[82] *See supra* note 66 and accompanying text.

> We disagree with BSC's interpretation of the countervailing duty law and the Code. Our statutory obligations are carefully defined and mandatory in nature. Whenever it is determined that subsidized imports are injuring the domestic industry that manufactures or produces a like product, we are *required* by domestic law, and authorized by the Code, to impose appropriate countervailing duties, provided, of course that all relevant procedural requirements are satisfied.[83]

Therefore, even though actions taken by the Canadian Government might be consistent with article 11 of the Subsidies Code, they still would be subject to countervailing duties under the existing law. This dichotomy points out the need, once again, for increased discretionary authority in the imposition of countervailing duties. Such discretionary authority would allow the executive branch to exempt from countervail those "subsidies" which are employed by the Canadian Government to facilitate adjustment under the free trade agreement.

Finally, both the countervailing duty and antidumping laws need to be modified in order to allow Canadian manufacturers to bring an action against third-country importers.[84] Since there may be certain areas in which Canadian producers would face no competition in the combined market, it is necessary to protect them from unfair actions of third-country exporters. Such an action is not presently available under United States law because there is no harm of which to complain if there are no United States competitors. The availability of an action by Canadian competitors to protect their rights in that market is consistent with the notion of a unified market created by the free trade agreement.

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[83] *British Steel*, 605 F. Supp. at 292 (emphasis in original). The court further stated that "the countervailing duty law concerns itself not with the government's purpose or intent in a particular program, but whether the government's funds give the country's exports an unfair competitive advantage." *Id.* at 294.

[84] *See, e.g.*, Australia-New Zealand Agreement, *supra* note 25, at 967 (art. 16(8)). That section provides:

> If a Member State (hereinafter in this paragraph called "the first Member State") is of the opinion that goods imported into the territory of the other Member State from outside the Area are being subsidized by a third country and that this subsidization is causing or is threatening to cause material injury to an industry located in the territory of the first Member State the other Member State shall, at the written request of the first Member State, examine the possibility of taking action, consistent with its international obligations, to prevent material injury.

Id.

IV. ANTIDUMPING

The antidumping statutes provide that a duty is to be imposed on an import if its market price in the United States is less than the price charged by the producer in its home market.[85] Additionally, the statutes require that a domestic industry be materially injured or threatened with material injury, or that the establishment of an industry in the United States be materially retarded by reason of the sale of the import.[86] Material injury is defined in the same manner as under the countervailing duty laws: "harm which is not inconsequential, immaterial, or unimportant."[87] The purpose of the statute is to protect United States producers and, ostensibly, consumers from the negative effects of unfairly-priced imports.[88]

Several reasons exist for dumping: (1) To prevent the creation of a competitive domestic industry; (2) to eliminate competition in an export market; (3) to reduce excess inventories without disrupting domestic pricing policies; and (4) to utilize excess production capacity.[89] The first two reasons are clearly predatory because their purpose is to destroy competition in the importing market. The long-term goal of these actions is to be able to cease dumping at some future time and then to charge higher prices containing an element of monopoly rent.[90] The second two reasons by themselves are not predatory. Instead, they may be a rational and competitive response designed to maximize profitability or minimize loss.

It must be possible to separate the two national markets for dumping to technically occur.[91] The reason for this is relatively straight-

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[85] *See* 19 U.S.C. § 1673(a)-(i) (1982 & Supp. II 1984). Antidumping remedies also are authorized under article VI of the GATT and by the separately adopted GATT Antidumping Code. Implementation of Article VI of the General Agreement on Tariffs and Trade *done at Geneva*, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. 9650, *reprinted in* H.R. Doc. No. 153, 96th Cong., 1st Sess., pt. 1, at 309 (1979).

[86] 19 U.S.C. § 1673b(a) (1982).

[87] *Id.* § 1677(7)(A).

[88] *See generally* J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1966) (presenting the initial standard reference on dumping and its distorting effects on international trade).

[89] GRAY, *supra* note 39, 170.

