

# **ADMINISTERED PROTECTION IN THE GATT/WTO SYSTEM**

by

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## **Abstract**

This paper examines how WTO member governments have used safeguards, antidumping, and other instruments of “administered” or “contingent” protection in the management of domestic pressures for protection. Three conclusions emerge from the examination:

- These provisions have been extensively used but at the same time have remained under discipline. Application of the restrictions they allow has been minimal relative to the liberalization the GATT/WTO system has supported.
- Reform-minded developing country governments have employed these rules skillfully to support their own liberalization programs.
- Antidumping is perhaps the classic example of a pragmatically successful flexibility instrument with pretensions – but no more than pretensions – to a real economic rationale.

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All dogs have fleas, therefore all dogs have legs with which to scratch. Similarly, any government committed to a generally open trade policy will be pestered for 'import relief' by one industry or another – usually on grounds that its situation is 'exceptional.' It follows that governments will have procedures for fielding and managing such pressures.

As policy-making has evolved in the GATT/WTO era, such complaints are infrequently taken up as part of the general politics of government; where decisions are made by vote of a congress or parliament. To use the United States as an example, administrative agencies, particularly the US International Trade Commission (USITC) and the International Trade Administration (USITA) of the Commerce Department have become the primary apparatuses for dealing with such pressures.<sup>1</sup>

Legislative bodies have established criteria under which an industry is entitled to 'import relief;' e.g., 'injury' as a result of increased imports or as a result of 'dumped' imports. An industry's complaint under such a 'trade remedy' statute is, in form, a request that the administering agency investigate if the criteria are in its case satisfied, e.g., that the industry has in fact suffered injury as a result of increasing imports.

Legislation and administrative regulations provide detail as to what the criteria – injury, dumping, etc. – mean. The role of the administering agency is not to 'decide' if the industry will be provided protection, but to 'determine' if the criteria have been met.<sup>2</sup>

Another side of this matter is that the United States, like other GATT/WTO members, has 'bound' its import restrictions through the various rounds of negotiations. It cannot, willy-nilly, impose a new restriction.

The persons who drafted the GATT and the WTO were experienced officials aware that making trade policy is politics perhaps more than it is science. They accepted that to win domestic industry's acceptance of liberalization a government will often have to assure it that 'exceptional circumstances' will be dealt with. Once a liberalization program is under way, one step back might sometimes be necessary to preserve two steps forward. For that and other reasons GATT/WTO rules do allow new restrictions – at the same

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<sup>1</sup> The Office of the United States Trade Representative (USTR) is responsible for trade negotiations and generally has some input into the trade remedies process. The USITC and the ITA are, however, the agencies who carry out major trade remedies investigations.

<sup>2</sup> Finger, Hall and Nelson (1982) elaborate the distinction between a 'political' decision in which the decider can determine the criteria as well as whether or not they have been met (e.g., Congress) and a 'technical' determination, in which the criteria have been established by a higher authority.

time as they attempt to discipline their imposition. Consequently, the US government or any other WTO Member may introduce a new import restriction only when GATT/WTO rules allow. The definition of dumping and injury applied by the USITC and USITA must be consistent with the specifications in the GATT and the WTO agreements that allow a safeguard or an antidumping action.

Historically speaking, trade remedies such as the escape clause, antidumping and countervailing duties existed in national legislation before there was a GATT or WTO. The initial GATT agreement of 1948 did little more than to reserve the right of countries to impose such restrictions. Unless these rights had been retained, the domestic politics of trade, particularly in the United States, would not have accepted the agreement to reduce tariffs.

Trade remedies remain today unilateral decisions in that they result from national investigations and determinations.<sup>3</sup> Over time however the operational detail of what dumping, injury, etc. mean have been elaborated at the international level, particularly in the Uruguay Round agreements. These agreements have likewise elaborated the administrative dimensions and procedural rules of an investigation by a national administering agency – recognition of interested parties, allowing them to provide information and to comment on the accuracy and relevance of information provided by other interested parties and the investigating agency, etc. Each national investigation and determination must comply with multilaterally agreed GATT/WTO standards for both criteria and procedure. There is an emerging WTO dispute settlement jurisprudence that interprets what these standards mean.

This internationalization of trade remedies has changed them in several ways. For one, when the standards for applying import restrictions are established through international negotiation, export interests play a prominent role – as they do when tariffs are set through reciprocal negotiations.<sup>4</sup> Also, the application of the same criteria in all WTO

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<sup>3</sup> Indeed, use of administered protection instruments by the US government dates back to before the United States adopted a generally liberal trade policy. For example, Section 336 of the Smoot Hawley Tariff Act of 1930 established a mechanism for administrative adjustment of tariff rates. In a Section 336 case, the Tariff Commission would conduct an investigation to determine the costs of producing a product in the United States and in exporting countries. Based on that information, the Tariff Commission would then recommend to the President the rate change that would “equalize competition” – make the foreign cost plus the tariff equal to the domestic cost. Over the history of the section the Tariff Commission conducted Section 336 investigations on 101 products. Twenty-nine of these led to tariff increases, 25 to tariff reductions and 47 to no change.

The National Industrial Recovery Act (NIRA) of 1933 provided for companies in a industry to negotiate and maintain codes for maintaining product prices and other conditions of competition. The Act also provided for investigations by the US Tariff Commission to determine if imports were interfering with the operation of such codes. Such determination gave the President authority to restrict imports. Before the NIRA was rendered nearly inoperative by a US Supreme Court decision in 1935 the Tariff Commission had returned affirmative determinations in nine cases.

<sup>4</sup> In developed country domestic politics protectionist pressure in recent times (since most tariffs are already low) has focused more on the expansion in domestic law of the scope for application of administered protection than on resisting the negotiation of further tariff reductions. A way for exporters to resist such expansion, say in US law, is by preventing GATT/WTO rules from allowing such expansion. This has produced a complex politics and has generated a degree of mistrust, expressed, for example, in the accusation that at the end of the Uruguay Round the

member countries can help a government to gain industry acceptance of a negative decision, help to depoliticize the management of pressures for exceptional protection.

