

# Evolution and Political Economy of Trade Protectionism: Antidumping and Safeguard Measures

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**R**egulation of foreign trade is one of the most important policy issues faced by national governments. In addition to affecting national economic welfare, trade policy is highly distributive in nature, and thus often controversial. Since World War II, the global trend across countries has been towards greater liberalisation, due largely to the multilateral trade regime and a broad application of the most favoured nation (MFN) principle. Nevertheless, pressures originating from both the international and domestic arenas have ensured that protectionism, whether in the form of tariff, antidumping and safeguard mechanism or other non-tariff mechanisms, remains a powerful force.

In the trade policy horizon nations generally choose one or a mix of production subsidies, import tariffs and import quotas or physical restrictions as ways to protect domestic import-competing industries. Yet another option is import-quota-rights accruing to the foreign exporters called 'Voluntary Export Restraints' (VERs), because foreign exporters voluntarily restrict exports to avoid other forms of protection. The US, the EU and other developed countries extensively used this instrument for protecting their textile industry in the early 1930s. The VER mechanism was subsequently institutionalised under the guise of negotiated export restraints as in the Multi Fibre Agreement (MFA), which dominated international trade in the textile sector for the entire last quarter of the twentieth century till it was replaced by the Agreement on Textiles and Clothing (ATC) in 1995.

Despite the general trend towards trade openness, a significant cross-national variation in protection exists and political economists have tried to explain

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Antidumping and Safeguards, often referred to as 'safety valves' for enabling greater liberalisation of trade, have occupied the centre stage of trade protection in both developed and developing countries. However, they may also be the cause of large trade distortions, the very problem that these instruments were designed to solve.

this phenomenon through various analytical approaches. Domestic compulsions partly explain why some countries pursue more liberal policies, while others retain significant barriers to trade. The dual pressure for trade liberalisation on the one hand and protection on the other has forced nation states to evolve various 'emergency' and 'safety valve' protection measures to guard against various contingencies arising out of liberalisation and tariff reduction under the multilateral trade regime. Two protectionist instruments, Antidumping (AD) and Safeguards, often referred to as 'safety valves' for enabling greater liberalisation of trade, have occupied the centre stage of trade protection in both developed and developing countries. However, they may also be the cause of large trade distortions, the very problem which these instruments were designed to solve.

Canada (1904), New Zealand (1905), Australia (1906), and the USA (1916) were among the first countries to adopt Antidumping laws. The Treaty of Rome (1957) adopted Antidumping as a trade policy instrument for the EU. Historically, the US, the EU, Canada and Australia have been the primary 'traditional' users of the antidumping law, accounting collectively for over two-thirds of the antidumping cases initiated between 1990 and 1995. However, after the completion of the Uruguay Round (1986-1994) negotiations and the adoption of Antidumping Agreements under the WTO framework, followed by a larger trade liberalisation process, other 'non-traditional' users adopted antidumping as an instrument of trade defence, surpassing the traditional user group. The number of active users shot up from seven in the 1990s to 41 in 2003. In a dramatic proliferation of the antidumping weapon, developing countries have been filing AD actions against one another, and against members of the

traditional user group. Over the past decade, almost 3300 antidumping cases were investigated and notified to GATT/WTO. Of these almost 50% were initiated by the four traditional user countries/territories and approximately 40% by developing countries. Mexico, India, Argentina, South Africa, Brazil, Korea, Indonesia, Turkey, Philippines and Malaysia have become some of the heaviest users of antidumping measures. Out of more than 3300 investigations initiated between 1987 and 2001, 1700 resulted in definitive measures<sup>1</sup>. Between 1995 and 2003, 2437 AD cases were investigated by the users of this instrument, resulting in 1511 measures during the same period, most of which were imposed by the new users.

