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Do Rules Control Power?

GATT Articles and Arrangements in the Uruguay Round

J. Michael Finger
and
Sumana Dhar

Do rules control power? Or apply power? Has the elaboration and application of GATT rules been an exercise in the application or the control of economic and political power?

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This paper — a product of the Trade Policy Division, Country Economics Department — is part of a larger effort in the Department to understand the economics of the emergence of "fairness" as a standard for regulating international trade, its implications for the continued openness of the international trading system, and its continued functioning as an important vehicle for development. This research was funded by the Bank's Research Support Budget, "Regulations Against Unfair Imports: Effects on Developing Countries" (RPO 675-52). The paper was presented at the Conference on Analytical and Negotiating Issues in the Global Trading System, held October 31-November 1, 1991, at the University of Michigan at Ann Arbor. Copies of this paper are available free from the World Bank, 1818 H Street NW, Washington DC 20433. Please contact Nellie Artis, room N10-013, extension 37947 (51 pages). January 1992.

Many complain — and offer evidence — that in recent years the GATT system has become more power-oriented, less stable, and less equitable. A concern to reverse this drift was one of the motives that brought the international community to agree to undertake the Uruguay Round. Rules control power, assumed the signers of the Punte del Este declaration, so elaborating and extending GATT rules would move the international community toward a fairer, more stable international trading system.

Finger and Dhar contend that the opposite is true. Particularly in the 1980s, the elaboration and application of GATT rules has been an exercise in the application of economic and political power, not in its control. GATT rules, in theory, are there to limit national trade restrictions. Finger and Dhar contend that in fact things work the other way around: national practice comes first, and determines what the GATT rules mean. Gatt's rules do not put limits on national practices, but provide international sanction for these practices. Such rules are not part of the solution but are part of the problem.

Theirs is a situation-specific argument, say Finger and Dhar, not a generic one. Their target is not "rules," nor is it "GATT." Rather, it is *the* GATT rules.

DO RULES CONTROL POWER?

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In complicated situations efforts to improve things often tend to make them worse, sometimes much worse, on occasion calamitous.

- Jay W. Forrester

Do rules control power? One of the implicit public choice precepts of the GATT is that they do. In theory, the GATT strives to maintain an orderly and equitable international trading system by bringing previously agreed rules to bear on differences between countries as to whether or not a particular trade-restricting action may be taken. Without rules, the GATT could do no more than provide a forum for open negotiations to reach a situation-specific outcome. Such negotiations would end up accommodating ad-hoc solutions: temporary palliatives; or worse, venal applications of economic or other power. Powerful countries would grab the "gains from trade" away from the less powerful, the trading environment would be unstable and unpredictable -- from the perspective of trading enterprises, a bad business climate.

Many complain -- and give evidence -- that in recent years the GATT system has become more power-oriented, less stable and less equitable. A concern to reverse this drift was one of the motives that brought the international community to agree to undertake the Uruguay Round. Thus one of the Uruguay Round objectives, stated in the Punta del Este declaration, is to:

> strengthen the role of GATT, improve the multilateral trading system based on the principles and rules of the GATT and bring about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines [paragraph I.A.(ii)].

Rules control power, the signers of the Punte del Este declaration presume, therefore elaboration and extension of GATT rules would move the international community toward a fairer, more stable international trading system.

Our contention is that the opposite is true. Particularly in the 1980's, the elaboration and application of GATT rules has been an exercise in the application of economic and political power, not in its control. While GATT rules, in theory, are there to limit national use of trade restrictions, our contention is that, in fact, things work the other way around: national practice determines what the GATT rules mean. GATT's rules do not provide limits to national practice, they provide international sanction for it. Such rules are not part of the solution, they are part of the problem.

Our presentation contains three parts. In the first we examine the argument for GATT rules that is summarized above. In the second we provide an alternative "model" of the relationship between GATT rules and national trade remedies, one that is more consistent with the facts of the matter than is the conventional public choice model of GATT rules. In part III we review proposals that have been tabled at the Uruguay Round, and argue that these proposals are much more consistent with our "the rules apply power" thesis than with the "rules control power" thesis. In the final section we examine the policy changes that our model suggests would make things better.

The reader should note and keep in mind that ours is a situation-specific argument, not a generic one.[1/] Our target is not "rules" nor is it "GATT." Our target is the GATT rules.

1/ This seems a hard point to absorb. See, for example, the second paragraph of David Richardson's discussion.

I: THE LOGIC OF THE IDEALIZED GATT

(theory, with rules exogenous)

The world trading system the GATT envisages would have two principal characteristics. (1) It would be a liberal, or open system; though not a laissez faire system. (2) Government intervention in international trade would be predictable, i.e., only in previously stated circumstances; and non-discriminatory.

The openness of the system would be achieved through successive rounds of multilateral negotiations: bargaining to reduce each member country's import restrictions to minimal levels and to bind them against unilateral revision.

Minimizing government interventions

Minimizing new government interventions in international trade; and particularly, limiting these interventions to previously stated circumstances, are what GATT's rules are about. Some of the rules specify actions that national governments must not take. The tariff concessions that have opened the international trading system would be of little import if a government were free to take offsetting action such as imposing excise duties that fell only on imported goods, or assigning artificial customs values so as to inflate tariff charges. Thus the GATT bans such actions. Other GATT rules specify circumstances in which a national government may restrict international trade. Article XII, for example, states that

> any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article. (emphasis added)

Antidumping, antisubsidy and several other sorts of import restrictions are similarly provided for. (The specifics, i.,e., the rules, will be taken up in more detail in the next section.)

Give-and-take, or reciprocity, was to be an important element in building a liberal trading system. In the trade negotiations, reductions of tariffs were to be exchanged: membership in the GATT committed a country to participate in the tariff negotiations, but the reductions a country made would be those the country then explicitly bargained away. In the rules part of the GATT, the idea of give-and-take, or reciprocity, is broader. The GATT's bans and limits on use of non-tariff restrictions cover all products, not just those on which a country has made particular concessions. The scope of this ban is implicit in article XXIII, under which a country is entitled to redress when any benefit accruing to it under the agreement is "nullified or impaired," even if that nullification or impairment is not the result of another country having failed to meet its explicit obligations. Thus GATT's sense of reciprocity or balance extends across the effects of conditions and government actions not even mentioned in the agreement.

But judging governmental actions against the broad standard of "maintaining across countries a balance of concessions and obligations"[2/] invites all of the many dimensions of international relations to come to bear -- and this was something GATT's founders wanted to avoid. They wanted international trade to be the business of businessmen, not of diplomats, hence they wanted governmental intervention in trade to be limited to the few circumstances enumerated in the agreement. Their intent then was that trade disputes between countries be a matter of constrained diplomacy -- diplomacy conditioned by the rules and procedures stated in the agreement.

2/ Because of the "mutuality" of GATT's benefits and obligations -- crudely, one country's obligation not to impose trade restrictions is another country's benefit -- maintaining a balance of concessions and obligations is the same as maintaining a balance of benefits.

Power diplomacy versus rules diplomacy

Table 1 compares in schematic fashion the characteristics of open diplomacy and rules-constrained diplomacy. These "types" have been analyzed in several studies by Professor John H. Jackson, and we have tabulated their characteristics from his work.[3/] Open diplomacy is the mode that would evolve if diplomats were guided toward no standard more precise than "reciprocity," i.e., if they were not constrained by specified criteria or regularized procedures. Such a situation allows the overall status or power of nations to shape outcomes. Following Professor Jackson, we have labeled it "Power-oriented diplomacy." Professor Jackson's other polar type is labeled "Rules-oriented diplomacy." Rules-oriented diplomacy might be thought of as two-level diplomacy: at one level rules or norms are agreed, at the other they are applied. Application then includes two elements, a set of agreed rules and an institution authorized to determine if a rule has been violated, by whom, and to specify what might be done to fix things. But the institution authorized to evaluate behavior and recommend remedies has no sovereignty over the disputant powers. Its power is the power of persuasion, armed by appeal to an internationally agreed standard.

