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# Need for Coherence Among the WTO's Escape Clauses

Patrick Messerlin

MANY governments think they could not secure the support of domestic producer interests for the trade-liberalizing agreements they negotiate with other countries without provisions in them that permit a degree of flexibility in implementing the core obligations they undertake in the event of unforeseeable or even foreseeable problems.<sup>1</sup> Thus in the General Agreement on Tariffs and Trade (GATT) there are “escape clauses” that, as exceptions to the rules, allow members to exceed their tariff bindings and impose import restrictions that would otherwise violate GATT articles.<sup>2</sup>

The result is a constant tension between the rules drawn to permit limited exceptions to general GATT obligations and constant pressures in member countries of the World Trade Organization (WTO) to expand the escape clauses to provide protection to politically powerful constituencies – often without much regard for the limits within the GATT – in the other direction. General GATT obligations include Articles I, II, III and XI. Politics dictate the pressures that predominate, but, to ensure that protectionist pressures do not gain excessively, the different escape clauses in the WTO must be narrowly defined. They are justified in various ways. There is little or no coordination or consistency left, however, between the terms under which they are applicable, given all the changes that have taken place with the rapid integration of the world economy since the GATT came into being in 1948.

## A Plethora of Escape Clauses

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<sup>1</sup> This essay is also being published in John J. Barcelo III and Hugh Corbet (eds), *Rethinking the World Trading System* (Cambridge and New York: Cambridge University Press, 2005). It was first presented, with other essays in the volume, at a meeting on “The Role of the WTO System in the World Economy” in Paris on July 9-10, 2004, convened by the Cornell Law School and the Cordell Hull Institute, Washington, DC, before being presented at a conference on “China Participation to the WTO” convened by Hong Kong University. I would like to acknowledge my deep debt to Gary Horlick. The essay has also benefited from the comments of Hugh Corbet, Andreas Freytag, from an unpublished paper by William J. Davey, of the University of Illinois, Urbana-Champaign, and from the participants of the Paris and Hong Kong conferences.

<sup>2</sup> On the role of “escape clauses” in international agreements, see Irving Kravis, *Domestic Interests and International Obligations: Safeguards in International Trade Organizations* (Westport, CN: Greenwood Press, 1975), first published in 1963 by University of Pennsylvania Press; and Kyle Bagwell and Robert Staiger, *The Economics of the World Trading System* (Cambridge, MA: MIT Press, 2002).

Escape clauses might all be viewed as “safeguard” measures, some for unforeseeable difficulties, others for foreseeable ones. But one point often forgotten is that, as summarized by Table 1, there are more than a dozen escape clauses in the current GATT-WTO regime. It is interesting to recapitulate all these clauses, remembering that the Doha Round negotiators are busily working on adding a few more – almost half a dozen, as of today.

There are the provisions in Article XII and Article XVIII:B for general trade restrictions for balance-of-payments purposes, in Article VI and Article XVI for anti-dumping and subsidy-countervailing (hereafter countervailing for short) measures and in Article XIX for emergency protection against a sudden surge of imports of a particular product (which in the United States is often called “the escape clause” and in the WTO forum, more widely, is called “the safeguard clause” or “the safeguard provision”). Escape clauses also include the provision in Article XXVIII for bound tariffs to be re-negotiated and in Article XXV (now Article 9 of the WTO Agreement) for rules to be waived, enabling unanticipated problems to be addressed.

The GATT also provides for departures from the principle of non-discrimination to form customs unions or free trade areas (Article XXIV), an example of the exception overwhelming the rule. In another departure from the principle, the GATT allows developing countries special-and-differential treatment, including preferential tariffs in their favor and among themselves, this through Part IV, added in 1965, and the so-called Enabling Clause. The GATT also allows developing countries to protect for infant-industry purposes (Article XVIII:C).

The original GATT, nowadays cited as the GATT 1947, permitted quantitative restrictions on imports of agricultural products (Article XI) and contained special rules on exports of agricultural products (Article XVI), but these provisions have been superseded by the WTO Agreement on Agriculture, concluded in the Uruguay Round negotiations of 1986-94. The GATT admits measures to defend national security (Article XXI); and, more generally, to safeguard public morals, national treasures and public health and to secure compliance with laws that are not inconsistent with GATT rules, including the protection of patents, trademarks and copyrights (Article XX).

There was also the “grandfather clause”, the Protocol of Provisional Application, which provided that the rules in the GATT’s Part II, covering non-tariff measures, must be applied only “to the fullest extent not inconsistent with existing legislation”. Because of it, many non-tariff measures were able to stay in force for years, long past their “sell-by” dates. The grandfather clause finally lapsed when the WTO became effective in 1995.

As for the analogous provisions in the GATS, there is little in them (and some wonder whether they are necessary), but a very limited safeguard clause is found in Article X, the balance-of-payments provision in Article XII, the re-negotiation provision in Article XXI, the health-and-safety exception in Article XIV and the national-security exception in Article XIV bis. There are no provisions analogous to GATT Article VI.