Indiscriminate use of the Antidumping and Safeguard instruments, particularly AD actions, is a cause of concern for economists and policy makers due to the inherent weakness of these instruments in terms of their economic rationale. Several studies<sup>2</sup> indicate that the GATT Antidumping Code treats dumping as a legal issue from a protection angle rather than analysing the underlying economic parameters. The studies also indicate lack of objectivity in the substantive and procedural elements of determination, allowing too much discretion to the authorities in determining dumping, injury and causal links. An earlier study by the author<sup>3</sup> suggests that the strongest reason for the proliferation of AD action is the asymmetries and inherent flaws in the AD system itself, which allow national governments and rent seeking domestic industries to take recourse to this instrument more frequently than any other action. The WTO Antidumping Agreement and the corresponding legislation of the WTO members deal, among other things, with the conditions under which AD duties can be imposed, and not with the necessary conditions for dumping to occur. As a trade remedy law it fails to separate and distinguish between market distorting trade practices and monopolisation attempts from normal price behaviour and competitive advantage of exporting firms. Questions have repeatedly been raised about whether the GATT code should take into account the economic considerations and factors that need to be satisfied for dumping to actually take place, i.e. to subject the dumping determination to an economic test before such dumping becomes actionable<sup>4</sup>. It has also been argued that the rise and spread of AD action has a strong political economy consideration, which deliberately allows the weaknesses in the GATT Code of Antidumping to continue. It explains the ability of the code to support the collusive and rent seeking behaviour of domestic industries in the name of contingent protection<sup>5</sup>.

This paper analyses the evolution and political economy of trade protectionism with regard to the two major trade remedy instruments i.e., Antidumping and Safeguards, with particular focus on Antidumping, which has become the most favoured instrument of trade remedy.

The US and the EU, the two dominant trading regions in world trade in the post war period, have greatly influenced the shape of the liberalised international trade under multilateral trading systems in the 20th century. At the same time the political economy considerations and pressure from their domestic constituencies have an overwhelming influence in shaping the course of their internal trade policies as well as the evolution of the protectionist instruments against so called unfair trade. The domestic political economy in these two major trading nations and their influence on the evolution of trade remedy mechanisms under multilateral arrangements is the subject matter of this article. The political economy of Japan, which provides a contrast in terms of its trade policy, institutional framework and response mechanism to trade remedies is also examined.

## The Political Economy of Protectionism

There is a body of literature which describes the evolution of various trade remedy laws in the last century as a response to political economy forces within nation states and to the progressive dismantling of tariff and non-tariff barriers under multilateral trade arrangements starting in the middle of the twentieth century. Numerous factors influence the trade policy decision making of nations. Literature on the subject focuses on the systemic factors, societal preferences and national institutions<sup>6</sup>. Protectionism has also been explained through the 'Demand-side' and 'Supply-side' Approach<sup>7</sup>. Various schools have tried to explain the political economy and domestic lobbying factors influencing external trade policies.

The 'Systemic factors' school suggests that the structure of international geopolitical and economic systems and the presence of hegemonic powers, as well as the compulsion of nation states to continue within these institutional frameworks, influence trade policy and trade defence mechanisms of nations<sup>8</sup>. The presence of a hegemonic power overcomes the collective action and enforcement problems inherent in trade liberalisation, and facilitates the reduction of trade barriers. However, the neo-liberals argue that the declining hegemony of the US has not resulted in the erosion of the international trade regime, which emphasises the importance of international institutions in promoting

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cooperation and facilitating enforcement<sup>9</sup>. Both the arguments underline the fear of defection from international trading arrangements as the sole issue preventing states from restrictive trade. In reality, however, states often choose varying degrees of protectionism for domestic reasons.

Foreign policy and national security objectives do not always militate for trade protectionism. In the postwar period the idea that liberal trade policies helped promote US foreign policy and national security considerations was a powerful force behind efforts by both Democratic and Republican administrations to promote trade liberalisation and fight protectionism. At the same time, societal preferences of interest groups like labour unions, environmentalists and import competing industries influence national governments to take a protectionist stance<sup>10</sup>. The rent seeking behaviour of well organised producer groups and import competing industries generally result in more producer than consumer influence on the political process<sup>11</sup>. The 'Societal' explanation' model explains when firms, labour unions, and other influential groups will advocate free trade, and when they will prefer protectionism<sup>12</sup>. Obviously, import competing firms generally demand protectionist policies, while exporting firms advocate free trade. In general, this 'public choice analysis' states that if most individuals and groups are more interested in their own costs and benefits than those of their country or the world, then it is perfectly consistent with rational behaviour for some individuals and groups, such as labour unions and environmentalists, to favour trade protection. Particular groups, who know that their income under protection will be higher than under free trade, will be willing to spend part of their expected increase in income to campaign for protection. Counter-lobbying by foreign

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interests who might stand to lose from protection faces certain inherent disadvantages.