In both modes, negotiation and private agreement will be the way in which differences are normally settled. Each party knows that impasse will be followed by "institutional" dispute settlement -- fact-finding, evaluation, interpretation and recommendation. Hence the issue will go to institutional dispute settlement only if one disputant's anticipation of the institution's decision is considerably different from the other's -- i.e., only if the parties "read" the rules quite differently.

As explained by Richard N. Cooper (1972), "the establishment of rules governing international trade permitted trade issues to be discussed and

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3/ Jagdish Bhagwati's (1991) schema of "Fix-rule" versus "Fix-quantity, results-oriented" systems is similar. We have followed Professor Jackson's schema because it has been more elaborately developed.

Table 1

ELEMENTS IN
PROFESSOR JOHN H. JACKSON'S ANALYSIS OF RULES v. NEGOTIATION

Power-oriented diplomacy	Rules-oriented diplomacy
Negotiation (1990, p. 59)	Rule application
Negotiating forum designed to preserve a balance of concessions and obligations (1990, p. 60)	Deal with subjects in precise detail so that obligations are clear and unambiguous
Settlement by negotiation and agreement with reference (explicitly or implicitly) to relative power status of the parties (1989, p. 85)	Settlement by negotiation or decision with reference to norms or rules to which both parties have previously agreed
A forum for discussion and negotiation -- the OECD is an example (1990, p. 48)	An international institution that provides concrete and reasonably precise rules that governments feel are necessary -- the IMF is an example
Every issue analyzed through the international institution, with reference to the general principle of balance 1990, pp. 60-61)	Deal with subjects in precise detail; obligations of member governments become clear and unambiguous -- provisions applied by governments without formal recourse to the international institution
Representatives of disputant nations assert the status or power of each (1978, p. 98)	Institution (third party) ensures highest possible adherence to legal obligations
Intermediaries encourage and assist settlement by reference to the economic or other power of disputants (1990, p. 75)	Intermediaries encourage and assist settlement primarily by reference to the existing rules
Advantage to larger countries (1978, p. 98)	Smaller countries less vulnerable

Power-oriented diplomacy	Rules-oriented diplomacy
Alternative weapons include aid, trade concessions, exchange rate changes, military maneuvers (1978, p. 98)	Outcome limited to the criteria specified in the rules, hence few alternative weapons may be brought to bear
Open bargaining, unconstrained as to procedure or criteria (1979, p. 3)	Rules and guiding institutions provide regularized procedures, limit consideration to specific criteria
Settlement reflects the effective power or status of the disputants (1978, p. 99)	Settlement reflects international determination of which party breached its international obligations as codified in the rules
To solve the instant dispute (by conciliation, obfuscation, power-threats or otherwise) (1990, p. 59)	To promote certain longer-term goals
GATT's informal role as catalyst for the resolution of disputes (1990, pp. 59-60)	The formal role of GATT as third-party arbiter

resolved in their own realm, without intruding into other areas of policy." (p. 19) Thus trade policy was in the realm of "low foreign policy." Matters of low foreign policy take up many person-hours in governments, but relatively little of the time of higher-level officials whose authority spans many subject areas -- the "high foreign policy" of national security and survival.

The trade policy rules would shape not only the international politics of trade, but the domestic politics as well. National commitments to the international rules form the basis from which a national government can equilibrate between diverse domestic interests: producers versus consumers, export industries versus import competing industries.

How close does this model come to the real world? Robert Hudec's (1975) reading of GATT history -- a reading we find convincing -- suggests that for ten years or so it came close. The weakness of the model however is that it does not take into account how the rules are made -- it assumes that there exist a set of rules that are both good and agreed, then focuses on application.[4/] The first ten years of the GATT do not reveal this flaw because, we speculate, the rules as interpreted then were both agreed and good. We will argue below that as the rules became endogenous they became both more disputatious and less good.

II. THE EVOLUTION AND SIGNIFICANCE OF THE GATT RULES

(theory, with endogenous rules)

As World War II ended, maintaining peace and stability was the major objective of western leadership. An important part of the liberal design for world peace and stability was to increase the number of nongovernmental

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4/ Some analysts would argue that GATT is not about good rules, only about agreed rules. Agreed rules will provide stability of trading conditions and stability, this view claims, is the essence of a liberal system. We are not convinced that any set of rules (whatever their substantive content) that are agreed will provide stability of business conditions, nor that those will be favorable business conditions. The matter, however, is not taken up in this paper.

contacts between nations -- cultural and particularly commercial contacts. Thus western leadership insisted that world trade be open and unregulated, the business of businessmen, not of diplomats or other public officials. The GATT evidences the success of this leadership in moving the world toward unrestricted international trade, but it also reveals some of the compromises that had to be made along the way.

GATT provisions that allow trade remedies are more correctly placed among the compromises than among the achievements. They say, for example, that

> to safeguard its external financial position ... a [developing] contracting party may ... control the level of its imports by restricting the quantity or value of merchandise permitted to be imported (article XVIII.B, paragraph 9);

or,

> to offset or prevent dumping a contracting party may levy on any dumped product an antidumping duty (article VI, paragraph 2).

In short, they give countries permission to impose import restrictions.

In GATT's early years (just after WWII) the most frequently used permission to restrict imports was Article XII, under which the industrial countries imposed trade restrictions to protect their balances of payments. By the mid-1960's, almost all of these restrictions had been eliminated -- Anjaria (1987) points out that between 1958 and 1964 the number of industrial countries invoking Article XII fell from 14 to 3 (p. 672). Since then, nearly all GATT-legal trade restrictions have been imposed under article VI, that allows antidumping and countervailing duties; and article XVIII:B, allowing developing countries to restrict imports to protect the balance of payments.

Article XVIII:C allows developing countries to impose infant industry protection but few countries have notified restrictions under this article. Article XVIII:C carries tougher notification and compensation requirements than the balance of payments article; and though the economic logic of balance

of payments measures suggests that they be applied across-the-board, article XVIII:B allows such measures to vary according to how "essential" different products are. Hence restrictions imposed for "infant industry" purposes can readily be "notified" as balance of payments measures, and they usually are. Anjaria's tabulation found that in the mid-1980's eighteen developing countries had notified import restrictions under the balance of payments criterion. In eight of the eighteen countries the restrictions covered 20 percent or less of import categories, in only one did the notified restrictions cover as much as 75 percent of import categories.

Over the past two decades, GATT article VI, that allows antidumping and countervailing duties, has been the most frequently used GATT cover for trade restrictions. Patrick Messerlin's (1990) tabulation of 1979-1988 notifications to the GATT reports a total of 2384 restrictions, more than three-fourths were antidumping actions, and another 18 percent were countervailing duty actions. Only sixty-eight safeguards actions were notified, less than 3 percent of the total.

Even developing countries are switching to article VI for GATT cover for their import restrictions. By the end of the 1980s, the pace of GATT consultations under article XVIII:B was down to one country per year. (U.S. International Trade Commission, 1991, p. 44) In 1989, several developing countries, including Korea, Mexico and Brazil, notified the GATT of antidumping cases they had undertaken.

The antidumping rules are now the popular form of GATT cover for import restrictions. The evolution of these rules illustrates well the public choice dimensions of the rules part of the GATT. This evolution is explained at greater length and is more extensively documented in a forthcoming book, Finger and Associates (1992): here we will touch only two incidents in that evolution.

An example: the evolution of the antidumping rules

The accepted reading of the GATT's negotiating history is that no country delegation to the international trade organization or the GATT negotiations strongly insisted on including a provision for antidumping (see, for example, Barcelo 1991 and Jackson 1969). And though there was concern that antidumping laws might compromise the objectives of the agreement if overused, the drafting committees concluded without controversy that antidumping and countervailing duty provisions were needed.

Through GATT's first two decades, antidumping was a major instrument of policy only in Australia, Canada, and South Africa. On the international scene, it was a minor issue. Though the GATT came into force in 1948, the contracting parties (as GATT member countries are called) did not canvass themselves about the use of antidumping until 1958. The resulting tally showed a total of thirty-seven antidumping decrees in force as of May 1958, twenty-two of them in South Africa. A similar tally in 1989 found 530. (Because Canadian and Australian antidumping actions could not be distinguished from every-day customs valuation determinations, the 1958 tally did not cover those two countries.)