Last but not least, some recent protocols of accession allow the trading partners of a new WTO member country to use the “non-market economy” status in their investigations against exports allegedly dumped by the new member. This is the case with China, whose non-market-economy status is scheduled to last for fifteen years, until 2017. It allows foreign investigators of alleged dumping to use proxies in estimating the home-market prices or costs of Chinese exporters. Such proxies make proving the existence of dumping much easier than under the rules for anti-dumping investigations in market economies; and they inflate the magnitude of the estimated anti-dumping margins compared with those, already high, imposed on market economies.

In addition, Section 16 of the China Protocol of Accession creates the “transitional product-specific safeguard” (TPS) mechanism. The TPS makes it legally much easier for WTO members to impose safeguard measures against Chinese exports for twelve years, until 2014. All the terms defining the use of a safeguard action in the traditional GATT-WTO context (under Article XIX) have been systematically weakened. There is no provision for “unforeseen circumstances”, no most-favored-nation (MFN) requirement, a “material” injury test (rather than a “serious” injury test), a smaller number of factors related to the condition of the domestic industry, a weaker causal link between increased imports and injury and no provision for a non-attribution causation analysis.

But the most important provision of Section 16 of the WTO China Protocol – and potentially the most devastating for the WTO – states that WTO members have the possibility (never known before) to use a “trade-diversion” clause, meaning that as soon as one WTO member implements a TPS measure against Chinese exports all the others could enforce a similar measure at almost no cost in terms of legal procedures (no investigation, no prior notification, no input from Chinese parties *et cetera*). In other words, the trade-diversion clause makes almost unchallengeable the hypothesis that Chinese exports will be diverted from the first closed market to the rest of the world.

All these features put the TPS largely in contradiction with the WTO's usual concerns about a balance of rights and obligations.

### **Hence the Importance of “Coherence”**

The great number and variety of available escape clauses makes it crucial to “coordinate” their terms and conditions of use. Countries wanting to restrain imports may be able to choose from several escape clauses. Very often, several clauses are used at the same time, providing layer on layer of protection. For many observers that is the main problem. The aim of liberalizing international trade by increasing “discipline” over the use of one method of restricting imports by making it more difficult to invoke will not reduce the overall level of protection if there are other escape measures that can be used in its place.

In particular, when the Uruguay Round agreements were being concluded, it was anticipated that prohibiting the use of “voluntary” export restraints (VERs) involving governments and, secondly, requiring governments “not to encourage industry-by-industry

VERs” would probably lead to increased use of the anti-dumping provision because tightened disciplines were not likely to be translated effectively into national laws. Where anti-dumping laws are used, it is often easier to invoke them than to invoke the provision for emergency (hereafter safeguard) protection, under GATT Article XIX, in the face of a sudden surge of imports of a particular product that is too competitive for the corresponding domestic suppliers. Moreover, by requiring developing countries to improve access to their markets and to bind more of their tariffs at lower levels, it was anticipated that many more of them would introduce anti-dumping laws. By then several had already done so, among them Argentina, Korea and Mexico.

Thus it is important to consider how GATT escape clauses have operated in the past, how they were modified in the Uruguay Round negotiations, the extent to which they overlap and whether further improvements are needed to achieve a coherent framework of WTO escape clauses.

There is already, it could be said, a degree of coherence in the GATT-WTO repertoire of escape clauses. They deal with allegedly “unfair” trade practices, trade-inflicted “injuries” to a specific industry and an economy, health-and-safety and national-security concerns and unanticipated problems. The list appears to be comprehensive. Any trade problem that a country might face would probably fall within one of those categories and the relatively infrequent use of the provisions for waivers and re-negotiations suggests that there have been relatively few unanticipated problems.

### **Brief Review of Three Escape Clauses**

Only the three major escape clauses – antidumping, countervailing (anti-subsidy) and (emergency) safeguard – which share the common feature to require the pre-existence of certain events (dumping, subsidy, import surge and material or serious injury) for being used are examined in this essay.<sup>3</sup>

#### ***Anti-dumping and Countervailing Actions***

The GATT permits member countries to impose anti-dumping and countervailing duties in excess of *bound* tariffs to offset dumping and subsidization if dumping or subsidization materially injures, or threatens “material injury” to, domestic producers. Essentially, the justification for this escape clause in Article VI is that dumped or subsidized imports are “unfairly” traded and, therefore, ought to be subject to control, at least if they cause material injury.

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<sup>3</sup> These provisions and the related Uruguay Round agreements have been extensively analyzed in other places, so the discussion here is relatively brief, addressing their relationships with one another and other GATT provisions. Of the remaining escape clauses, the two balance-of-payments provisions were once significant, but have been subjected to tighter discipline. The “waiver” and “re-negotiation” provisions are not discussed here.

Whether behaviour covered by the anti-dumping and countervailing laws makes legal or economic sense is a controversial question to be examined in the next section. Even so, the criteria for applying them are relatively well defined – even if they are often ignored in national laws or practices. More precision was added to the criteria during the Uruguay Round negotiations, in the Anti-dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM). If dumping or subsidization is found, the remedy permitted is limited to (i) imposing duties that offset the margin of dumping or subsidization or (ii) accepting an undertaking from the exporters to adjust their prices to achieve that result (assuming the amount of dumping or subsidy is calculated correctly).