Becker<sup>13</sup> provides an explanation for why nations end up at neither free trade nor autarchy. He argues that the level of protection of the import competing sector at the expense of the rest of the economy is a function of the expenditure by lobbies for the two sectors. Each segment will spend time, energy and money on political pressure up to the point of balance between the expected cost and benefit of further lobbying.

While the US does have many formal and informal trade barriers today, they are relatively minor compared with the high levels of protection provided by the Smoot-Hawley tariffs of the 1930s. The story is the same for many other countries as well. This dichotomy has led public choice analysts and political scientists to focus on a wider range of considerations such as the roles of ideas and institutions, the objectives of the executive branch, and the emergence of anti-protection interest groups.

Domestic public institutions and their officials also influence the course of trade policy and the trade defence mechanism. The 'Domestic Institutional' explanation of trade protectionism<sup>14</sup> deals with the ability of public institutions and officials to withstand pressure from society and conflicting societal preferences in trade policymaking. Public officials in democracies develop preferences based on the beliefs of their constituencies, as well as their own. How these conflicting preferences are unified into a policy outcome depends on how insulated state officials and policy-makers are from public and interest group pressures. The domestic political institutions constitute the filter through which

demands from societal actors are transformed into policies, whose political behaviour in turn responds to the opportunities and constraints created by these institutions<sup>15</sup>. Hence, domestic political institutions and institutional changes are the key variables in determining the patterns and shifts in trade policy.

The 'demand-side' approach links general economic conditions and pressure group demands to trade policy formation. This approach regards trade policy as the product of competition among societal interest groups that react to changes in market conditions. Macroeconomic factors are often cited as important variables. Employment is the most important macroeconomic factor in generating the demand for protection. On the other hand 'supply side' approaches, more akin to the 'rent-seeking model', deal with the protection seeking behaviour of firms under threat from import pressure.

## Political Economy and Evolution of Trade Protectionism

Most of the trade policy instruments and trade defence mechanisms have evolved in response to progressive trade liberalisation due to tariff reduction and removal of other non-tariff barriers in the developed world, particularly in the US. With the easing of foreign policy pressures on trade policy in the aftermath of World War II, the US provided the political and economic leadership for opening up the international trading system. However, domestic pressures have led to the parallel development of protectionist instruments.

### *The US*

The US trade policy has a long history of legislation and executive-legislative tug-of-war. In the US, foreign policy concerns and the learning from the great depression combined to foster institutional reforms designed to treat trade policy as an instrument of foreign policy, not just domestic policy, and to strengthen the hands of the executive branch relative to Congress in setting trade policy<sup>16</sup>. Simultaneous with the progressive lowering of US trade barriers during the first several decades of the postwar period, the import competing industries, environment and labour lobbies exerted enough domestic pressure on the executive through the Congress to include trade protectionist instruments and use them effectively. Some of the reasons for the slowing of the US movement towards trade liberalisation could be the weakening of both national security concerns and the clout of the executive branch relative to Congress, and the growth of interest group pressures<sup>17</sup>.



The Smoot-Hawley Tariff Act of 1930, the principal statute governing the treatment of imports into the US, reflected the extreme position of protectionism, but the Reciprocal Tariff Agreement Act of 1934 ceded significant power over trade policy to the more insulated executive, with Congress voluntarily limiting its involvement in trade policy making. After the Second World War, Congress facilitated the birth of the ad hoc General Agreement on Tariff and Trade (GATT). However, GATT was never formally ratified, ensuring that its legal status in the US never superceded its domestic law. The subsequent strengthening of the so called 'Escape Clause', allowing import-competing businesses better access to the decision making process, later got the force of law in 1951.