The Kennedy Round antidumping code. Antidumping first became a significant GATT issue at the Kennedy Round of 1964-67, perhaps more by dint of diplomatic manipulation than by clear intent. As Kenneth Dam (1970) explains, "The United States, having introduced the subject of nontariff barriers into the negotiations, was chagrined to find that the nontariff barriers most often singled out by other countries for priority of action were those maintained by the United States, of which one of the most often mentioned was the U.S. antidumping statute" (174). The attack on U.S. antidumping was clearly a strategy of offense being the best defense of the European nontariff barriers that the United States had wanted brought to the negotiating table. From passage of the U.S. antidumping law in 1921 through December 31, 1967, the U.S. government had conducted a total of 706

antidumping investigations -- all but 75 of them had ended with a negative determination (Seavey 1970, 65).

In those years, the function of U.S. antidumping and "escape clause" procedures was much more to preserve the openness of the U.S. market than to restrict foreign access. Particular pressures for protection that in Smoot-Hawley days would have brought the congress to enact higher tariff rates could be diverted into antidumping or escape-clause investigations. As long as the U.S. government could dismiss nine out of ten petitions as unworthy, the few restrictions added by these "trade remedies" were more than offset by reductions agreed at the almost continuous rounds of GATT tariff negotiations.

Nevertheless, the U.S. delegation to the Kennedy Round adopted a strategy of accommodation rather than of explanation or defense. The U.S. administration defended the resulting antidumping code against criticism from congress on grounds that it would discipline Canada and the United Kingdom and insure against European Community (EC) restrictions on U.S. exports. (The EC was developing its own antidumping regulations at the time.) When the administration realized that congress would not legislate the changes required by the code, it insisted that the executive branch had the power to implement these changes by modifying investigation and enforcement procedures. The congress disagreed.

The resulting scrimmage between the administration and the congress was one of many through which the congress reasserted its control over U.S. trade policy. Antidumping, countervailing duties, and safeguards -- the major trade remedies -- were often the focus of these scrimmages. Broadening and strengthening these trade remedies was, to the congress, much more than a means to retake control of trade policy from the president. It was also an important congressional objective on its own. Adding this or that technical amendment -- tailor-made to fit the situation of a particular and powerful constituent -- soon became another vehicle for constituent service, the lifeblood of congressional politics.

The reasons antidumping emerged as a major policy instrument in the EC were not all that different from those in the United States. Slower growth made European governments sensitive to displacement of domestic production by emerging Asian exporters. The EC antidumping mechanism -- essentially the GATT Tokyo Round antidumping code translated into operational language (see Eymann-Schuknecht, 1991) -- proved a doubly convenient means for responding. As economics, it was flexible enough to cover all problems. As politics, it was a community instrument. The EC Commission, with the instinct of any organization for demonstrating its usefulness and thereby expanding its turf, pressed forward with antidumping action to preempt member state governments from serving industries' increased demand for protection. And those who might have opposed either the illiberality of such actions or the shift of regulatory practice to Brussels were slow to see through the camouflage of propriety that cloaks antidumping actions.

The growth of unfair trade regulation in national trade policies is the cumulation of many changes, some small, some not so small. Each of the changes was made because antidumping, if expanded in a particular way, could fix a pressing political problem. The dominant question was always "How can antidumping be applied to this problem?" The question was never "Is this really a problem caused by dumping?"

Perhaps the most significant step in the expansion of antidumping into a weapon against all imports was its extension to imports not priced at full cost. This extension expanded the substantive scope of the instrument and it brought antidumping's administrative focus in line with its political focus: keeping import prices high enough to prevent injury to domestic companies. The extension also necessitated a significant increase in administrative discretion, allowing administrators -- pushed by ever more powerful protectionist pressures -- to probe for new ways to expand the scope and power of the instrument.

We want to highlight here one facet of the extension to below-cost pricing. This extension illustrates the role power politics has played, at both the national and the international level, in the emergence of antidumping as an all-purpose weapon against imports.

Power politics: national. In the 1930's, when the U.S. and many other countries raised their tariffs, the increase of Canadian protection was achieved by adjustments to customs valuation practices and expansion of the scope of Canadian antidumping law.[5/] In amendments passed in 1921 and 1930, Canada extended its antidumping regulations to cover sales below fully allocated costs plus a reasonable allowance for overhead and profit. Given the depressed markets of the 1930s, that meant that antidumping action could be taken against almost any import shipment. Antidumping could be used against what the Canadian government perceived to be a major economic problem -- generally low prices.

Action against below-cost imports came into U.S. antidumping practice through the back door. The 1921 U.S. law provided that if the administrator was unable to determine the exporter's home-market price (because there were no home-market sales, or for other reasons) and if he could not determine the exporter's price in a third market, then he could base an antidumping case on an estimate of the exporter's cost. U.S. business was as anxious as Canadian to have protection against below-cost sales, but because the U.S. congress in the 1920s and 1930s was generous with tariff protection, U.S. business did not press for extension of the scope of antidumping.

However, as the export capacity of other countries increased and the U.S. tariff was negotiated downward, pressure increased for trade remedy

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5/ In the 1930's Canada's antidumping procedure was, legally and administratively, a part of customs valuation. Orville J. McDiarmid (1946), a Canadian economic historian, has documented the Canadian government's frequent use of antidumping and other customs valuation procedures to respond to domestic pressures for protection. McDiarmid concluded "The power of the executive to fix prices at which imports could be sold in Canada was practically unlimited. ... The decision of the minister of customs and his civil service advisers became the final arbiter (pp. 310-311)."

action. This pressure eventually brought the administering agency to add below-cost imports to the circumstances under which antidumping action would be taken.

The antidumping administrators found the necessary legal cover in the following sentence in the U.S. antidumping law: "The foreign market value of imported merchandise ... shall be the price ... at which such or similar merchandise is sold ... in ... the home country ... **in the ordinary course of trade**" (U.S. Code 1677b, emphasis added). (The highlighted phrase is also in GATT article VI.) Sales below full cost, the U.S. administrator interpreted, were not made in the ordinary course of trade. Before data on foreign price could be used, the prices had to be compared with the exporter's cost, and prices below cost would be thrown out.

Action against import sales below full cost thus came into U.S. antidumping policy as a revision of administrative interpretation, not as a legislated change. When the administering agency (then the U.S. Treasury Department) first adopted this interpretation, it tried to limit application to instances that could not be explained as reductions of price to meet competition in a temporarily depressed market. But the agency had the bad judgment not to apply the below-cost standard when it was critical to an antidumping request from a company with a politically powerful friend. The friend was Senator Russell Long of Louisiana who, as chairman of the Senate Finance Committee, probably had more power over trade legislation than any other person in congress. Pending at the time was the 1974 trade bill, whose main purpose was to authorize U.S. participation in the Tokyo Round of GATT negotiations. Senator Long included in the bill an amendment to the antidumping law to require that sales below cost be considered dumping.

Power politics: international. International sanction for antidumping action against imports priced below fully allocated costs came about in a similarly arbitrary way. The Tokyo Round antidumping code allows for "normal value" (the generic term in the GATT for home-market price) to be determined

on some basis other than market price in the exporting country "when there are no sales of the like products in the ordinary course of trade ... or when ... such sales do not permit a proper comparison" (article II:4).

The code itself does not clarify whether sales below cost are covered by this expression. But in November 1978, when some parts of the code were still being negotiated, Australia, Canada, the European Community, and the United States reached an understanding that it is appropriate to regard sales below costs as "not in the ordinary course of trade" and to exclude them from the determination of foreign market value. A document announcing this understanding was circulated in the manner in which negotiating proposals or comments on proposals were normally distributed (Koulen 1989, 366).

Action against below-cost imports continues to be an major part of antidumping policy everywhere. Current U.S. administrative practice is that if 10 percent or more of observed foreign sales are below estimated cost, such sales are not included in the calculation of foreign market value. This means that in any investigation, up to 90 percent of the U.S. government's information on foreign price -- the 90 percent most favorable to the exporter's case -- may be thrown out. There has been no GATT challenge to practice in the United States or in any other country.