No WTO review is required prior or subsequent to the imposition of duties, or to the acceptance of price undertakings, although their use must be reported to the WTO Secretariat. Furthermore, no compensation is due to affected countries, even though duties are raised above bound levels.

In essence the problem of dumping or subsidy is viewed as a case of “unfair” trade, as the “fault” of the firm or exporting country. If the exporting country believes that anti-dumping or countervailing duties have been imposed in violation of Article VI and the ADA or ASCM agreement, the matter may be examined by a dispute-settlement panel where, in the past, challenged measures have been found to violate GATT-WTO rules (and in past GATT cases, illegally imposed duties have been refunded).<sup>4</sup>

### ***Safeguard Actions***

Article XIX of the GATT, the safeguard provision, permits the use of protection – including import quotas and tariffs above *bound* rates – for such time as may be necessary to remedy “serious” injury to a domestic industry caused (or threatened) by a sudden surge of imports of a particular product. It generally requires prior consultations with the WTO and those member countries that have a substantial trade interest in the product in question.

The WTO Agreement on Safeguards has added further obligations by requiring investigations of possible injury to meet certain procedural requirements (including prior WTO reviews), by specifying factors that must be considered in assessing injury and by putting time limits (a maximum of eight years) on measures taken under Article XIX. If the country taking a safeguard action and those adversely affected cannot reach agreement on compensation, Article XIX permits the affected member countries to retaliate by suspending trade concessions made to that country.

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<sup>4</sup> See, for example, “Korea: Antidumping Duties on Imports of Polyacetal Resins from the United States”, Document ADP92, 2 April 1993 (panel report adopted by the Committee on Antidumping Practices on 27 April 1993); and “Canadian Countervailing Duties on Grain Corn from the United States”, in *Basic Instruments and Selected Documents*, 39th Supplement (Geneva: GATT Secretariat, 1993), hereafter cited as *BISD*, p. 411 (panel report adopted by the Committee on Subsidies and Countervailing Measures on 26 March 1992).

By sharp contrast to anti-dumping and countervailing actions, the problem in the safeguard case is viewed as the “fault” of the import-competing industry, which is perceived to have been unable to anticipate the import surge and/or to take appropriate measures to cope with foreign competition. This point – essential to remember when looking for a better design of these escape clauses – implies that compensation is viewed as appropriate under Article XIX actions because the imports were *fairly* traded, although the Agreement on Safeguards provides that no compensation is due for the first three years of a safeguard action if it is imposed in accordance with the Agreement, including the requirement to consult the countries likely to be affected.

### **Evaluating the Coherence**

To evaluate the coherence of WTO escape clauses, it is necessary to consider the extent to which anti-dumping actions or countervailing duties may be used, or are being used, instead of other WTO escape clauses, particularly the safeguard. The requirements for invoking the anti-dumping or countervailing provisions are threefold: (i) the existence of dumping/subsidization, (ii) material injury and (iii) a causal connection.

Compared with the safeguard provision in GATT Article XIX, Article VI contains a lesser injury standard, for it is easier to show “material” than “serious” injury, but there is a similar causation standard, since in each case the injury must be caused by the imports in question. So the question of whether Article VI actions could substitute for Article XIX actions turns on how the third criterion, dumping or subsidization, is applied.

Almost all scholarly writing on this subject concludes that the definition of dumping is too broad and far more often than not encompasses normal competitive behaviour. Moreover, the calculation of anti-dumping duties is biased in a way that further expands the coverage of anti-dumping rules. The results are demonstrated by an examination of practices in the United States (which is not unrepresentative), where the Department of Commerce makes negative final dumping determinations in less than 5 percent of all cases, while the U.S. International Trade Commission makes negative injury determinations in about 50 percent of all cases. If an industry seeking relief from imports can show material injury, it would appear that a finding of dumping is almost automatic. This suggests that the criteria for invoking a dumping or subsidy remedy may be too “loose” by comparison with other WTO escape clauses and, in particular, with the safeguard provision.

In short, while the WTO needs an escape mechanism, more restrained devices than the anti-dumping and countervailing laws are necessary. Even though (i) their criteria are precisely defined, (ii) the range of possible responses is circumscribed and (iii) the lack of compensation could be considered as appropriate, the supervision of the WTO is inadequate simply because these two escape clauses can cover a great deal of conduct that is not really “unfair” – in sum, they overlap too much with the provisions of Article XIX.

## Controversies

In order to prepare what could and should be done during the Doha Round negotiations, it is important to summarize the ongoing controversies on the anti-dumping and safeguard instruments.

### *Anti-dumping Actions*

The core issue is whether dumping and subsidization as defined in the WTO are really “unfair” trade practices. In this respect, the many criticisms about the use and abuse of anti-dumping laws can be divided into legal and economic categories.<sup>5</sup>

There is a wide consensus among legal scholars that anti-dumping actions have been expanded far beyond the language of Article VI (and contemporary practice in 1947). Article VI took aim primarily at sales in export markets that are below the price in the home market on a theory of cross-subsidization. Even if a company would not have been found to be dumping in 1947, the rules have been stretched so that the same company would today be found to be dumping under Article VI, even if it (i) charges identical prices in both markets, (ii) sells through an affiliate, which is normal practice in a modern business, or (iii) fails to make a profit on at least 80 percent of the individual sales.