After the Import Trade Expansion Act 1962, which allowed wide ranging multilateral trade negotiating authority to the President for the GATT Kennedy Round (1963-67), continued domestic lobbying and congressional influence brought in the trade adjustment assistance programme. This presaged the famous Super 301 by authorising the executive for the first time to retaliate against trading practices deemed unfair. The law stipulated that the President could not negotiate tariff reduction on products where the Tariff Commission had made affirmative ruling for damages. It also created the important Office of the 'Special Trade Representative' (STR) under the control of Congress, which was meant to lend a sympathetic ear to injured business in the policy making process and protect domestic industry interests. The STR played a very important role in the evolution of the Short Term and Long Term Agreements in Textiles and Clothing, into a Multifibre Arrangement (MFA) in the early 70s.

The Trade Act of 1974 provided the President and the executive more flexibility to negotiate the Tokyo Round (1974-79) and reduce trade barriers, while ensuring Congressional control on the degree of openness and on 'fast track trade negotiations' for reciprocal tariff reduction. The other provision in this act was the Super 301, which mandated the President to retaliate against unfair trade practices.

The 1979 Trade Agreement Act enacted with the primary purpose of inserting some of the provisions of GATT Tokyo Round into US law, introduced important cuts in American trade barriers. However, retaliation against unfair trade practices got a shot in the arm with the strengthened 'Section 301' to compensate injured business, along with a reinforced 1916 Antidumping Law, reflecting the protectionist stance of the political economy. The Reagan Administration got two important laws passed in the 80s – the Tariff and Trade Act of 1984 and the Omnibus Trade and Competitiveness Act of

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1988, which would give the President more power and flexibility to negotiate multilateral trade arrangements in the Uruguay Round. However, these acts also transferred the control over the Super 301 provision and retaliation from the President to the United States Trade Representative, the implementation of which required such trade discouraging measures as countervailing and antidumping regulations.

When Congress approved both the NAFTA and WTO Agreements, the debate over the same created an unprecedented coalition among labour groups concerned with protecting blue-collar jobs, environmental activists protecting endangered species, import-competing firms, and isolationist groups guarding American sovereignty against further expansion of free trade. While these treaties were being discussed, the Antidumping Law of 1916 was being used to great effect by import competing industries. Between 1990 and 1993, 212 AD cases were brought before the International Trade Commission, out of which only four were rejected.

In the final analysis, the US trade protectionist developments show a mix of the 'systemic', 'societal' and 'rent seeking' models discussed earlier; and the institutions evolving as a response to these factors have in turn contributed to the evolution of protectionism.

### *European Union*

The political economy approach to trade policymaking highlights that policy decisions are conditioned by the close interdependence of economic problems, political forces and institutions. Both the EU and the US are developed market economies. Hence their economic problems are on the whole

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similar. Therefore, in form and substance their trade protectionism and trade remedy laws followed similar patterns in the pre- and post war period, largely influenced by powerful domestic interests in the textiles, steel and agriculture sectors. However, the political systems and the institutional set up in the two were fundamentally different, the US being a powerful state with a hegemonic world role and a full market economy, while the EU was an inward-looking incomplete state aspiring to a political unity that it has not achieved so far<sup>18</sup>.

The greatest political economy factors of the European community, in the years after the formation of the EU and Common European Market, have been its concern for consolidation and its preoccupation with intra-European affairs including sustainable growth, generating employment, greater social cohesion, the Common Agricultural Policies (CAP) and environmental protection including culture and landscapes. These have been the driving forces for the formulation of the intra-EU and external trade strategies and its trade protection measures. While supporting trade liberalisation and tariff reduction in all sectors on MFN basis, the EU vehemently opposed any kind of liberalisation in its agriculture and textile sectors. However, while faced with the prospect of liberalisation in these traditional sectors, its reaction has been protection under trade remedy laws like antidumping and safeguards. The European Union industries, with their large labour force, have managed to obtain selective protection through protectionist devices such as the MFA<sup>19</sup>.