[90] *Id.*

[91] Barcelo, *The Antidumping Law: Repeal It or Revise It*, 1 MICH. Y.B. INT'L LEGAL STUD. 53, 59 (1979). Dumping also requires that the dumper have the power to affect the price in its home market by increasing or decreasing supply. If it could not so affect the price, the dumper would be able to sell its entire output in its home market without the excess supply, now dumped, exerting a downward pressure on the price. *Id.* at 59-60.

forward. If barriers did not exist between the two national markets, anyone could undercut the dumper's higher home market price by re-importing the lower-priced exported goods.[92] Additionally, without barriers the dumper would be unable to subsidize the losses incurred in its predatory conduct by charging higher prices in its domestic market. Those manufacturers hurt by such predatory conduct could begin selling their products in the dumper's home market, thereby eliminating the dumper's ability to absorb the short-term dumping losses.

A free trade agreement between Canada and the United States would eliminate many of the barriers presently affecting trade between the two countries.[93] Eliminating the barriers would result in a corresponding reduction in the possible occurrence of dumping. Even if dumping technically could occur under the agreement, the retention of the existing antidumping law is flatly inconsistent with the economic goals of such an agreement.

The economic effect of a free trade agreement would be to increase competition, which would hopefully result in lower prices and greater efficiency. Therefore, the focus of economic regulation should be to encourage and facilitate that competition. The focus of the antidumping law, however, is not on the protection of competition but on the protection of competitors.[94] As one commentator noted:

> At the root of [the antidumping law] . . . is the notion that U.S. producers. . .are entitled to government-imposed protection against foreign "unfair" competition . . . . [However,] the traditional concept of price discrimination which is at the heart of the antidumping law, focuses entirely on a difference in prices charged by the individual foreign producer in his domestic and foreign markets; the

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[92] *Id.* at 60.

[93] Although a free trade agreement would eliminate many of the artificial barriers to trade, natural barriers, such as transportation costs, would still exist. Thus, a manufacturer could still dump without fear that the dumped products would be re-imported.

[94] As one author stated, contrasting the antidumping laws with the antitrust statutes:

> In both [antidumping and antitrust] . . . Congress intended to eliminate the use of price-cutting tactics that impair the competitive position of domestic sellers. The Antidumping Act applies, however, without regard for the competitive structure of the industry being affected by price discrimination . . . . The Antidumping Act . . . has been administered without regard to the anticompetitive impact of duties imposed on lower priced imports at the behest of domestic monopolies, oligopolists, or cartels.

S. METZGER, LOWERING NONTARIFF BARRIERS 63 (1974).

> element of predation is lacking . . . . Dumping does not exist merely because the foreigner undersells all U.S. competitors; on the other hand, dumping is not avoided because the foreigner is merely meeting the price of the U.S. market.[95]

In addition, the antidumping law fails to provide "basic defenses that would be inherent in an antitrust regime, such as meeting competition and an absence of effect on the competitive process (as opposed to mere injury to the domestic producers)."[96] Thus, with no showing of predatory intent required, even a relatively small import penetration may result in the imposition of duties despite the absence of any anticompetitive effect on United States industry and the fact that the United States industry may be concentrated or inefficient.[97]

The retention of the antidumping law in a free trade agreement would inhibit increased price competition resulting from the agreement. The abolition of the antidumping law, however, would not leave the domestic producer defenseless in the face of predatory price competition. The problem of predatory pricing can be handled under existing legislation that contemplates private adjudication rather than government intervention.

The reasons for moving to a private adjudicatory framework are threefold.[98] First, such a move would reduce possible inter-governmental friction. Since dumping is essentially a business-to-business problem, the dispute should be resolved without involving the respective governments. Second, under a private adjudicatory proceeding, a manufacturer is directly compensated for any proven violation. This compensation may take the form of damages and/or injunctive relief and, in contrast to antidumping duties, would accrue to the manufacturer rather than to the government. Third, private adjudication would be more cost-effective. Those businesses alleging injury would devote as many resources to the problem as they deem justified.

One piece of existing legislation which addresses the problem of unfair price competition is the Robinson-Patman Act (Act).[99] The pertinent statutory language reads as follows:

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[95] Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1362-63 (1979).

[96] 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 62-63 (2d ed. 1981).

[97] *Id.* at 62.

[98] *See* Ehrenhaft, *supra* note 95, at 1393-95.

[99] Robinson-Patman Price Discrimination Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13-13b, 21a (1982)). *See generally* E. KINTNER, A ROBINSON-PATMAN PRIMER (1979) (providing a detailed discussion of this Act).