No wonder, then, that every year there are, on average, 250 anti-dumping cases initiated and, as shown by Table 2, more than 1,000 cases enforced – all numbers likely to continue to increase as more countries adopt anti-dumping and countervailing laws, supplementing escape clauses already on the books or introduced at the same time.<sup>6</sup> By 2004, no fewer than 88 countries were applying anti-dumping laws, but more had such laws on their books. By the turn of the decade, the *World Development Report* noted that

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<sup>5</sup> See Richard Dale, *Anti-dumping Law in a Liberal Trade Order* (London: Macmillan, for the Trade Policy Research Centre, 1981); Brian Hindley, "Dumping and the Far East Trade of the European Community", *The World Economy*, Oxford and Boston, December 1988; Richard Boltuck and Robert E. Litan (eds), *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington, DC: Brookings Institution, 1991); Hindley and Messerlin, *Antidumping Industrial Policy* (Washington, DC: American Enterprise Institute, 1996); Brink Lindsey, *The U.S. Antidumping Law* (Washington, DC: Cato Institute, 1998); and Paul Waer and Edwin Vermulst, "EC Antisubsidy Law and Practice After the Uruguay Round: a Wolf in Sheep's Clothing?" mimeograph, Vermulst & Waer, Brussels, 1999.

<sup>6</sup> For a detailed description of the situation in the early years of the WTO, see Jorge Miranda, Raul A. Torres and Mario Rutz, "The International Use of Antidumping: 1987-1997", *Journal of World Trade*, Geneva, October 1998.

anti-dumping actions were becoming a widespread phenomenon, “diluting market access and the gains from trade liberalization”.<sup>7</sup>

Anti-dumping actions also attract heavy criticism from economists. Economic theory analyzes the so-called “dumping” practices as being one of three possible pricing and competitive behaviours: price discrimination, predatory pricing or strategic pricing.

**Price discrimination** (charging different prices in markets characterized by different price elasticities of demand) is considered as well-founded economic behaviour in a world based on profit maximization. Dumping occurs when the domestic price elasticity is lower than the foreign price elasticity. If this situation flows from factors exogenous to the exporting firm (different tastes of the consumers in the home and export markets of the firm in question, different reputations of the firm in these two markets, etc.) profit maximization requires that firms charge a higher price in its home market than the price in its export market – that is to say, “dump”.

The only case where economists would oppose such a “dumping” policy is when differences in price elasticities are endogenous – that is, flow from the firms’ influence (via abuse of dominant situation or monopolization) on the structure of the market in which they operate. But in this case, economic analysis shows that the authority that should act is not the trade authority of the importing country, but the competition authority of the exporting country – and such a shift does not lead to anti-dumping measures on imports to be paid by consumers, but to fines to be paid by the wrong-doing firms.

If **predatory pricing** may be a reprehensible behaviour for economists, the key question is whether it is a plausible one? Economists have strong doubts for two reasons. First, predation is likely to be costly. As the predator has to “dump” products in great quantities in order to depress the market price (hoping to eliminate its existing competitors), it runs the great risk that its unit cost will be skyrocketing while its sale price is plummeting. As a result, the losses during this first phase of the predation strategy may be very large; and the predator needs to recoup them in the second phase, when it will use its hard-won monopoly power.

But can it do so? No, if entry in the market is relatively easy. In this case, as soon as the predator increases its price in order to recoup its losses, it generates by the same token appetites among potential competitors that may turn out quickly to be competitors for good. Of course, entry may be difficult in some markets, but the crucial question is: for how long? The key point is that the period required for recouping losses should not be longer than the one necessary for new entry in this market or in markets of the product substitutes. In times of fast technological progress, as is the case nowadays, entry is always likely to be “too” rapid for making predatory pricing a profitable proposition

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<sup>7</sup> *World Development Report, 1999/2000* (Oxford and New York: Oxford University Press, for the World Bank, 2000), pp. 58-61, incl. Table 2. and Figures 2.7 and 2.8.

The second reason for questioning the likelihood of predation is that it has an attractive, or cheaper, alternative: a merger which is, by definition, a way of “eliminating” competition. The perspective of joint additional profits generated by negotiating a merger does not require the tough first-phase losses that characterize predatory pricing. Last but not least, the public authority best equipped to act in case of predation (as in the case of merger) is the competition authority – either of the home or of the export market of the predator.

The last economic argument for explaining dumping is **strategic dumping** – that is, the possibility of the exporter to charge total (fixed plus marginal) costs in its home market, but only the marginal cost in its export market, whereas the producers in the importing market cannot adopt the same pricing strategy (hence, its consumers in the importing country should pay total costs). This asymmetry in pricing policy, however, requires an important condition, which is that the home market of the exporter should be large compared with its export market. Anti-dumping actions could then be a way of preventing such potentially anti-competitive behavior.