Another result of the GATT/WTO (and corresponding national regulations) allowing new import restrictions only in certain circumstances is that industries seeking import relief must shape their complaints accordingly. Domestic import relief mechanisms can respond only to the 'problems' for which the GATT/WTO rules allow remedies. Practically speaking, the remedy determines the nature of the illness, not the other way around. Whatever distress it is experiencing, if a restriction on imports would improve the situation, an industry will present its situation as qualifying under a trade remedy's criteria. (The chapter's later sections will show how fungible the trade remedy criteria have proven to be, in practice.) Hence an antidumping petition is about antidumping, not about 'dumping.' The practical definition of 'dumping' is 'whatever you can get the government to act against under the antidumping law.'

Gary N. Horlick and Eleanor Shea (2002), two prominent Washington trade lawyers, have made this point more diplomatically: "From the perspective of a US industry seeking protection, those laws [the various trade remedies] simply represent different ways of reaching the same goal – improvement of the competitive position of the complainant against other companies."<sup>5</sup>

## 1. Content of the chapter

The remainder of the chapter is an elaboration of the story just told. My objective is to explain the history of the usage of such instruments in order to provide the reader a sense of the function of administered protection instruments.<sup>6</sup>

The key points I want to make are:

- These provisions have been extensively used but at the same time have remained under discipline. Application of the restrictions they allow has been minimal relative to the liberalization the GATT/WTO system has supported.
- Reform-minded developing country governments have employed these rules skillfully to support their own liberalization programs.
- Antidumping is perhaps the classic example of a pragmatically successful flexibility instrument with pretensions – but no more than pretensions – to a real economic rational.

The following section (Section 2) enumerates the various provisions on the GATT/WTO agreements that allow import restrictions and explains how their use has evolved over time. Section 3 and 4 focus on use of such provisions by developing countries. Section

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United States implemented into US law its negotiating position on antidumping rather than the contents of the Uruguay Round antidumping agreement.

<sup>5</sup> Particularly as the number of trade agreements has increased the number of administrative procedures available to solicit changes in the terms of importation have likewise increased. For example, USTR (2010) provides notice of an investigation to remove certain sleeping bags from eligibility for tariff preferences under the US General System of Preferences (GSP). Removal of the items from the GSP would mean that importers would have to pay the 'normal' US duty on the items. This is the duty the US has 'bound' under the GATT/WTO, hence no question about consistency with GATT/WTO rules would come up.

<sup>6</sup> The reader should take note that the chapter is existential in perspective, thinking inductively toward function, not deductively from purpose or definition. In the author's view, any analysis that begins with the statement, 'The definition of dumping is,' or 'The purpose of antidumping is,' will come to no useful end.

3 examines the use of restrictions justified under GATT provisions to allow protection of the balance of payments and finds that such usage was in economic reality infant industry protection. Section 4 summarizes the role that GATT/WTO flexibility provisions have played in Latin American liberalization experiences of the latter part of the 20th century. I pay particular attention to how the system disciplines use of the provisions. The final section brings together lessons from these experiences.

## 2. How usage of flexibility provisions has evolved

The GATT provides a long list of provisions from which a government can construe legal coverage for an import restriction. Table 1 provides a tabulation.

The GATT itself has been carried over as one of the agreements administered through the WTO, hence these provisions are still part of the GATT/WTO system.<sup>7</sup> The WTO agreements, e.g., on safeguards, on antidumping, provide detail as to the meaning of the GATT provisions and as to the procedures that must be followed in order, for example, to demonstrate that dumping and injury, within the meaning of the agreement, have occurred.

**Table 1: GATT/WTO Provisions that Allow Trade Restrictions**

Description	GATT Article Number
<b>1. Provisions for renegotiating previous tariff concessions and commitments</b>	
Periodic - three year - renegotiations (at the initiative of the country wanting to increase a bound rate).	XXVIII.1 and XXVIII.5.
Special circumstance renegotiations (requires GATT authorization to open the renegotiation).	XXVIII.4
Increase of a duty with regard to formation of a customs union.	XXIV.6
Withdrawal of a concession in order to provide infant industry protection.	XVIII.A
<b>2. Restrictions that can be imposed unilaterally</b>	
<b>a. Restrictions that may be applied in particular circumstances, i.e., contingent or administered protection</b>	
Emergency actions (Safeguards)	XIX
Countervailing duties	VI
Antidumping duties	VI
Restrictions to safeguard the balance of payments	VII (general) and XVIII:B (developing countries only)
<b>b. Measures that may have trade effects but are imposed for different reasons</b>	
Necessary to protect human, animal or plant life and health; to apply industrial standards	XI.2.b and XX
Necessary to protect national security	XXI
Import restrictions on agricultural or fisheries products necessary to maintain the integrity of domestic supply restriction programs.	XI.2.c

<sup>7</sup> Most of the 22 agreements and understandings in the Uruguay Round package elaborate on matters already addressed in the GATT, the agreements on intellectual property and on trade in services most clearly go beyond GATT's scope.

<b>3. Restrictions that require specific GATT approval</b>	
Waivers	XXV
Retaliation authorized under dispute settlement.	XXIII
Exceptions specified in accession agreement.	XXXIII
Releases from bindings to pursue infant industry protection.	XVIII.C
Withdrawal of a concession initially negotiated with a government that fails to join GATT, or withdraws.	XXV11
Releases from bindings by a 'more-developed' country to pursue infant industry protection.	XVIII.D

The provisions listed in sections 1 and 2.a of Table 1 have been the most often used flexibility provisions.<sup>8</sup> As the reader may have noticed, the items at the top of the table provide for renegotiation and are not generally included within the ambit of 'administered protection.' I discuss them however because they were in GATT's early history the most used 'flexibility' provisions.