After many changes such as this one -- generic words to extend antidumping protection to a pressing interest -- "dumping" has no meaning other than the cumulation of circumstances in which the politics of the immediate problem have exploited the flexibility of the underlying admiinistrative structure to rationalize action against imports. The corruption of the "rule-making" process fed on itself. As antidumping became more and more detailed, the motive behind subsequent changes became more and more to find a way to fit antidumping to each immediate problem. (If your favorite tool is a hammer, your problems will all look like nails.) "Dumping" has come to mean, in GATT law as well as in national practice, anything you can get the government to act against under the antidumping law.

The ascendance of trade remedies

Speaking figuratively, when the GATT began the trade remedies dragon was a small one, chained to the service of an internationalist master. Amendment by amendment, antidumping and the other trade remedies grew larger and stronger, becoming the dragon that the early negotiators feared they might become. One day, the positions in national trade policies of the trade remedies and the trade negotiations were reversed.[6/] Now the internationalists are chained to the service of the trade remedies dragon -- as mindless of the function they serve as was the dragon when it was small.[7/]

III. WHERE THE GATT RULES GO WRONG

We stated above that our quarrel was with the rules, it is now time to state the specifics of our quarrel:

- The devil, not virtue, is in the details.
- Their basic economics leads to autarchy.
- Their legal principles are shameful.

In turn, each of these will be explained.

The devil is in the details

Putting a good face on a necessary bargain, some contemporary interpreters have argued that the underlying logic of the GATT rules is that if the circumstances under which a country may impede trade are specified, it will do so less often. The Tokyo Round codes advanced this view even further -- that the GATT limits on trade remedies were in the GATT details. An

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6/ The several elements that contributed to this reversal are discussed in Finger (1986).

7/ Robert E. Baldwin (1985) traces how amendments to the US escape clause have made it more protectionist. There has been no parallel evolution of GATT's treatment of safeguards. With antidumping expanded to provide GATT legality for the industrial countries' import restrictions there has been no need to probe the limits of safeguards.

eighteen-page antidumping code was negotiated to elaborate and apply the two pages in the GATT.

It does not seem, however, that GATT's original sponsors believed that the agreement's ability to limit new trade restrictions lay in the trade remedies details. Neither the international trade organization negotiations nor the GATT negotiations probed for detail, and the agreement that was finally made (the GATT) avoided detailed specifications. Detail came much later, in the 1979 Tokyo Round codes. The founders' brevity suggests that they recognized the inherent flexibility of the concepts on which they were building.[8/]

The logic of these provisions as controls over the very actions they permitted seems then to depend on two elements: (1) that the specifications of circumstances provided some basis for limiting action, and (2) that the administrators of the antidumping system would be sympathetic to preserving the openness of the international system and therefore hesitant to impose trade restrictions. So disposed, administrators would use the flexibility of the concepts to conclude that the circumstances of each case were not those in which action was allowed.

The facts bear out this interpretation. Nine of ten U.S. investigations before 1967 led to rejected petitions. Today we have ten times more GATT rules, ten times more U.S. trade law, and ten times more administrative

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8/ The structure of the dispute settlement process suggests the same thing. GATT's negotiators recognized that however "obligations" were worded, a contracting party could always find a way to restrict imports without violating these obligations. Thus the drafters provided that dispute settlement could take up any instance in which the complaining party was being denied a benefit to which the agreement entitled him. Explicitly, no violation by another party was necessary for the complaining party to have a case.

regulations -- and, nine of ten U.S. dumping investigations reach affirmative findings.[9/]

The underlying economics encourages autarchy

We concluded above that the functional definition of "dumping" is "anything you can get the government to act against under the antidumping laws." The next question is: What can you get the government to act against under the antidumping laws? The answer: **injury** to domestic producers. The "dumping" test is strictly ceremonial, an elaborate ritual to recite the litany of evils and unfairnesses of exporters, thereby working the country into the emotional mood to restrict imports (an act to which the people of the country are, in principle, opposed). The dumping test is always affirmative -- it always passes the buck to the injury test. The rules thus justify restricting any import that "causes or threatens material injury to an established industry or materially retards the establishment of an industry." (GATT Article VI.6)

What does that mean in practice? It means something severe enough that the European Community, defends its interpretation of it as **liberal** because

> In practice, the level of the [antidumping] duty is mainly determined by the level of price undercutting ... or by the level

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9/ There are many instances in GATT's early history to suggest that reduction of trade restrictions was not driven by the cleverness of GATT's words or arrangements, nor by the power of an international agreement to overcome protectionist interests. Progress was driven by the determination and courage of GATT's founders to advance a set of policies they passionately felt to be right. The early tariff negotiators were almost always beyond the limits of domestic political safety and sometimes beyond the limits of their legal authority. The GATT negotiations provided the leaders of the international community an *opportunity*. The resulting document was not a statement of their objectives and it was not a *laissez passer* through the protectionist opposition. It is the path brave men and women have hacked through the protectionist opposition, and some of its signposts are monuments to their *losses*. It took strong leadership to build and defend the system. Today's view is that a strong system will defend the leadership. Curzon (1965, chapters III, IV and V) is a good reference.

of resale prices that would be required to cover the costs of Community producers and provide a reasonable profit.[10/]

Compare that statement above with the following one:

In any protective legislation the true principle of protection is best maintained by the imposition of such duties as will equal the difference between the cost of production at home and abroad, together with a reasonable profit to American industries. (quoted in Taussig 1931, p. 363)

The second of these is the 1908 U.S. Republican party platform statement of the cost-equalization formula: the formula that the U.S. congress followed in writing the Smoot-Hawley Tariff. Frank Taussig (1931) points out that anything can be made within any country if the producer is assured a price high enough to cover all cost of production together with a reasonable allowance for profits. "Yet," he adds, "little acumen is needed to see that, carried out consistently, it means simple prohibition and complete stoppage of foreign trade" (633).

Perhaps it is overkill to recall the wisdom of Frank Taussig to argue that contemporary trade remedies are out of control. It should be sufficient to point out that its own defenders bring forward the economic philosophy of the Smoot-Hawley Tariff as their underlying rationale.

Shameful legal principles

Antidumping began in 1904 as another in a long series of customs valuation tricks the Canadian government came up with to mollify one or another protection-seeking group in a period in which raising the tariff would have been politically difficult. Other countries soon followed Canada's example. Creating "antidumping" as a separate category of trade administration made it possible for governments to clean up customs valuation:

10/ Bellis, pp. 84-84.

what had previously been the dirty tricks of customs administration became the explicitly sanctioned practice of antidumping.

One of the significant legal characteristics of antidumping is that the accused is not protected against multiple jeopardy. If the petitioner for antidumping action does not succeed with his first petition, he may try again -- and again, and again. The U.S cut flowers industry filed more than twenty trade remedies complaints against imports from Columbia: not just antidumping cases, countervailing duty and escape clause cases, too. When the U.S. International Trade Commission found that there had been no injury to the U.S. cut flowers industry, the industry filed separate petitions for ordinary chrysanthemums, pom-pom chrysanthemums, long-stem roses, sweetheart roses, etc. Swedish exports of stainless steel were found innocent when attacked with safeguards cases, "301" cases and countervailing duty cases. The Swedish industry was continuously pressured by the U.S. government to accept a voluntary export restraint agreement, but continuously refused. In the end, the U.S. government found in the affirmative in an antidumping case, the resulting antidumping order against Sweden completing the U.S. government's program to control steel imports from all sources.

The flaws are synergistic

The flaws of antidumping practice are worse than additive, they are synergistic. As long as the trade remedies were generally worded (a protectionist would say "vaguely"), administrators who wanted few trade restrictions could interpret them in a way that made economic sense. But as interpretation shifted to the specific, the implicit economics became a greater and greater failing: the trade remedies came to explicitly empower the beneficiaries of import protection and to explicitly disenfranchise everyone else. The technicality that would trap any particular exporter is in the rules somewhere, the multiple jeopardy dimension of antidumping and other

trade remedies give the petitioner seeking protection as many bites at the apple as he needs to find the restrictive one.