These economic arguments should be completed by two essential facts drawn from the observation of anti-dumping enforcement during the last 20 years. First, less than 5 percent of the U.S. and EU cases in the 1980s and 1990s could ultimately be predation cases – a certain number of these cases are likely not to be predation cases, if more detailed investigation is done (once again, the appropriate reaction in predation cases should be to eliminate monopolizing practices, not to reduce trade).<sup>8</sup> Second (as underlined below when examining Table 3), the vast majority of anti-dumping cases are initiated by large economies against exporters from small economies – exactly the converse of what should be observed in the strategic pricing case, as underlined above.

### ***Safeguard Actions***

Until the end of 1993, the safeguard provision was rarely invoked – only about three times a year. This was largely because of the widespread use in the 1970s and 1980s of VERs (and anti-dumping in the 1980s) in major industries. As a result, the success of the WTO Agreement on Safeguards in eliminating the use of VERs implied that, in due course, Article XIX would be used more often. Indeed, the number of safeguard initiations reached ten in 1998, 26 in 2000, 53 in 2001 and 132 in 2002, before returning to fifteen in 2003 and 2004.

If the increase was large in growth terms, however, the absolute number of safeguard actions remains small, except in 2001 and 2002. That was due to the fact that a large share of the VERs that existed at the end of the Uruguay Round negotiations was either irrelevant (legal remnants of outdated protection) or “re-designed” as anti-dumping

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<sup>8</sup> See for the United States: Shin Hyun-Ja, “The U.S. Experience”, *Brookings Trade Forum*, Brookings Institution, Washington, DC, 1997; and for the European Union: Jacques Bourgeois and Messerlin, “The European Community’s Experience,” *Brookings Trade Forum*, 1998.

measures. Anti-dumping measures can take the form of price or quantity undertakings ; that is, of price increases or quantity decreases agreed by the foreign exporters during the investigation period. Quantity undertakings are straightforward equivalents to VERs. The EU and U.S. steel industries offer the best illustration of this shift. Addicted to VERs in the 1970s, they were the first and (by far) the greatest anti-dumping users, with many price and/or quantity undertakings.

In 2002-03, the safeguard clause may have undergone a critical evolution, with the EU and U.S. safeguard actions in steel<sup>9</sup> These two actions covered a much larger trade – defined in terms of number of tariff lines – than the anti-dumping cases usually launched by the steel industries of the European Union and the United States when they feel too pressed by foreign competition. If one combines the coverage in terms of products and countries targeted, the scope of the EU steel safeguard was roughly thirty to fifty times the average scope of an EU anti-dumping case – as a result, one should avoid comparing the number of safeguard actions and the number of anti-dumping (or countervailing) actions.

This much broader coverage has not generated a lower level of discrimination (the high level of discrimination in the measures taken is one of the features of anti-dumping actions that is the most valued by complainants). The methods used in the European Union and the United States in pursuing safeguard actions may have been different, but both introduced a lot of discrimination. The U.S. safeguard has excluded four countries that have a free-trade agreement with the United States, and it has introduced the possibility of “exclusions” on a product-by-product, firm-by-firm basis, generating intense lobbying and negotiations by non-U.S. firms, in particular by European firms, for benefiting from such exclusions. The EU safeguard has imposed a certain number of tariff-quotas defined by individual exporting country. Such tariff-quotas have had two well known negative economic consequences.

First, they have reinforced the restrictive impact of the measures, for imposing individual quotas by country is more restrictive and distortive (particularly in the case of steel markets which have been distorted by protectionist measures for so long) than imposing a global quota to be fulfilled by all the countries.

Second, individual quotas eliminated competition between quota holders, all the more since there were very few steel firms in each exporting country, since the non-attributed share of the in-quotas was often small and since most of the individual quota recipients were Central European countries with bilateral preferential agreements with the European Union (Switzerland, Czech Republic, Hungary, Slovakia, Bulgaria, Romania, Turkey, Serbia-Montenegro).

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<sup>9</sup> For more details, see Kommers Kollegium, *The Agreement on Safeguards*, Swedish National Board of Trade, Stockholm, November 2004.

In other words, there is little doubt that the U.S. and EU safeguard actions have generated incentives favoring the “cozy” nature of U.S. and European steel markets and, too, that they may have been a source of tailor-made anti-competitive situations, which have greatly amplified the costs of protection *per se*.

### **Assessing the Pro-reform Forces**

Reforming anti-dumping, countervailing and safeguard actions (to limit ourselves to this most pressing issue, but again there are many more escape clauses in the GATT-WTO framework) raises a preliminary question too often left aside. What are the forces at work – those ready to push for reform and those ready to fight for the *statu quo*?

#### ***WTO Members...?***

Reforming escape clauses is often rebutted on the basis that, in the United States, “Congress won’t buy it” and that the European position has shifted to support the U.S. opposition.

The “optimists” retort that, since the Uruguay Round negotiations, antidumping laws have been used increasingly all over the world as surrogates for selective (discriminatory) safeguard or “grey area” measures that have been prohibited. More developing countries have introduced anti-dumping laws, modeled on American or European practices because, as their tariffs are reduced and bound, they may need to have such an easy-to-use and selective escape clause in their arsenals. The trend may gradually result in pressure for change as more U.S. and EC firms come to understand what is happening.