The form and degree of discipline that the system imposes on the use of these provisions I take up as part of the discussion of their usage.

### **Renegotiations and Emergency Actions**

In GATT's first decade the most prominent of the provisions that sanction new restrictions was Article XXVIII, providing for renegotiation of any tariff reduction a participating country had agreed.<sup>9</sup> The 1947 GATT gave each country an automatic right to renegotiate any of its reductions after three years and, under 'sympathetic consideration' procedures, reductions could be renegotiated more quickly. As to discipline on the use of renegotiation, the process carries with it the requirement to compensate – in undoing a previous tariff reduction a country would be expected to offer exporters something equivalent on other tariff lines.<sup>10</sup>

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<sup>8</sup> The basic difference between items in sections 2.a and 2.b of Table 1 is as follows:  
2.a; GATT/WTO rules specify the circumstances in which a restriction may be imposed,  
2.b; GATT/WTO rules allow for these purposes restrictions that may have trade effects,  
but ask that they be constructed so that they do not discriminate among suppliers and  
that they not be disguised restrictions on trade.

Several Uruguay Round agreements, particularly those on health standards and on technical standards, elaborate on what is or is not allowed under the provisions in section 2.b. I do not in this chapter examine possible fungibility of measures in section 2.b and safeguards, antidumping, etc.

<sup>9</sup> A GATT tariff bargain is consummated by each participating country submitting a schedule of tariff rates, by tariff line, that it accepts as bound legal obligation. A WTO Member may unilaterally increase any applied tariff rate up to the bound rate, or increase without limit the rate applied on any tariff line that is not bound. (Many developing country at the Uruguay Round bound their tariffs at ceiling rates somewhat above the rates they had applied since the liberalizations of the last quarter of the 20<sup>th</sup> century.) Once a tariff line is so bound, a country must cite 'permission' under a specific GATT/WTO provision to justify increasing the tariff rate above the bound rate or otherwise imposing a new restriction on that tariff line. A renegotiation is more precisely about increasing the level at which a country has bound its tariff rather than about undoing a tariff reduction it has agreed.

<sup>10</sup> The early GATT rounds were collections of bilateral negotiations, but tariff cuts had to be made on a most-favored-nation basis (i.e. applicable to imports from all GATT Members). A

GATT Article XIX, titled 'Emergency Actions on Imports of Particular Products' but often referred to as the escape clause or the safeguard clause, provides a country quicker access to much the same renegotiation process. In instances of particularly troublesome increases of imports – that cause or threaten serious injury to domestic producers – a country could introduce a new restriction, then afterwards negotiate a compensating agreement with its trading partners. Though the GATT asks a country taking emergency action to consult with exporting countries beforehand, it allows the action to come first in 'critical circumstances.' In practice, the action has come first most of the time.<sup>11</sup>

The Uruguay Round Safeguards Agreement modified the emergency action procedure in several ways. Among these: in some cases no compensation is required nor retaliation allowed the first three years a restriction is in place; no restriction (including extension) may be for more than eight years – ten years by a developing country; and all measures of more than one year must be progressively liberalized. The Uruguay Round Agreement on Safeguards, but not the initial GATT, requires a formal investigation and determination of injury. The Uruguay Round Agreement provides more detail as to the procedure of investigation and determination, but adds nothing to the definition of 'serious injury' other than to state that "'serious injury' shall be understood to mean a significant overall impairment in the position of a domestic industry."<sup>12</sup>

Reciprocity is the basic discipline over imposing such restrictions. GATT negotiators were aware that these mechanisms offered the potential to overcome the principal purpose of the agreement: a general reduction of trade barriers. There are consequently certain disciplines built into each mechanism, the basic discipline on new restrictions through renegotiation being reciprocity. A country seeking to increase a restriction was expected to offer compensating reductions on other products. If supplier countries did not consider these to be satisfactory, they could retaliate. i.e., increase their restrictions in a parallel manner.<sup>13</sup>

Within fifteen years after the GATT first came into effect, every one of the twenty-nine participating countries who had bound tariff reductions had undertaken at least one renegotiation—in total, 110 renegotiations, on average almost four per country. These actions were in large part renegotiations under Article XXVIII, supplemented by emergency actions (restrict first, then negotiate compensation) under the procedures of Article XIX.<sup>14</sup>

Over time, the mix shifted toward a larger proportion of emergency actions. (Figure 1) In use, Article XIX emergency actions and Article XXVIII renegotiations complemented each other. Nine of the fifteen pre-1962 Article XIX actions that were significant enough that the exporter insisted on compensation (or threatened retaliation) were eventually

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renegotiation was not with the entire Gatt membership but only with the country with whom that reduction was initially negotiated, plus any other countries enumerated by the GATT as 'principal suppliers'.

<sup>11</sup> Gatt, 1994, p. 486.

<sup>12</sup> Article 1.(a)