Because of the one-sided economics of the system, repeated attacks on the exporter have no political cost. Each iteration of the technical specifications allows the industry to renew and refresh the political rhetoric of its accusations against foreign exporters. A sequence of cases thus not only searches for the winning combination of technicalities, but it also builds political pressure on the government to do something for the industry -- to accept one of the technical combinations as satisfying the criteria for relief. The only cost the system puts on the petitioner is to pay the lawyers' fees.[11/]

IV. GATT ARTICLES AND AGREEMENTS IN THE URUGUAY ROUND

The Uruguay Round, as it was structured for the first four years, included a negotiating group on GATT Articles and another on GATT Agreements and Arrangements. There are thirty-eight GATT articles and 180 or so GATT agreements or arrangements, so the potential scope for these negotiations is very broad. When negotiations were resumed in 1991, these groups were combined with safeguards, subsidy-countervail and dispute settlement into a larger group unofficially labeled "GATT Rules." Functionally speaking, the subjects that were grouped together were those that related to the task of protecting market access, including the value of concessions previously agreed.

11/ The administrative costs the system imposes do not necessarily embarass the congress nor disadvantage protection seekers. Costs to petitioners can be another vehicle for constituent service: members of congress can press administrators to help small petitioners. And, the government may be the first one to blink over administrative costs. The U.S. steel industry's strategy in the mid-1980's was to file so many trade remedies petitions that the government would not have the capacity to investigate all of them in detail and within the time limits that the law requires. Negotiating VER's was the only way out for the government.

The International Monetary Fund's (1991) tabulation of the status of negotiations lists thirteen "articles and agreements" subjects that have been taken up. By the December 1, 1990, deadline, texts had been agreed on several of them, each country's agreement being ad referendum, i.e., subject to acceptance of the final, across-the-entire-round, package.

Some of the tentative agreements within the "articles and agreements" groups are aimed at making administrative procedures, e.g., import licensing and customs valuation, more transparent and neutral. Others, such as the tentative agreements to expand the government procurement code and to eliminate GATT waivers, are more directly aimed at eliminating trade barriers. Final acceptance of some of these tentative agreements will require substantial progress in other negotiating groups. For example, United States agriculture policy has enjoyed a GATT waiver since 1955, and the United States is not likely to agree, in the end, to a provision that would terminate the U.S. waiver unless other countries agree to substantial reductions of their agriculture supports.

Controlling antidumping is the key issue

The charge of the Rules Group is to preserve market access -- the openness of the trading system -- against further erosion. Because antidumping is where the protectionist action is, the first challenge is to bring antidumping under control. And, antidumping must be brought under control in a way that prevents protectionist pressures from simply shifting horses. It was easy to have honest customs valuation once antidumping had been invented to do the dirty work: and even if customs valuation and

antidumping were both "clean," there are sixteen other areas of GATT rules that might be bent to serve protectionist purposes.[12/]

An academic issue: Safeguards

We should distinguish the meaning of "Safeguards" (with a uppercase "S") -- article XIX stuff -- from "safeguards" (with a lowercase "s") -- how governments respond when a domestic interest want protection. Functionally speaking, antidumping is the currently popular safeguards mechanism; nevertheless, the international community continues with elaborate, but only symbolic, negotiations on Safeguards.

The reason there are no Safeguards actions is similar to why there are no Article XVIII:C (infant industry protection) notifications: another article provides more convenient GATT cover. A developing country can notify any import restriction under XVIII:B, and XVIII:B has less stringent notification and compensation requirements. Likewise, the industrial countries notify under Article VI, antidumping, rather than Article XIX (Safeguards). Article VI has no compensation requirement, and because it provides the protection-seeking industry and the protection granting government the balm of labeling the exporter "unfair," Article VI carries less embarrassing domestic politics.

The illusion that keeps the Safeguards negotiations going is that Safeguards can discipline the use of "grey area measures." The grey area measures are "voluntary" export restraints that exporters have implemented to escape the very legal antidumping orders that were just around the administrative corner: very legal re national law and re GATT. It is however

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12/ Jackson (1989, pp. 40-43) enumerates eight different GATT "obligations" and ten different "exceptions" to GATT obligations. Generally speaking, obligations are statements that specify trade-affecting actions national governments may not take, exceptions are statements of trade-affecting actions national governments may take. The categories overlap, for example, Jackson lists antidumping and countervailing duties under obligations, balance of payments and development exceptions under exceptions. The overlap reflects the basic intent of the GATT rules to limit government intervention: even the GATT provision for voting explicit waivers to GATT obligations has the intent of containing to the specifics of the waiver a national action that violates the spirit of the GATT.

nonsense to think that reform of Safeguards will discipline grey area measures. If each day you surrender your lunch-money to the class bully at knife-point, a school rule prohibiting firearms -- even if effectively policed -- will do you no good.

In the Safeguards group, the United States has offered administrative menus to determine injury, threat of injury, causal link to imports, etc. These menus would provide for transparency, notification, opportunity to consult: all the administrative virtues the world bought from the United States and put into the Tokyo Kound Antidumping Code. The current negotiating text includes these proposals, along with elimination of the victim's right to retaliate if the Safeguards action is for three years or less. The European Community has proposed to allow quantitative restrictions that would not target specific exporters. The Safeguarder could, however, "modulate" the global quota among sources of imports; as was necessary to eliminate injury to the domestic industry Safeguarded.

Suppose the international community accepted the tentatively agreed proposals for bureaucratization and for elimination of the right to retaliation, and added to these the European Community's proposal for targeted quantitative restrictions. If so, today's questionable antidumping actions and gray area VER's could be notified as honest Safeguards. Just as in 1904 Canada made an honest man of its customs administrator by giving him a second legal title, antidumping enforcer; the new article XIX would turn today's sleazy export restraint negotiators and overzealous antidumping administrators into Honest Safeguarders.

The Uruguay Round antidumping proposals

In July 1990, the GATT Secretariat tabulated the proposals for antidumping reform that had been submitted at the Uruguay Round (GATT 1990d). The tabulation covered 172 pages. The proposed changes were what the history of antidumping suggests they would be: generic language to add or repeal

technicalities associated with particular antidumping cases. For example, the first proposal in the Nordic countries' submission (GATT 1990e) is to change the GATT antidumping code preamble as follows, the words in italics being the proposed change: "antidumping duties may be applied ... only if *a causal relationship can be clearly established between* ..." (1).[13/]

Compare that statement with the following one, made by the Swedish government when it took the U.S. antidumping action against Sandvik Steel, AB, to the signatories of the GATT antidumping code for conciliation: "The main issue is that no causal link between dumping and injury has been demonstrated..." (GATT 1988, 2).

Thus Sweden's proposed change of the rules (submitted through the Nordic group) is the same thing as Sweden's plea to have a specific antidumping action declared illegal.

Not every proposed change would take away a past action: some would justify one. The United States has proposed changes that would explicitly validate U.S. actions against "recurrent dumping" and "repeat corporate dumping." The European Community (EC) has proposed changes that would validate already-in-place actions to prevent circumvention. And many of the proposals are opposed "pairs" in the sense that one would discredit what the other would validate. One such pair contains the EC's proposals to expand the meaning of "like product" and thereby validate certain anticircumvention measures. Its complement, the other half of the pair, is the Korean proposals to narrow that definition. Behind this generic language, of course, are several specific EC actions against Korean exports.

Finding generic language for specific restrictions is an old and well-practiced skill among import restrictors. While today's practitioners want to appear to be writing rules, yesterday's wanted to appear to be obeying them.

13/ The submission goes on to propose that the title of code article 3 be changed to "Determination of injury *and causality*" and then moves on in the text of the article to the specifics of examining causality.