As a result, it is increasingly realized in trade-policy communities around the world (even in the United States) that the explosion in anti-dumping activity in both developed and developing countries poses a danger that may already be outweighing the value of anti-dumping laws as a political “escape valve”. The danger is a discriminatory, selective and semi-permanent unbinding of tariffs. So some change will be necessary. The longer it is put off, the greater the added danger that vested interests in the maintenance of anti-dumping laws in developing countries, as well as in developed countries, will become entrenched and hard to budge.

This optimistic view finds some comfort in the fact that the European Union, Japan, Chile and several other developing countries have put a high priority on anti-dumping law reform, in spite of the U.S. disposition to treat it as an “untouchable” subject. But is this optimism warranted? Data on anti-dumping enforcement suggests serious caution.

First, the optimists perceive anti-dumping reform above all as a struggle between WTO member countries. In this perspective, what counts is the balance of power between anti-dumping users and anti-dumping targets on which Table 2 provides a key observation: the ten top anti-dumping users enforce 90 percent of the anti-dumping measures notified in the WTO in the period 1995-2002, whereas they represent 70 percent of the world GDP,

and 50 percent of the world trade.<sup>10</sup> Anti-dumping enforcement is thus highly concentrated in less than a dozen of countries, and all of them are among the largest in the world economy. The situation prevailing during the Uruguay Round negotiations, with anti-dumping users were almost exclusively industrial countries, is no more true. Six “new” intensive anti-dumping users (all of them developing countries: Argentina, Brazil, India, Mexico, South Africa and Turkey) have almost caught up with the four major “old” users. All this is in sharp contrast to the stock of anti-dumping measures in force by targeted countries. As shown by Table 3, during the same period, the top ten users are the targets of less than one-third of all the measures in force, with a strong amplification of this gap in 2001 and 2002.

This huge asymmetry between anti-dumping users and anti-dumping targets is critical in assessing the strength of the pro-reform coalition. That anti-dumping law is an instrument enforced by a few large countries against the smaller economies of the rest of the world does not suggest a strong leverage or incentive to change the existing regime. Small economies targeted by anti-dumping actions would obviously like to discipline anti-dumping rules, but such a goal will be difficult to achieve in the WTO forum. It is necessary to build a coalition of many members, which, by definition, is a coalition costly to create and hard to keep alive. And the better rules that the coalition could get in WTO negotiations may ultimately be ignored by the large anti-dumping users (see below), all the more because the small size of these economies would hamper them from opposing the misuse of WTO rules by the large anti-dumping users by using credible threats in dispute-settlement cases or retaliatory anti-dumping cases.

In this broad context, China deserves special attention.<sup>11</sup> When acceding to the WTO, China listed high in its priorities the reform of WTO anti-dumping rules. That was easily understandable. Table 2 shows China as the main target of all anti-dumping measures enforced in the world; and, indeed, as almost exclusively targeted by the top users. After a slow start in 1997-98, however, the number of cases has rapidly increased, reaching 30 cases in 2002, 22 in 2003 and 11 in 2004 – totaling 63 cases, ranking China as the third anti-dumping user since 2002, and the ninth since 1995. This evolution can only be a source of serious concern. It remains to be seen whether it simply mirrors cases that which were “in the pipeline” for a long time, or whether China has begun to follow the drift observed for the six top developing country antidumping users, and has become another regularly intensive antidumping user (ultimately putting in danger her so far successful liberalization).

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<sup>10</sup> One should note, however, that the rest of the developing countries, while still small users individually, have doubled their global share of measures in force during the observation period.

<sup>11</sup> The following paragraphs on China rely on Messerlin, “Antidumping and Safeguards”, in Deepak Bhattasali, Shantong Li and William J. Martin (eds), *China and the WTO: Accession, Policy Reform and Poverty-reduction Strategies* (Washington, DC: World Bank, 2004)

These concerns are exacerbated by a few observations on China's antidumping enforcement. First, protectionist measures have been taken in almost all the anti-dumping cases – a very high percentage compared with what is generally observed (60-70 percent in industrial countries). Second is the relatively high duty level of the measures adopted by the Chinese authorities. Third, the main countries targeted are industrial and advanced developing countries – not quite the pattern observed for the other developing-country anti-dumping users. Fourth, the product coverage of Chinese cases is closer to what is observed for the other anti-dumping users, best illustrated by the steel cases (echoing the EC and U.S. safeguards) and by the ethanolamine cases (observed in several other anti-dumping users). In other words, Chinese anti-dumping enforcement is “echoing” EC and U.S. anti-dumping cases. If confirmed, China anti-dumping enforcement may be starting to be part of the ongoing process of segmenting world markets through worldwide anti-dumping activity. It also raises the issue of a progressive capture of China's trade policy by firms, similar to what is observed in the ten major anti-dumping users.

### *... or firms?*

An alternative perspective – also pessimistic – on anti-dumping actions suggests that firms rather than countries as the dominant actor. Trade problems, particularly anti-dumping cases that have been shown as favoring anti-competitive practices, are fundamentally conflicts between firms. Taking into account firms' behaviour suggests that firms which are the petitioners in a country may well want to lodge similar anti-dumping complaints in several key countries in order to segment the world markets of their products through anti-dumping measures. There is now ample evidence supporting this hypothesis.<sup>12</sup>

If such a perspective is the most accurate one, the worldwide spread of anti-dumping regulations and the increase of anti-dumping measures cannot be viewed as generating incentives to discipline anti-dumping use. Instead they should be seen as a “positive” development by the firms in question in their worldwide strategy of market segmentation.