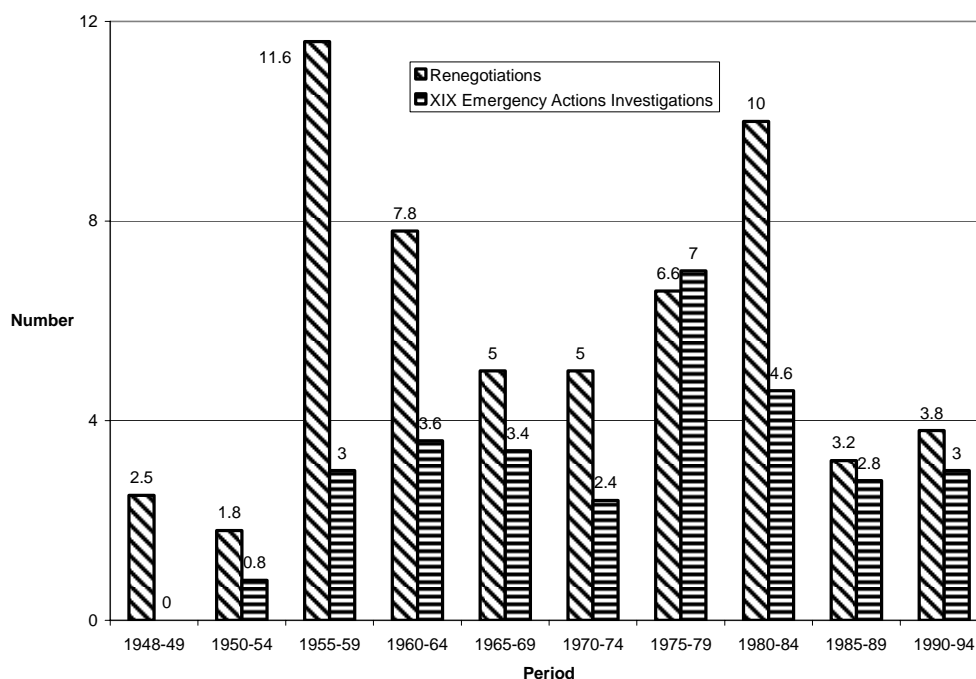
<sup>13</sup> This ultimate discipline, retaliation, was itself subject to discipline. When the GATT was first agreed the trading system was in the shadow of the chain reaction of protection and retaliation that had severely restricted international trade between World Wars I and II. Hence the matter of retaliation was cushioned by several administrative steps intended to bring the countries involved to reach a mutually acceptable solution that would not start such a chain reaction.

<sup>14</sup> GATT 1994, pp. 863-910.



resolved as Article XXVIII renegotiations. Article XXVIII renegotiations, in turn, were often folded into regular tariff negotiations.<sup>15</sup>

Figure 1: Renegotiations and Article XIX Emergency Actions, 1948 - 1994



### Negotiated Export Restraints – reciprocity outside legal bounds

By the mid 1970s, formal use of Article XIX and of the renegotiation process began to wane. Actions taken under the escape clause tended to involve negligible amounts of world trade in relatively minor product categories.<sup>16</sup> Big problems such as textile and apparel imports were handled another way, through the negotiation of ‘voluntary’ export restraint agreements (VERs). The various textile agreements, beginning in 1962, provided GATT sanction to VERs on textiles and apparel. The same method, ‘negotiated’ export restraints or VERs, was used by the developed economies to control troublesome imports into several other important sectors, such as steel and automobiles.

Except for those especially sanctioned by the textile arrangements, VERs were GATT-illegal.<sup>17</sup> However, while VERs violated GATT legalisms, they accorded well with its ethic of reciprocity and their negotiation controlled for the possibility of chain reaction of import restrictions from one country to another, as had been disastrous in the 1930s.

<sup>15</sup> GATT 1994, pp. 477-516

<sup>16</sup> 1980 statistics show that actions taken under Gatt Article XIX covered imports valued at US\$ 1.6 billion, while total world trade was at the same time valued at US\$ 2,000 billion (Sampson, 1987, p. 145).

<sup>17</sup> Gatt, 1994, p. 494.

The reality of power politics was at play, but compensation was involved. Reduced export volumes were compensated by higher prices, the result being often a net gain for exporters.<sup>18</sup> Sometimes the quid pro quo was foreign aid or some other non-trade consideration.

Though VERs were GATT-illegal, they prevailed through the 1970s and the 1980s as the predominant mechanism for managing troublesome imports. Their use came to an end with the Uruguay Round Agreement on Safeguards. Its Article 11 includes an explicit prohibition and a procedure for notification and phasing out of those in place. One might speculate that the reasons behind this elimination included:

- the increasing weight of developing countries in world trade and their increasingly active role in the GATT system,
- the growing realization in developed economies that a VER was a costly form of protection;<sup>19</sup>
- the long-term legal pressure of the GATT rules; and
- the availability of an attractive, GATT-legal alternative, antidumping.

### **Antidumping ascends**

Antidumping measures were a minor instrument when the GATT was negotiated, and provision for antidumping regulations was included with little controversy. In 1958, when the GATT Contracting Parties finally canvassed themselves about the use of antidumping measures, the resulting tally showed only thirty-seven antidumping decrees in force across all GATT Member countries, twenty-one of those in South Africa (GATT, 1958, p. 14).

By the time of the GATT Kennedy Round of 1964-1967, the use of antidumping had increased sufficiently that it became a major topic of negotiation. Available data (mostly from the 1980s)<sup>20</sup> indicate that before the Uruguay Round agreements went into effect in 1995, application of antidumping was almost exclusively by the major industrialized countries. Of over 1500 cases identified in a study that covered 1980-1989, 96 percent were initiated by four major users, Australia, Canada, The European Communities and the United States. (Table 2)

Antidumping measures and VERS proved to be effective complements; the threat of formal action under the antidumping law provided leverage to force an exporter to accept a VER. Nearly half of the antidumping investigations opened in the United States in the 1980s were superseded by VERs, agreed price undertakings were the end result of EC cases more often than were antidumping duties.<sup>21</sup>

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<sup>18</sup> Had imports been restricted to the same volume by a tariff, the scarcity value of the restriction would have been collected by the importing country.

<sup>19</sup> For example, Hufbauer and Elliott (1994) found that of the welfare loss placed on the U.S. economy from all forms of protection in place in the early 1990s, over 83 percent of that loss came from VERs.

<sup>20</sup> The original GATT obligated participating countries to notify renegotiations as well as Article XIX investigations and measures, but not antidumping measures or investigations. Hence information was sparse until the Tokyo Round code of 1979 obligated notification among signatories to the Tokyo Round antidumping code.