Bilateral tariff negotiations, even before the GATT, were often subject to the most favored nation constraint -- tariff cuts had to be extended to all countries, not just to the one with which the cut was negotiated. Hence there was mercantalist value in descriptions of imported goods narrow enough to exclude all but the product variety imported from one country. Gerard Curzon (1965) offers an example from a German-Swiss commercial treaty of 1904, in which Germany agreed to reduce its most-favored nation tariff on "large dapple mountain cattle or brown cattle reared at a spot at least 300 meters above sea level and having at least one month's grazing each year at a spot at least 800 meters above sea level" (60, fn. 1). That was then. This is now (from a proposed footnote to antidumping code article 2.1):

> A product shall not be considered to have been introduced into the commerce of a country unless the product has been imported into such country, or a contract has been made for the importation of the product into such country. The fact that the product has been offered for sale in a country, whether or not the offer was irrevocable, shall not be sufficient for the product to be considered to have been "introduced into the commerce" of that country.

The cognoscenti understand this footnote to mean "E.C. antidumping action against Korean fork-lift trucks."

Would anything change?

Analysis requires simplification, so let us begin by assuming that all of the proposed changes are like the Swedish proposal cited above -- proposals to add generic language that would discredit a specific antidumping action. Then, we proceed by asking, in sequence, two questions:

1. If these proposed changes had been on the books since 1980 (the GATT books and the relevant national laws and regulations)

would they have prevented the antidumping actions that brought them forward?

2. Would "passage" of these proposals now lift the antidumping actions for which they front?

The answer to the first question is "No!" Had the clause-by-clause changes proposed at the Uruguay Round been there all the time, history would not have been different. Multiple jeopardy, remember, is an integral part of the system. An exporter may be accused and investigated under an unlimited number of specifications of each dimension of a case until the petitioner strikes a specification that the government agrees merits an affirmative determination. (If at first you don't succeed, try, try, again.) Explicitly outlawing the technicalities that justified yesterday's actions provides little assurance that yesterday's cases, if repeated tomorrow, would not reach the same outcomes. If yesterday's petitioner succeeded on the thirteenth iteration, but that technicality had not existed, the lawyers simply go on to the fourteenth, and the fifteenth. They need find only one accommodating set of details to win. Because multiple jeopardy is allowed, the respondent (exporter) never wins; because of the specificity (detail) of the system, the petitioner never runs out of options.[14/]

Eliminating multiple jeopardy -- limiting a petitioner to one try -- would seem to be the key to making the clause-by-clause changes effective. But the protectionists have managed to treat repeated antidumping cases as an indicator that repeated dumping is the problem. There are proposals on the Uruguay Round table to allow especially severe antidumping actions in such instances, but no proposals to control recidivist antidumping.

14/ The situation is even worse than this sentence makes it sound. The whole process is built on concepts that Alf Rattigan (1986) describes as "principles without content," E.E. Schattschneider (1935) indicts as "slogans, not formulas." Thus the petitioner can make up alternatives; he does not have to find them in the details of the regulation.

Turning to the second question -- Would passage of the proposed changes lift the antidumping actions for which they front? -- the answer again is "No!"

Enacting the generic words they have proposed would be a minor victory for the countries that wanted their exports out from under existing antidumping orders. The antidumping orders would remain in force. There would remain the need for GATT lawsuits to determine that the specific actions were illegal (assuming that GATT allows ex post facto legislation), then review petitions under national antidumping rules to have the antidumping orders lifted.

Can anything be agreed?

It would be hard to strike a balance between acceptance of the limiting phrases the Swedes, Koreans, Japanese and others have proposed against the expanding phrases the U.S. and the E.C. have proposed. The trade-restricting actions in the background have already been taken: the victims want these actions lifted, the perpetrators want international sanction for them. Amending the GATT code to include the limiting phrases and the expanding phrases would give the U.S. and the E.C. what they want -- international sanction for their (most recent) unilateral expansions of when GATT allows import restrictions. But the countries that want the actions lifted would not get what they want. Hence in any trading within the "GATT rules" negotiating group, the relative values of limiting phrases and of expanding phrases could not be based on the trade restrictions behind them. Limiting phrases would have to trade at a large discount against expanding phrases -- the discount relating to the delay and the expense of moving from this first step to lifting of the antidumping orders and to the uncertainty that this first step would ever lead to their being lifted.

A similar problem would complicate striking a balance across negotiating groups, e.g., the U.S. and the E.C. accept limiting rules in exchange for

Swedish, Korean and Japanese tariff cuts or non-tariff barrier relaxations. The "limits acceptance" half of the bargain would have to be heavily discounted for the uncertainty that it will affect market access, and for the administrative expense and delay that will be involved even if it does.[15/]

Why then do countries not trade directly in the restrictions for which the generic words are fronts, i.e., put the antidumping and other trade remedies actions on the table in the market access negotiations?

A straightforward answer is that doing so is outside the bounds of the delegations' negotiating authorities. A second answer is that doing things this way raises questions about the permanence (binding) of such liberalizations. The interests that are protected might exploit the multiple jeopardy property of the trade remedies to put everything back in place.

And, trading antidumping orders for tariffs or NTBs would raise religious questions within the GATT. Many would argue that the orders are illegal under the GATT -- especially the negotiated quantitative restrictions that have superseded many trade remedy actions -- and therefore it would be improper to trade legal actions for illegal ones: a compromise of underlying legal principles that would, in the long run, be more damaging than the present restrictions. But to us this is not a compelling argument. Antidumping's underlying legal principles have been shameful from the beginning, and they have been further compromised many times over antidumping's ninety year history.

Although 172 pages of proposals were on the table, when the Uruguay Round's Secretariat announced the restart of negotiations in March 1991 they admitted that "the Brussels document does not contain a text on antidumping and this is therefore one area in which *there is no basis for negotiations*"

15/ This discussion has failed to take into account another important complicating factor: half the time a trade remedy action is superseded by a negotiated export restraint -- a restraint that the exporter prefers to the trade remedy action that is just around the administrative corner. This factor will be another source of discounting of the "what" and the "when" of what Sweden, Japan and Korea will gain if the U.S. and the E.C. accept the limiting phrases the exporting countries have proposed.

(GATT 1991, 5, emphasis added). One hundred seventy-two pages of clause-by-clause proposals, but no basis for negotiations.

As it is very difficult to tell what the proposals tabled in the antidumping negotiations are worth -- vis-à-vis each other or vis-à-vis the subject matter of other groups -- this is no surprise. Flaws in the GATT rules (enunerated in section III above) and the unwillingness of the international community to deal with these flaws have rendered multilateral negotiations over these rules impotent to deal with international trade problems.

V. CONCLUSIONS

As the process currently works, the rules are made from the bottom, up. The sequence of causation (within the synergistic structure of things) is as follows:

1. Concerns of domestic enterprises to have protection from import competition.

2. Expansion of national administrative practice to accommodate.

3. Revision of national laws and regulations to validate the expanded administrative practice.

4. Expansion of the international code to provide international sanction for expanded national practice.

In short, national rules empower domestic import-competing interests, international rules sanction national rules. The rules do not work in the opposite direction. The fate of the Kennedy Round antidumping code shows that detail that moves from the center, out, is rejected at the national level. Detail that comes from the bottom -- like the expansion of antidumping to include pricing below full costs -- gain international sanction.

The menu on the table at the Uruguay Round is consistent with the history of antidumping. The underlying actions that give meaning to the words

are, first of all, national responses to special-interest pressures for protection. The expansion of antidumping to cover pricing below full cost is the archetype case, and this case tells us that the latest rounds of expansion of the scope of Article VI's permission to restrict imports will seize international sanction if the international community does not give it "voluntarily."

The process begins with the power of national sectoral interests (pressure groups) over national governments, it continues with the power of the restricting national governments over the national governments whose exporters are restricted. The definition of fair imbedded in the GATT rules is the one put in at the beginning of this process, by the protection-seeking special interest.

Things do not have to be this way. The power at the base of international differences is not the power of one country relative to another, it is the power within each country of import-competing interests over other interests. This power is given to them by the national trade remedies rules, the GATT rules endorse this power, and in so-doing, intensify it. Making things better depends on changing national trade remedy rules in a way that creates a countervailing force, an offset to the already enfranchised interests of import-competing enterprises. Buyers of imports and of import-competing domestic goods should be equally enfranchised.