This conclusion is reinforced by the fact that anti-dumping cases are characterized by a high proportion of relatively standard products and by oligopolistic market structures, as best illustrated by the metal and chemical industries. By contrast, there are few anti-dumping actions in the industries characterized by many firms and highly differentiated products. Such a pattern strongly suggests that complaining firms use anti-dumping as an additional (cheap and powerful) instrument for segmenting the markets that ongoing or scheduled trade liberalizations aim to make more competitive.

In sum, “echoing” anti-dumping cases and the observed sectoral pattern of anti-dumping actions reflect the increasing “privatization” of trade policy by firms that enjoy enough initial oligopolistic power to use fully the “pro-collusive” bias embedded in anti-

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<sup>12</sup> Jean-Christophe Maur, “Echoing Antidumping Cases”, *World Competition*, vol.21, no. 6, 1999, pp. 51-84.

dumping regulations (a key lesson to be kept in mind when observing China's anti-dumping enforcement).

Last but not least, analyzing the forces inside the major anti-dumping users does not look good either. Adjusting the number of foreign anti-dumping measures in force by the size of the trade in question (in thousands of U.S. dollars) from both an export and import perspective shows a strong imbalance between export interests and import-competing anti-dumping beneficiaries in the top ten anti-dumping users. The number of cases per dollar against exports from anti-dumping users is substantially smaller than the number of cases per dollar against imports by the anti-dumping users. In this context, it is unlikely that domestic coalitions in the main anti-dumping enforcers are strong enough to support anti-dumping reforms in these users which are key WTO players.

## **Options for Reforms**

Three main options emerge as candidates for reforming the current system. The first is to shift anti-dumping and countervailing enforcement – the major sources of the current problems and dangers – to anti-trust and competition authorities. The second is to focus on the safeguard clause as the anchor of the future escape-clause regime. The third one is to work on detailed aspects of the current anti-dumping and countervailing actions in order to reduce progressively their harmfulness and prepare their convergence to the safeguard clause.

### ***Putting anti-trust and competition authorities in charge***

Many argue that WTO rules are too broad and that alleged “unfair” trade practices targeted by anti-dumping and countervailing actions could be more appropriately dealt with by applying existing anti-trust and competition laws.<sup>13</sup> By the same token, this approach would achieve coherence between anti-dumping and countervailing actions, on the one hand, and safeguard actions, on the other hand, since it would rely on a non-discriminatory application of competition (anti-trust) law against all trade-related (as well as domestic) practices within an economy.

In order to assess the value of this first option, one should apply it to the past anti-dumping cases, and predict what would have happened if competition authorities were in charge.

First, the competition authorities might have recognized that all the safeguard cases are outside their domain of competence, for they are fundamentally political measures. Competition authorities are only one part of the executive branch of government and do

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<sup>13</sup> See W.J. Davey, “Antidumping Laws: a Time for Restriction”, in Barry Hawk (ed.), *North America and Common Market Antitrust and Trade Laws* (New York: Matthew Bender, for the Fordham Corporate Law Institute, 1988), p. 8-1.

not have the final word in implementing the core obligations a country undertakes in the event of unforeseeable problems.

Second, it is often assumed that putting competition authorities in charge would have inevitably led to the elimination of at least 95 percent of the existing anti-dumping cases (the share of cases not related to predatory or strategic pricing). It would be a great mistake to take this assumption for granted. After all, appealing to competition authorities could have occurred systematically during the past thirty years, but it did not. When it occurred (it does so increasingly rarely), it led nowhere – except that it was clear that competition authorities were not ready to tackle the issue, refusing to look at the substance of the cases or disengaging themselves from the cases. Another proof of the reluctance of the competition authorities to enter the anti-dumping arena is provided by the introduction of competition policy in the so-called “Singapore” issues. It was initially driven by the desire to shift anti-dumping and countervailing actions to the supervision of the competition authorities, but this initial motive has been carefully buried since then. Finally, one should not ignore the possibility that putting competition authorities in charge could have led to the examination of an unknown additional number of cases on the basis of allegedly “unfair” strategic pricing.

A “reduced” form of the competition option would consist in expanding the “national interest” or “consumer interest” clause. This provision has not worked well in the WTO member countries where it exists. It is too vaguely defined and it comes too late in the procedure to be credible in front of the vested interests where the investigated cases involve powerful lobbies.

### ***Making the safeguard clause the anchor***

If reforming anti-dumping laws to conform to anti-trust or competition laws is hard to believe, what else could be considered? Today high tariffs are jealously guarded by the industries they benefit. A coherent framework of escape clauses in an international trade agreement needs a “clause” like the safeguard provision. There will be occasions when imports cause significant dislocation to an industry; and it has long been accepted, in such cases, that it is appropriate to allow the industry time to adjust to increased imports. The problem is to set conditions for invoking the provision at a level that is appropriate, given the general free-trade orientation of the WTO system.