<sup>21</sup> Finger (1993, ch. 13) and Stegemann (1991)

Table 2: Numbers of Antidumping Investigations Initiated, January 1980 - June 1989, by initiating country

Initiating country	Number of investigations
Australia	488
Canada	318
European Community	285
United States	398
Other developed countries	35
Developing countries	34
All countries	1,558

Source: Finger, 1993, p. 4.

Once antidumping action proved itself to be applicable to any case of troublesome imports, its other attractions for protection-seeking industries became apparent.<sup>22</sup> The rhetoric of foreign unfairness provides a vehicle for building a political case for protection. Additionally, GATT/WTO rules allow specific exporters to be targeted by antidumping measures (do not require multilateral application) and the usual practice has been to target the newer, more dynamic ones. Traditional exporters – who did not enjoy the cost advantage of the newer exporters, and who often were being displaced by them – were in effect protected by the measures. In the matter of applying international discipline to such restrictions, traditional exporters would often serve as passive if not active allies of such restrictions. If restrictions had to be applied in a non-discriminatory manner (i.e., against all imports), as GATT's Article XIX requires of Safeguard Actions, traditional exporters' interests would have been on the side of opposing the measures.

Another factor is that in national practice, the injury test for antidumping action tends to be softer than the injury test for a Safeguard Action, justified under GATT Article XIX. Moreover, the antidumping investigation process itself tends to curb imports more than a Safeguards Investigation would. An Article XIX Safeguard Investigation – of injury to domestic producers – demands information principally from domestic producers, while an antidumping investigation demands considerable pricing and cost information from exporting firms. Lastly, importers face the uncertainty of having to pay backdated antidumping duties if the investigation reaches an affirmative determination.

Since 1 January 1995, when the Uruguay Round agreements came into force, use of antidumping has dominated use of other provisions that sanction import restrictions: 2190 antidumping measures as compared with 89 safeguard measures, 129 countervailing duty measures and 32 renegotiations reported by the WTO Secretariat.<sup>23</sup> Since the Uruguay Round agreements are in place 91 percent of the applications of these traditional GATT flexibility provisions have been antidumping measures.

<sup>22</sup> The process by which the scope of antidumping action was expanded is examined in Finger, 1993, Chapter 2.

<sup>23</sup> The antidumping, safeguard and countervailing measure data are from the WTO website and cover 1 January 1995 through 31 December 2008. The information on renegotiations is from WTO (2009) page 134 and covers 1 January 1995 through 31 December 2007.

Table 3: Numbers of Antidumping, Safeguard and Countervailing Investigations Undertaken and Measures Applied by Developed and Developing WTO Members, 1995 – 2008

	Investigations		Measures	
	Developed	Developing	Developed	Developing
Antidumping	1252	2175	744	1446
Safeguards	70	103	30	59
Countervailing	176	39	98	30

Source: Tabulated from data in the WTO website database.

### Discipline in the antidumping system

Even as the scope of the criteria under which antidumping may be applied has expanded (the definitions of dumping and of injury have been stretched) the record of usage indicates that there is a good deal of discipline in the system. Finger, Nelson and Hall (1982) found that over 1975-79, only 2 percent of US imports were covered by either affirmative antidumping or countervailing duty cases; 4 percent by affirmative safeguard (Article XIX) cases. Galloway, Blonigen and Flynn (1999) found that in the mid 1990s the percentage for the total of all three of these trade remedies was still about 5 percent. Egger and Nelson (2007) looked at the impact of antidumping world-wide, estimated that over the 40 years 1960-2000 antidumping had reduced world export volume by no more than 2 percent.

One might also think that GATT/WTO rules limiting antidumping acting to those instances in which certain conditions exist would be a disciplining factor. On this matter, there is considerable evidence that the requirement that the imports against which a restriction is imposed be 'dumped' is not a source of discipline. Under pressure from protection-seekers, dumping's legal definition has been expanded beyond its economic or accounting definition that almost every international transaction is 'dumped.' Antidumping requests are sometimes rejected because the industry has not been found to suffer injury, almost never because the imports were found not to be dumped.<sup>24</sup>

Reciprocity again has been found to be a significant source of discipline. Though WTO rules do not require compensation when an antidumping duty is imposed, several studies have found that the threat of retaliation provides considerable discipline. Blonigen and Bown (2003) summarize these arguments and evidence. Nelson (1996) documents how threatened retaliation by the EEC caused the US government to pull back from taking antidumping action against imports of automobiles from Europe.

Another disciplining factor is cost. An industry seeking relief bears the cost of legal representation and of supplying the information needed to support a petition.<sup>25</sup> Likewise, conducting an investigation imposes costs on a government, costs that may make the government hesitate before accepting a request to undertake an investigation.<sup>26</sup>

<sup>24</sup> Finger (1993) chapters 2 and 13 brings together the evidence. Irwin (2005) points that before the 1980s a high percentage of dumping determinations were negative. He explores legal and administrative changes that may explain the change.

<sup>25</sup> Casual information in Washington, DC, suggests that the legal costs of pursuing an antidumping case are well over one million dollars, for each plaintiff and each respondent. There is also a collective action problem here. Concentrated industries can more readily act together to collect the funds to pay for representation.

<sup>26</sup> Baracat and Nogués (2005) look into how costs have influenced Latin American usage.

There is also evidence that the procedural dimensions – transparency, participation by interested parties, etc. – of the Uruguay Round agreements on trade remedies have made a considerable difference. The Latin American study, summarized in Section 4, takes this up.

### **Antidumping provides flexibility but not policy guidance**

There are circumstances in which an import restriction makes more than pragmatic sense. Actions, for instance, that neutralize distortions, (situations in which the market price of a product differs from its true economic cost) will serve the national economic interest in the short run as well as in the long. The rhetoric of antidumping sometimes suggests that that antidumping makes such economic sense; that an antidumping action follows more or less the same economic logic as an anti-trust action.