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . .[100]

Inasmuch as the Act defines "commerce" as including both interstate and foreign commerce,[101] it would appear that conduct now dealt with under the antidumping law could be actionable under the Act. In the only case to deal with this specific question, however, the Third Circuit Court of Appeals upheld the district court's determination that the two prices being compared under the Act must be from sales within the United States.[102] In disallowing a claim based on differing prices between the foreign manufacturers' domestic sales and their sales in the United States,[103] the district court held that "the requirement of 'use, consumption, or resale within the United States' modifies and limits the more general 'in commerce' provision upon which plaintiffs primarily rely."[104]

This Third Circuit decision, however, does not totally preclude a Robinson-Patman action based on differing prices between the United States and Canada. As the Supreme Court noted in *Automatic Canteen Co. of America v. F.T.C.*,[105] "precision of expression is not an outstanding characteristic of the Robinson-Patman Act."[106] Thus, one could make a good faith argument for disregarding the decision of the Third Circuit. Additionally, Congress could make a statutory modification, or clarification, to delineate clearly the scope of the Act. Finally, a provision of the free trade agreement could provide for the application of the Act to all sales in the combined market.

Some have argued that a better alternative to the antidumping law is the Sherman Act.[107] Section 2 of the Sherman Act[108] provides

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[100] 15 U.S.C. § 13(a) (1982).

[101] *See Id.* § 12(a).

[102] In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 316-17 (3rd Cir. 1983).

[103] At issue was a claim by several United States manufacturers of electronic products that their Japanese competitors were selling the same products in their home markets at prices higher than what they were selling them in the United States. *See id.*

[104] Zenith Radio Corp. v. Matsushita Electrical Industrial Co., Ltd. 402 F. Supp. 244, 248 (E.D. Pa. 1975).

[105] Automatic Canteen Co. of America v. F.T.C., 346 U.S. 61 (1953).

[106] *Id.* at 65.

[107] *See* Barcelo, *supra* note 91, at 66-67.

[108] Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at

protection against monopolization or attempts to monopolize "any part of the trade or commerce among the several states, or with foreign nations."[109] The beneficial attributes of the Sherman Act are that it applies to "all forms of predatory pricing, not just discriminatory predation, and there . . . [is] no difficulty in obtaining personal jurisdiction over a foreign supplier against whom a colorable case could be made of seeking through predatory pricing to monopolize an American market."[110]

Finally, relief may be obtained under the Predatory Dumping Act of 1916.[111] The Act "forbids regular, continued price discrimination between purchasers in different national markets whenever the discrimination is motivated by a desire to destroy competition."[112] This Act, like the Robinson-Patman Act and the Sherman Act, provides for the recovery of treble damages.[113] The Predatory Dumping Act, however, has rarely been invoked due to its multiple proof requirements, including a showing of specific intent to destroy competition in the United States.[114] Given the more mechanical proof elements required under the regular antidumping law, which lacks any mens rea element, it is not surprising that the 1916 Act has been used so rarely.[115]

V. CONCLUSION

The trade laws of the United States should facilitate adjustment in the continuing transition towards global trade interdependence.

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15 U.S.C. §§ 1-7 (1982)).

[109] 15 U.S.C. § 2 (1982).

[110] Barcelo, *supra* note 91, at 67.

[111] Act of Sept. 8, 1916, ch. 463, § 801, 39 Stat. 798 (1916) (codified at 15 U.S.C. § 72 (1982)). *See generally* Hiscocks, *International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916*, 11 INT'L LAW. 227 (1977) (detailing the history and use of the Act).

[112] 15 U.S.C. § 72 (1982).

[113] The statute provides that "[a]ny person injured in his business or property . . . shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee." *Id.*

[114] The Act states that such predatory action shall be unlawful:

> *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Id.

[115] *See* Hiscocks, *supra* note 111, 228-34.

They should not, therefore, impede the development and utility of trade-liberalization measures such as free trade arrangements. The modifications to the safeguard, countervail, and antidumping legislation suggested in this paper would substantially eliminate their availability vis-a-vis Canadian manufacturers. The modifications, however, are predicated on the assumption that Canada would make reciprocal modifications to its import relief laws. The effect would be to create that "level playing field" which the United States has espoused as its goal in the area of international trade. It would put Canada and United States manufacturers on an equal competitive footing as they adjust to the changes arising from the conclusion of a free trade agreement. Given the relatively minor effect which tariffs now have as barriers, the conclusion of a free trade agreement which eliminated customs duties but left the present import relief measures substantially intact would be a triumph of form over substance and would prevent both Canada and the United States from realizing to the fullest extent the benefits arising from free trade.

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