The Uruguay Round reforms go a long way in that direction. The concept of serious injury is defined more precisely and there is considerably more surveillance over the use of the safeguard provision than previously. Moreover, with the discouragement of informal safeguards – the prohibition of VERs involving governments and the stipulation that member countries “shall not encourage or support” industry-to-industry VERs – the Uruguay Round reforms have suggested that more rigorous control will be exercised over safeguards than in the past, particularly since the GATT had no influence over VERs at all.

The EU and U.S. steel cases, however, have revealed that there is still room for much improvement. The problem is that reforming the implementation procedures of the

safeguard clause is not in the Doha Round mandate, which unfortunately did not recognize the need for coherence in terms of escape clauses. One (fragile) possibility would be to introduce tighter disciplines in the dispute-settlement mechanism— for instance, allowing retroactive compensations in cases of misuse of safeguard actions.

***Making anti-dumping and countervailing converge on the safeguard standard***

The problem of choosing the safeguard clause as the anchor is that if the requirements for the safeguard actions are too strict, when those for anti-dumping and countervailing actions are not, countries seeking to restrain imports may avoid the greater discipline on the use of safeguard measures and continue to resort instead to Article VI measures. That would be unfortunate because the remedy afforded by anti-dumping and countervailing laws has little to do with the remedy traditionally afforded to injured industries under the safeguard provision. It is evident that, as currently structured, the relationship is not properly balanced.

Anti-dumping and countervailing duties are based, at least to some extent, on the degree of dumping or subsidization – an amount that is not necessarily related to the degree of injury (even in some countries that claim to base the duty on injury). Accordingly, anti-dumping and countervailing duties tend to over-protect a domestic industry in light of its injury. Such measures, moreover, tend to remain in place for a long time, even where there are in theory provisions calling for expiration after a specified period. Last but not least, industries interested in import relief tend to prefer to initiate anti-dumping or countervailing actions, since they are more likely to obtain relief

What can be done, then, in anti-dumping and countervailing enforcement? A first approach would be to go back to the rule book during the Doha Round negotiations. One possibility would be to apply anti-dumping action only to the behavior that is claimed to be the rationale for anti-dumping activity. In particular, importing countries could be required to prove that the market of the exporting countries is, indeed, closed to foreign competition by government action and that the proposed duty is proportional to the degree of cross-subsidization caused by closure.<sup>14</sup> Some of the more blatant abuses could also be limited by a requirement of prior WTO review (at least as much as occurs in theory in Article XIX cases under the Safeguards Agreement).

Experience has shown though that such rules are likely to be circumvented or simply not followed by the WTO member countries. Revealing such circumvention or non-compliance in the dispute-settlement mechanism would be hard and costly work.

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<sup>14</sup> The more direct discipline on subsidies provided in the WTO Agreement on Subsidies and Countervailing Measures has worked well on export-contingent subsidies, but not on all the other subsidies, as argued in Gary N. Horlick, *Subsidies Discipline under WTO and U.S. Rules* (Florence: European University Institute, 1999).

A first promising alternative could be a greater role for compensation. In the early years of the GATT (and through the first few years of the 1960s), trade compensation was typically agreed when a country invoked Article XIX and retaliatory measures were only occasionally imposed. Over the last thirty odd years, however, compensation and retaliation have been quite rare. This may be explained by the fact that greater scope for compensation was afforded by “water” in tariff levels in the 1950s and 1960s. Later, when safeguard action was taken via VERs, compensation was achieved by letting quota rents accrue to the exporters. The problem with compensation is that it does not fit well with the “unfair” aura behind anti-dumping and countervailing actions.

A more promising alternative would be to focus on stricter thresholds. A very large number of anti-dumping and countervailing cases are launched when foreign entrants represent a small, often tiny, proportion of the domestic market. In other words, it simply cannot be the case that such a limited level of competition could cause material injury, except to firms in a powerful dominant position or to monopolies (indeed, a noticeable number of anti-dumping cases are lodged by monopolies, which are the best illustration of “a major proportion of the domestic industry”). Doha Round negotiators should use this fact – and the economically sound and politically acceptable argument which flows from it – for pushing for reforms on thresholds as an “anti-monopoly initiative”.

What are the possibilities for reform on thresholds?

- First, it would be to express them in terms of shares of domestic consumption, not import shares (a large import share could represent a small domestic consumption share, as is often the case).
- A second possibility would be to take into account the number of countries targeted when assessing the threshold. Clearly, the fact that 10 percent of the domestic consumption share is held by foreign firms from one country has not the same economic significance than the same share held by foreign firms from five or ten different countries. Alternatively, one could introduce the consideration of the parent relationship between targeted exporters (and include plaintiffs in this analysis).
- A last possibility would be to make the definition of thresholds dependent on the size of the exporting economy: the threat from an exporter coming from a small economy is smaller than the threat from an exporter based in a large economy (this exporter has less workers or resources available than an exporter based in a large country). This approach could indeed reflect ongoing preoccupations with special-and-differentiated treatment.

Thresholds have a great advantage. Non-compliance is much easier (faster) to show. This feature could be amplified by introducing a “fast track” dispute-settlement procedure in cases of non-compliance in terms of thresholds, possibly coupled with retrospective compensations in such non-compliance cases.