There is however considerable evidence to show that this is not true. I will cite the results of two studies. An extensive review by the OECD of antidumping cases in Australia, Canada, the European Union and the United States found that well more than 90 percent of the instances of import sales found to be unfair under antidumping rules would never have been questioned under competition law, few of the others would have advanced past a preliminary investigation.<sup>27</sup> Brink Lindsey, in an meticulous analysis of procedures followed in US investigations found that the procedures fail even to detect if export prices are below home prices or costs, much less to establish that the pricing practice an exporter employs in the US market differs from practices routinely used by US sellers at home. Antidumping is perhaps the classic example of a pragmatically successful flexibility instrument with pretensions – but no more than pretensions – to a real economic rational.

### **3. Developing country usage of GATT balance of payments provisions**

The GATT/WTO system imposes no restrictions on unilateral increases of unbound tariffs. Before the Uruguay Round developing countries had bound few of their tariff lines, and those that were bound were usually products on which the country had a strong export position and imports were a minimal threat to domestic producers.<sup>28</sup> While some developing countries had antidumping and safeguard regulations on the books, their increases of import charges on any unbound tariff line could be defended simply as their right to adjust any tariff that was not bound; without complying with the formalities or constraints that the GATT's safeguards and antidumping articles imposed.

The GATT does however constrain the application of quantitative restrictions on unbound tariff lines. GATT Article XI provides a general prohibition against quantitative restrictions, hence any application of such a restriction is a violation unless it finds legal sanction in other provisions of the agreement.

Article XII allows quantitative restrictions as measures to guard the balance of payments, and in GATT's earlier decades was frequently cited by developed countries. More relevant for developing countries however is Article XVIII. Provisions under Article XVIII B allow developing countries to impose quantitative restrictions to address balance

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<sup>27</sup> OECD Economics Department 1996, p. 18. The country studies were eventually published in Lawrence, 1998.

<sup>28</sup> Finger, Ingco and Reincke (1996, p. 50) report that only 30 percent of developing country imports were in bound tariff lines. The figure is likely an overstatement. It is based on data submitted to the GATT by countries that are active in GATT affairs.

of payments disequilibria and to maintain reserves adequate for development. Section C of the same article allows protection for infant industries, or in GATT language, measures to promote the establishment of particular industries in the context of a development program.

In practice, developing countries invoked the balance-of-payments exception far more often in the GATT era than the infant industry exception, or any other of GATT's flexibility provisions. Table 4 reports almost 3,500 restrictions under the balance of payments exception compared with less than 100 under the infant industry exception. Over the 1948-1994 GATT era before the Uruguay Round, developing countries notified only 10 Article XIX actions.

Table 4: Number of CCCN items notified under each GATT article by developing countries 1974-87

Article cited as justification	Number
VIII: Fees and formalities connected with importation and exportation	316
XI.2: Restrictions to apply standards or classifications, manage short supplies or complement agricultural or fisheries support programs	108
XVIII: State trading enterprises	15
XVIII B: Balance of payments measures for developing countries	3,437
XVIII C: Industrial development	91
XX: General exceptions	131
XXI: National security	4

Source: OECD 1992, p. 100.

The paucity of actions notified under the infant industry provision should not be taken as an indication that developing country governments did not apply trade restrictions for this purpose. Anjaria (1987, p. 671) concludes that the explanation for the larger number of measures notified under the balance of payments provision is its easier procedural requirements. Infant industry measures (Article XVIII C) require prior notification to the GATT, and compensation for affected exporters. Article XVIII C also provides that the GATT CONTRACTING PARTIES can disapprove such an action and can authorize retaliation if a not-approved action is taken. Balance of payments measures (Article XVIII B) are not subject to these restraints, nor are there time limits on how long they may be in place. The facts of usage suggest that measures notified under Article XVIII B were often intended to support particular industries rather than to restrict imports generally. Anjaria reports (1987, p. 680) that for each country the aggregate of measures notified under XVIII B was made up of many different applications, and that for three-fourth of the developing countries who notified measures the aggregate covered less than half of import categories.

Discipline we again find comes mainly from reciprocity. By the 1970s a number of developing countries had become important in world trade, both as potential export markets and as suppliers of imports that increasingly prompted developed country industries to call for protection. The intensified commercial presence of developing countries provoked industrial countries to press for market-opening actions by developing countries. Pressure was applied both through the GATT Balance of Payments Committee and the Trade Committee of the OECD. One of the focal points of this pressure was reduced use by developing countries of Article XVIII B restrictions.

The Uruguay Round agreements include an understanding on balance of payments provisions intended to reduce overall use as well as to shift usage to tariffs instead of quantitative restrictions. Under pressure of this agreement, developing countries have drastically reduced the number of measures justified under GATT's balance of payments provision. WTO Balance of Payments Committee Reports (WT/BOP/R/10 and WT/BOP/R/19) for 1995 and 1996 report balance of payments measures in place in 18 Members. Subsequent Reports (through 2008) indicate that all such measures have been removed. Rather, antidumping is now the instrument of choice of developing countries as well as of developed. It accounts for 1446 out of 1535 antidumping, safeguard and countervailing actions notified to WTO by developing country members between 1995 and 2008 inclusive.

#### **4. Lessons from Latin American liberalization**

A recent group of studies looked particularly at how developing country policy managers used safeguards and antidumping as part of their countries' liberalization and reform programs. The authors of these studies were economists who had been directly involved in the reforms, one, for example, as president of a central bank, another as chair of his country's international trade commission. The studies, covering Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, and Peru, are summarized in Finger and Nogués (2008).<sup>29</sup> Rather than repeating that summary here, I will report here only its conclusions and lessons.