VI. REFORM

The trade remedies, led by antidumping, have today a stronger momentum than the trade negotiations. Displaced competitors quickly bring any increase of imports under the scrutiny of antidumping administrators. And from there, the odds are overwhelming that formal restrictions will be imposed -- if the exporter does not agree to an informal restraint before the antidumping process runs its course. Antidumping is a particularly insidious threat in

that it appears to bring systemic justification to the trade restrictions it creates: it is as if the GATT system were programmed to destroy itself.

Get antidumping under control

Antidumping is ordinary protection, so reform must mean less antidumping, not a new rationale for the same thing. Reform will not be found in the details of the antidumping code. When the GATT worked to restrict imports, it worked by providing a means by which a government with the political will to control new restrictions could do so. So, reform turns on governments finding the political will to impose fewer antidumping restrictions.[16/] The next question, then, is the obvious one: when governments have had the political will to restrain antidumping, where did that will come from?

The source of political will

In the golden days of the GATT, trade liberalization dominated the politics of trade policy mainly through the GATT negotiations to reduce tariffs. The political will to resist trade remedies sprang from the political will that drove trade liberalization. But now, the forces that propelled trade liberalization are weaker and the trade remedies have an identity and a constituency all their own. "Fair and free trade" is the rhetoric of today -- trade liberalization has separate, but equal standing with the trade remedies.

As the trade remedies achieved their own momentum, it was perhaps instinctive to assume that as international negotiations had been the focus of trade liberalization politics, international negotiations could be the focus of efforts to restrain the trade remedies. But it did not work. The natural function of trade remedies is to restrict trade, and as things turned out,

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16/ This is the point at which discussions of reform often end -- by passing the buck to "political will" as if the analyst's responsibility ended just outside the border of that concept.

international negotiations have strengthened the natural momentum of trade remedies. The Tokyo Round codes were followed by an explosion of trade remedies, not a reduction. In Canada and Australia, attempts to rein in antidumping regulations were compromised by protectionist interests' references to agreed international standards.[17/] The will to resist has not been found then in international negotiations or agreements.

A strenuous will to resist has however been found, several times. The fertilizer case in Australia spurred the Hawke government to bring antidumping into line. (Banks, 1991) Farmers were an important source of support for Prime Minister Hawke's liberalization of industry policies, and when told to pay an antidumping duty on fertilizer, they fought back. Their resistance sparked sufficient political will to displace Australia from its position as the world's champion antidumper in the mid-1980s; by 1989, it had only one-tenth as many antidumping actions in place as in 1984. And before that, in the 1960s and 1970s, the Australian Industries Assistance Commission's work to measure and publicize the economywide effects of protection had contributed significantly to the Australian public's will to support the eventual shift toward open, market-oriented industrial policies.

17/ Any number of conversations with well-meaning, GATT-fearing trade officials also support the point. About the time the Uruguay Round began, one of the present authors (Finger) was among several World Bank staff who met with a high trade official of a country with a long record of supporting international organizations, including the World Bank, and of supporting the interests of developing countries. The official's opening statement began with a description of how the major trading countries were slipping into protectionism and ended with a call for a return to the GATT rules. When it came Finger's turn to speak he asked about a publicized trade restriction that official's country had imposed a short time before. The official's response was "But that was an antidumping action: antidumping actions are GATT-legal." To this, Finger replied that almost every new trade restriction was GATT-legal, or better -- "or better" in the sense that it was a negotiated restraint that the exporter preferred to the GATT-legal restraint that was just around the administrative corner. The matter was discussed no farther.

Finger learned eventually (when he was asked to explain his part in the meeting) that the official had later commented that the World Bank was anti-GATT. The official seemed not to be disingenuous. In his mind, trade restrictions were bad, GATT was good, and any statement associating the two was insincere.

The will to resist has often been found in the United States, most recently in the flat-panel displays antidumping case. ("Flat-panel displays" are screens for laptop computers.) U.S. producers alleged that ten Japanese companies were dumping by margins of 71 percent to 318 percent. U.S. computer manufacturers (buyers of flat-panel displays), led by Compaq Computer Corporation, vigorously opposed the petition. But within the legalities of the investigation, the computer manufacturers could not argue that the antidumping penalty would raise their costs, cut into their profits, and force them to lay off workers. The antidumping investigation can take into account only injuries to the *petitioner's* sales, profits, employment, and so on. So U.S. computer manufacturers, with recourse only to the technicalities of the regulations, chose to argue that U.S. firms do not produce the same type of screens as Japanese companies. But past practice had considerably stretched the meaning of "like product" and the Commerce Department did not revert to a narrow interpretation. Instead, it followed the familiar pattern in such cases: a ruling in favor of the petitioner, but at rates that would not unduly penalize U.S. buyers of the imports -- zero on some imports, 1.46 percent to 4.6 percent on others. The frozen concentrated orange juice cases (chapter 6) reached a similar outcome. Faced with resistance from powerful consumer product companies like Proctor and Gamble and Coca Cola, the U.S. government returned an affirmative determination but small antidumping rates (0.48 percent to 1.96 percent). Likewise, on imported color TV tubes, where U.S. manufacturers are buyers, the Commerce Department found a margin of 1.91 percent; on color TV receivers, it found margins in the range of 15 percent to 18 percent.

Where there has been the political will to resist, it has sprung from the domestic costs of the proposed antidumping restriction on imports.

A suggestion for change

That the only effective resistance to antidumping actions in the 1980s came from the domestic interests that bore their costs suggests that taking these costs and interests more effectively into account might offer a way out of the antidumping morass.

Ask the right question. Giving these domestic costs more influence begins with recognizing the basic public choice function of the trade remedies: they are channels for managing domestic pressures for protection. There is nothing shameful in that. An antidumping petition is a request for an action by a government. Deciding correctly whether to take or not to take that action begins with asking the right question. The right question is: *Who in the domestic economy will benefit from the proposed action and who will lose -- and by how much?* The traditional question -- What are the trade practices of foreign exporters and how do these practices affect producers of like products in the domestic economy? -- is the wrong one. The part of the question on trade practices is irrelevant while the other part is only half of what is relevant.

Get the economics right. The domestic economic costs of a trade-restricting action are as substantive as the gains. They have never been given legal substance because the legal profession has never been charged to do so, not because it cannot be done. A domestic loss and a domestic loser from an impediment to imports should have the same standing in law and in administrative procedures as a gain or a gainer -- including the administrative mechanics to petition for removal of an impediment to imports when that impediment compromises his or her economic interests.

The perspective that currently dominates such matters presumes that restrictions on international trade can be constrained only by international discussion and evaluation. Within this perspective, our suggestion will sound like a formula for autarky. It is not. Economic analyses routinely demonstrate that the domestic costs of import restrictions exceed the domestic

gains. If the procedures for reaching decisions got the underlying domestic economics right, the decision in most instances would be against the proposed import restriction.

This does not mean that econometric models would replace processes of public inquiry. The gains from protection have one representation in econometric models -- in the language of output effects, producer surpluses, and so on -- and an equally substantive but different representation in the process of public inquiry -- in the language of (avoided) injury to competing domestic production. The costs of protection have a representation in econometric models -- buyer effects, efficiency losses, and so on -- but so far, not in the public inquiry. The technician's task is to translate the concepts of costs of protection into the language of a public inquiry -- as has already been done for the concepts of gains. We will explain below that this is not nearly the technical challenge that it might at first seem.

The result might not only be better economics; but it might also be a more cooperative attitude among nations. Under present arrangements, a decision not to impose an import restriction has the appearance of a decision favoring the interests of another country against domestic interests. Building national decisions on better economics would reduce this source of animosity. Lester Maddox, governor of Georgia, when asked about prison reform replied, "If we want better prisons the first thing we need is a better class of prisoner." He should have been appointed to the GATT.

The technicalities of the suggestion

Our proposal would change the focus of the investigation from the effect of the proposed restriction on domestic producers of like or competing goods to the effect on the *national economic interest* of the restricting country. By "national economic interest" we mean *the sum of the benefits to all*

nationals who benefit minus the costs to all nationals who lose.[18/] "Injury," as it is defined in trade remedies law, is one half of the national economic interest -- as explained above, usually the smaller half. Antidumping would thus become *public* policy rather than *private* policy.