*The GATT/WTO system of bindings and rules was critical to the success of the liberalization programs.*

In their economic histories, these countries had passed through several cycles of protection and openness. Many different import control instruments were in use, among them tariffs, surcharges, benchmark customs values, enterprise-specific limits on foreign purchases, and import prohibitions. Application of restrictions was undertaken through processes that allowed wide discretion to government officials, with decisions often made at the sub-ministerial level. Safeguards and antidumping – as GATT and WTO rules define them – were rarely used. With almost all tariff lines unbound through the GATT/WTO, the legal sanction that use of such instruments would have provided was not needed.

The binding of tariff rates in the Uruguay Round meant that only GATT/WTO mechanisms could be used to apply new restrictions. This provided the basis in domestic politics for governments to eliminate the previous mechanisms and to maintain control over the management of new pressures for protection in agencies with economy-wide responsibilities and accountabilities.

*The motivation for reform was each government's perception that reform and liberalization would benefit the people of the country.*

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<sup>29</sup> The country studies are also available as World Bank working papers, Finger and Nogués (2008) provides references. The summary and the country studies were also published as Finger and Nogués (2006).

The mercantilist idea that liberalization was the 'cost' of advancing a country's export interests played a minimal role. The Asian example – growth and productivity through integration into the global economy – had considerable influence. The officials who led the reforms saw the objective as achieving world levels of productivity by becoming a part of the global economy rather than by simply boosting their exports. To them, GATT/WTO mechanisms were more about helping to manage reform than about forcing it.<sup>30</sup>

*Creating safeguard and antidumping mechanisms was often part of the bargain to gain industry acceptance of reform.*

Acceptance by industry of the idea that they could not only survive but prosper under the stimulus of international competition was paired with the promise that they would be protected from abnormal or unfair competition. This was a political bargain, expressed in speeches and other such statements, often with reference to GATT/WTO rules and mechanisms as the standard for distinguishing what industry would and would not be expected to face up to.

*The administrative dimensions of GATT/WTO rules for trade remedies supported valuable managerial reforms.*

One of the objectives of the officials who led the reforms was to change the culture of policy management, from one based on relationships to one based on the facts of economic potential. This relates particularly to such GATT/WTO rules as those on the recognition of and participation by interested parties, for open procedures according to previously announced processes, for publication of decisions, and of reasons for decisions. Notification requirements also proved valuable, they proved the basis for establishing an archive that allowed for continuing analysis of the impact of measures put in place. The collection of the data and the keeping of such records was a matter of changing management culture as well as of allocating the necessary resources.

*The economics of the GATT/WTO flexibility provisions proved an unconstructive guide to managing the national economic interest.*

Particularly in creating safeguard mechanisms, these governments attempted to create decision mechanisms that balanced the various domestic interests at play. Injury, the interests of displaced domestic production, was a basic element. At the same time, the new safeguard mechanisms asked protection seekers to submit a recovery plan that would demonstrate that the industry asking relief would, over the long term, pull its own weight – not be a long-term burden on the rest of the economy. Several of the governments provided also for a government agency to prepare a quantitative analysis of the impact of the requested protection on users of imported products, and made that information a part of the information base for a decision.<sup>31</sup> Peru required the petitioner to provide such analysis. Chile and Costa Rica paid particular attention to how restricting imports would affect the competitiveness of the local industry.

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<sup>30</sup> Among these seven countries, Mexico's negotiation of a free trade agreement with Canada and the United States was the most prominent use of trade negotiations as a vehicle (though not necessarily a motive) for trade reform.

<sup>31</sup> 24 GATT/WTO rules require an investigation and determination of injury before a safeguard or antidumping measure may be applied. A positive finding on injury does not however mandate that a restrictive measure be applied, a government may take into consideration any other factors it considers relevant.



The managerial logic of including such factors in the decision process was, first, that it made economic sense to do so, and, second, that having such information on the record would provide political support in those cases when the government concluded that a restrictive action would not be wise.

The fact that the WTO rules did not mandate consideration of such factors eventually provided leverage against reform. Petitioners who were turned down on the basis of long-run viability or cost to user industries complained that the government was being more rigorous than the GATT/WTO required, that they were being subjected to a higher standard than was applied in the industrial countries who were the inventors of safeguards and antidumping. Given that governments, in winning industry's acceptance of reform programs, had referred to GATT/WTO rules as the relevant criteria, these complaints had considerable political bite.

The Mexican government was subject to similar criticism when it attempted to base dumping investigations on operational techniques to determine the prevailing international price in competitive markets. WTO rules sanction constructed cost that allow generous overstatement of what normal business accounting practices would determine. Under criticism from protection seekers and from international antidumping professionals, the Mexican government was forced to abandon a disciplined measure of competitive price that it had concluded would better serve the Mexican national economic interest. The generous 'space' provided by GATT/WTO safeguard and antidumping rules proved to support resistance for reform rather than to support the policy leaders' case for it.

GATT/WTO rules earn a high mark on support for good process, a lower mark on support for good criteria.

*Liberalization at times involved considerable short-term use of flexibilities.*

Chile for one year notified more countervailing duty investigations than any other country. Mexico and Argentina, for short periods, initiated large numbers of antidumping investigations. These high rates of usage took place in years of extraordinary economic stress, often involving overvalued exchange rates. When crises had passed and the exchange rate adjusted, usage of the flexibility provisions fell back to levels comparable with those of other WTO Members.

*Build all of the interests that are relevant into the decision process.*

This is perhaps the overall lesson from the study. Adopting a technical approach to safeguard decisions was a key part of changing the decision culture, and GATT/WTO procedural rules were strongly supportive of adopting that approach. As noted above, when the GATT/WTO rules mandated a technical consideration only of the arguments for protection, they tended to support resistance to reform. Moreover, they compromised the reformers' confidence in a technical approach and thus their resolve to move trade policy decision-making away from 'politics as usual'. GATT/WTO guidelines should do more than allow good economics, they should support it.

## **5. Summing up**

Membership in the WTO commits a government to use only approved instruments of trade control, to apply them in a generally non-discriminatory manner and to subject them to a long-term process of binding and reduction through negotiation. The reality of trade politics is that to win acceptance of liberalization a government will often have to assure industry that 'exceptional circumstances' will be dealt with. Thus international

commitments to long-term reform usually include 'safeguard' provisions that provide flexibility to deal with exceptional events.<sup>32</sup> Within a country, these are the every-day processes through which pressures for protection are managed.

It is more useful to think of these measures as *what they have come to be* than as *what they were designed to do*. Though the rhetoric of the various instruments of administered protection – especially antidumping – suggest that they were designed to remedy specific situations, they have proven in practice to be quite fungible. The history of their usage suggests that the choice of instrument has been principally a matter of administrative and political convenience and constraint. This has changed as trade politics has changed.

Antidumping is perhaps the classic example of a pragmatically successful flexibility instrument with pretensions – but no more than pretensions – to a real economic rationale. Over the past three decades antidumping has been by far the most used instrument and has proven to be an effective pressure valve. It allows domestic interests to complain about foreign competition and provides a detailed process for investigation of such concerns.

At the same time, antidumping and other administered protection measures have been minor in comparison with the liberalization the global economy has witnessed. The system's discipline has several sources. The criteria such as injury, though fungible, are not empty. Moreover, their national application is subject to the scrutiny of the WTO dispute settlement process. WTO procedural requirements introduce a significant element of good government into such processes. Finally, there is the fundamental discipline in the GATT/WTO system, reciprocity. Though antidumping does not have a formal requirement of reciprocity, the reality of reciprocal action by other countries has had a significant disciplinary role.<sup>33</sup>

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<sup>32</sup> Flexibility in this context does not refer to the freedom a government would maintain by remaining outside the agreement or by not binding its tariff rates through the agreement. It refers to disciplined or guided flexibility intended to keep its application by each Member in line with the overall and long-term objectives implicit in membership. Being a part of the overall agreement, safeguards presume each Member's long-term commitment to liberalization.

<sup>33</sup> A final note, Nelson (2006) and WTO (2009) provide surveys of academic papers on administered protection. The WTO report also reviews the legal interpretation/application of GATT/WTO rules by the WTO dispute settlement process.

## 6. References

- Baracat, Elias and Julio J. Nogués. 2005. WTO Safeguards and Trade Liberalization: Lessons from the Argentine Footwear Case, World Bank Policy Research Working Paper 3614, May 2005.
- Eggar, Peter and Douglas R. Nelson. 2007. "How Bad is Antidumping? Evidence from Panel Data," Research Paper 2007/17, Leverhume Center, University of Nottingham.
- Finger, J. Michael and Julio J. Nogués. 2008. Safeguards and Antidumping in Latin American Trade Liberalization. World Bank Policy Research Working Paper 4680, July.
- Finger, J. Michael and Julio J. Nogués. 2006. Safeguards and Antidumping in Latin American Trade Liberalization: Fighting Fire with Fire, Palgrave Macmillan.
- Finger, J. Michael. 2009. "Maintaining WTO discipline: Procedural guidelines versus economic substance in GATT/WTO safeguards," a paper prepared for presentation at the conference Valuing International Trade Rules: A conference in Honor of Professor Heinz Hauser, June 17 - 19, 2009, Pfäffikon, Switzerland. To be published in the proceedings volume edited by Simon Evenett.
- Finger, J. Michael. 1993. Antidumping: How It Works and Who Gets Hurt, Ann Arbor, University of Michigan Press.
- Hoekman, Bernard, Aaditya Mattoo and Philip English (eds.), 2002: Development, Trade and the WTO: A Handbook, World Bank, Washington, D.C.
- Horlick, Gary N. and Eleanor Shea. 2002. "Dealing with US Trade Law", in Hoekman *et al.*, *op. cit.*, Chapter 23.
- Hufbauer, Gary C. 1981. Analyzing the Effects of US Trade Policy Instruments, National Science Foundation, Washington, DC, mimeograph.
- Hufbauer, Gary C. and Kimberley Ann Elliot. 1994. Measuring the Cost of Protection in the United States, Institute for International Economics, Washington, DC.
- Irwin, Douglas A. 2005. "The Rise of US Antidumping Activity in Historical Perspective," The World Economy, Volume 28, Issue 5, pp. 651-668.
- Lawrence, Robert Z. (ed). 1998. Brookings Trade Forum 1998, Washington, DC, Brookings.
- Lindsey, Brink. 1999. The US Antidumping Law: Rhetoric vs. Reality, Trade Policy analysis No. 7, Cato Institute, Washington, DC, August 16.
- Nelson, Douglas R. 2006. "The Political Economy of Antidumping". European Journal of Political Economy; V.22-#3, pp. 554-590.
- Nelson, Douglas R. 1996. "The Political Economy of US Automobile Protection," ch. 3, pp. 133-191 in Anne O. Krueger, ed., The Political Economy of American Trade Policy, Univ. of Chicago Press for the National Bureau of Economic Research
- OECD, Economics Department. 1996. Trade and Competition, Frictions after the Uruguay Round (Note by the Secretariat), Paris, OECD.
- Office of the United States Trade Representative, 2010. Generalized System of Preferences (GSP): Notice Regarding the Review of a Petition to Withdraw the Eligibility of Certain Sleeping Bags under the GSP Program, at

[http://www.strtrade.com/wti/2010/january/26/ustr\\_sleeping\\_bags.pdf](http://www.strtrade.com/wti/2010/january/26/ustr_sleeping_bags.pdf)  
Accessed Jan 26 10

Stegemann, Klaus. 1991. "Settlement of Antidumping Cases by Price Undertakings: Is the EC More Liberal than Canada?" In P. K. M. Tharakan, ed., Policy Implications of Antidumping Measures. Amsterdam and New York, North-Holland, Elsevier Science Publishers.

World Trade Organization. 2009. World Trade Report 2009: Trade Policy Commitments and Contingency Measures, WTO, Geneva.