The suggestion does not imply that each country replace its system of enforcement with somebody else's. The key point is that domestic losses and the losers from import restrictions have the same standing in law and procedures as the gains and the gainers. Australian users of imports should have the same entitlement as Australian regulations and procedures already give to Australian producers of like and competing products, EC users the same as EC producers of like products, and so on. Procedures in each country would retain their national character. In the United States, trade lawyers would organize the persons whose interests were newly enfranchised into client groups that could pay the lawyers to present the information that advanced their interests. EC administrators could legitimately spread their concerns to the interests of user industries, demonstrating to them as well as to import-competing interests that their interests were more duly considered in Brussels than in national capitals. National processes would take interests into account in the way they normally do, but each national process would take more interests into account.

Not a retrofit to present practice. Our suggestion is that the injury investigation be *replaced* by a national economic interest investigation, not that a national economic interest investigation be retrofitted to antidumping cases as they are presently conducted. Canada and the EC now have such public interest provisions: *after* an affirmative determination is reached in an injury test, the administering agency *may take* the public interest into

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18/ The reader should note we are not endorsing the Canadian, the US, or the EC definition of "national economic interest." Our suggestion is for a changed operational definition -- the sum of the interests of all nationals affected by the proposed trade remedy, those who will lose as well as those who will benefit.

account. (EC regulations provide for consideration of the Community interest, but they do not provide explicitly for investigation to determine what it is.)

Such arrangements create a conflict within the law: is the special interest determination of the injury investigation the basis for deciding whether to restrict or not to restrict imports, or is the outcome of the public interest determination the basis? In Canada and in the EC, regulatory practice has resolved the conflict in favor of the special interest. The United States has no public interest provision, but when the user industry is powerful, U.S. practice bends the law to take it into account: administrators enforce smaller antidumping margins when users press hard. Though this is another example of the devious practices that characterize antidumping regulation, the result in these instances is more consistent with the national economic interest (as we define it) than the result that EC or Canadian practice delivers.

Substituting a national economic interest test for the injury test would help to make honest persons of U.S antidumping enforcers. A national economic interest standard would mean that these interests could be the basis of a negative determination.

National economic interest in U.S. trade law. The concept of national economic interest is not novel; it has been a part of trade law for some time. The words themselves appear in the U.S. escape clause: when the International Trade Commission returns an affirmative injury determination, the president is instructed to provide import relief unless he determines that doing so is not in the national economic interest of the United States.[19/] National economic interest is not defined in U.S. law, but its legislative history suggests that the Congress inserted it so that the president would not trade injury to U.S. producers for the "foreign policy" interests of the United States. The stress was on "of the United States" (versus foreigners). The definition of

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19/ The U.S. escape clause gives the president a second alternative, adjustment assistance.

"national" already implicit in U.S. trade law -- U.S. producers of like or competing goods -- was not questioned.

Public interest provision in Canadian law. In 1984, the Canadian Parliament legislated several reforms in Canadian trade remedies. One of these reforms was a response to complaints that Canadian antidumping enforcement focused too much on Canadian producers of like products (Canadian corn growers in the grain corn case, say) and too little on downstream users and consumers (the Canadian feed industry or Canadian poultry, beef, and hog farmers). In response, the Canadian Parliament provided for a "public interest" inquiry as an additional part of the antidumping process.

But the Parliament did not specify -- either procedurally or conceptually -- what "public interest" meant. In its first public interest recommmendation, the Canadian International Trade Tribunal concluded that the public interest was not a basis for rejecting the Canadian corn growers' entitlement to protection under the antidumping law, but that it was the basis only for limiting protection to the level to which the corn growers were entitled. To determine that level, the Tribunal fell back on the long-lived "no injury" concept, the familiar half-economics of trade remedies law. Only after the Canadian corn growers were completely free of the effects of import competition would the interests of any other Canadian be considered.

The protection balance sheet of the Leutwiler Report. In 1983, Mr. Arthur Dunkel, Director-General of the GATT, invited a group of seven eminent persons to study and report on problems facing the international trading system. Their report, often referred to as the Leutwiler Report (GATT 1985), presented an idea similar to the national economic interest concept, which they called the protection balance sheet. But the suggestion lost its impact when its authors made the popular mistake of apologizing for the costs of protection being "intangible" while the benefits were concrete. Nonsense. The cost of prctection is measured in the same dimensions as the gains. If antidumping action pushes up the price of frozen concentrated orange juice,

the effect on an orange juice processor-distributor's costs, profits, and employment will be measured the same way as the effects (in the other direction) on a Florida orange grower. Likewise for the profits and jobs lost in shipping and distribution if imports of cut flowers are restricted. Consumer costs likewise can be converted into national jobs lost. Negotiated export restraints on Japanese cars in the early 1980s caused U.S. consumers to pay an additional $7 billion a year for the same volume of imported cars. Since about 90 percent of U.S. consumer expenditure is on domestic goods and services and 10 percent on imports, spending $7 billion more for Japanese cars means spending $6.3 billion less on U.S.-made things. At the average output in the U.S. economy of $40,000 per employed person, this $6.3 billion comes to 157,500 jobs. In comparison, jobs saved in the U.S. car industry by the import restraints are estimated at 20,000 to 50,000.[20/] Protection is not magic. Consumers cannot spend $7 billion more on one thing without spending $7 billion less on something else. Paying more for the same amount of something is a very bad way to get rich.

A momentum against restriction. The economics of import protection by mandating higher import prices -- the economics of antidumping -- is the same as the economics of the OPEC oil price increases. Citizens of oil-importing countries found many ways to express the *tangible* and very specific effects of these price increases, and many politically impelling ways to express their concerns about these effects. But an injury test disallows such effects and hence disenfranchises all the citizens who are concerned about them. If, say in the United States, the OPEC oil-price increases had been handled as an antidumping case, only the U.S. oil industry would have had a say in what U.S. policy toward the increase should be. Revised as we suggest the antidumping process be revised, every iteration through it would be an opportunity for users of imports to explain how troublesome the proposed restriction would be

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20/ The figures are from Finger (1991d).

-- not just an opportunity for those who would gain from the restriction to explain how unfair and disruptive the foreign exporters are.

Economywide perspective of the Australian Industries Assistance Commission. We brought forward the comparison between antidumping and the OPEC price increases to suggest that if injury investigations were replaced by national economic interest investigations, the process itself would help to inform the public about the costs of import restrictions and consequently generate a momentum against their expansion. In Australia, the Industries Assistance Commission's investigations of the *economywide impact* of Australian protection played this role. The change began, however, with an instinct for good government, not an instinct for good economics. Alf Rattigan, who led the Australian government to change the way it evaluated the impact of protection, was a good-government man and from that he became a good-economics man. The initial change was built on the earlier Tariff Board's mandate to advise on proposed tariff changes. When Rattigan took seriously the Tariff Board's mandate to conduct *public* inquiries and provide *public* information, "economywide perspective" economics evolved more or less naturally from his sense of good government. Later, the economywide perspective economics was made explicit in the Industries Assistance Commission's charter.

The Australian experience shows that good economics and good government can be complements -- even when the issue is trade policy. But Australian experience does not suggest that the transition to either will be easy. Industries that had built their entitlement to protection on the half-economics of the Tariff Board's "economic and efficient production" evaluation of how much protection a petitioning industry "needed" realized quickly the impact that information on the other half of the economics would have. Bill Carmichael, Rattigan's chief-of-staff for twelve years, was, like Rattigan, a good-government man first and derivatively a good-economics man. Carmichael had a master's instinct for recruiting and inspiring good staff who in turn produced sound economic analysis that would withstand the political heat.

More than that, Carmichael was tirelessly aggressive at getting this "dirt" into the hands of politicians who would use it mercilessly. (If your place at the political trough depends on the public not knowing half the economics of what is going on, then to you information on that other half is political dirt.) There comes to mind a saying of former U.S. President Harry S. Truman: "I never give the opposition hell. I just tell the truth on them and think it is hell." The good guys knew how to play hard-ball too. More than that, these good guys had the courage to try to make things better.

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