Antidumping measures emerged as a major policy instrument in the EU in the background of growing demand for protection against low-cost imports from emerging economies. Slower growth made European governments

sensitive to the displacement of domestic production by emerging Asian exporters. The Treaty of Rome adopted Antidumping as a trade policy instrument for the EU. Under the treaty the EU Commission could take trade remedial measures like antidumping, but member states could not. Until the mid 80s, AD duties remained relatively unused within the trade policy arsenal of the EU, but the development of the Single Market obliged member states to abandon their 'shadow policies' and look to centralised trade policy instruments such as antidumping duties to protect their domestic industries from international competition, promoting a relatively higher level of transparency among EU member states.

The EU's trade policy and well organised defence mechanism against what it perceived as unfair trade owes much to the influence of the protectionist instruments and institutions that the US developed in the 70s and 80s. However, lacking as it does the political cohesion of a state, it has not made significant use of the 'special instrument' for protection against illegal practices of trading partners (patterned on Section 301 of the US), and the later Trade Barriers Regulation, 1994. These instruments were designed not only to protect the EC market but also as an instrument of commercial offence, to open third country markets. Until 2002, the EC also had a separate trade policy instrument to protect its steel and coal sector against dumped imports from countries not members of European Coal and Steel Community. Since the instruments and safeguards provisions under GATT required elaborate examination of the sector specific policy of the national governments, negotiated settlement with the trading partners, and compensation, recourse to them has been rare in EC<sup>20</sup>. Since the early 80s, in response to greater trade liberalisation, the most preferred trade defence instrument in the EC trade policy arsenal has been recourse to antidumping actions at firm level.

The Article 133 Committee of the EC, which is responsible for all trade remedy legislation, is composed of representatives from the EU Member States and the European Commission. Its main function is to coordinate EU trade policy, and it discusses the full range of trade policy issues affecting the Community. The European Parliament has a more limited role in formulating trade policy, mainly in major treaty ratifications that cover 'more than trade', though the draft Constitutional Treaty of the EU provides for a major extension of the European Parliament's power over trade policy. The delegation of much of the powers of trade negotiations to the European Trade Commission, outside the supervision of the European Parliament, has largely insulated it from domestic

political pressure.

However, societal pressure groups like labour unions and domestic interests in the form of CAP and intra-EU trade interests have forced protectionist behaviours in those sectors, which have remained largely non-negotiable in spite of tremendous international pressure. In addition, the EC Council of Ministers (a political body of trade ministers from the member countries, and the main legislative body of the EU) has in principle the sole authority and competence to impose definitive duties. As the council members have to address the demands and pressures of their constituencies, definitive action under the EU trade remedy law has remained with the political leadership of the EU, unlike the US where the Congress has delegated these powers to the executive. Lack of political cohesion makes the system more susceptible to political lobbying and pressure. There is also a view that the European Commission, like any organisation demonstrating its usefulness and expanding its turf, pressed forward with antidumping actions to pre-empt member governments from responding individually to their industries' increased demand for protection<sup>21</sup>.

## Japan

Japan represents a very different political economy and institutional framework from those of the US and the EU. Japan has been one of the major defenders of trade remedy laws in other countries. Between 1995 and 2003 Japan faced 106 antidumping investigations against its products and they have resulted in 76 definitive measures against it. However, cases where Japan is a complainant have been rare – only five lawsuits until 1996<sup>22</sup>, and two investigations of antidumping complaints after the adoption of the WTO Agreement on Antidumping. Miyazaki<sup>23</sup> argues that such measures are unfamiliar in Japanese society, a non-litigious society, in which people prefer to settle conflicts out of court. In addition, very few Japanese industries actually suffered from import pressure until the mid 80s, due to low imports of manufactured products. Even when the ratio of manufactured goods to the total imports of Japan grew to 56.9% by 1996, much of it appeared to be intra-firm trade conducted by Japanese firms, particularly in consumer electronic goods. It has therefore been argued that demand side factors are more relevant in Japan's trade policy preference till the mid 80s<sup>24</sup>.

However, supply side factors have also played a role in Japan's policy choice. Government agencies in general and the Ministry of International Trade and Industry (MITI) in

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particular have a significant role in policy preference and the evolution of a different political economy in Japan. The Japanese government has intervened in the market to sustain a sound and steady development of particular industrial sectors. The close link between the government and the domestic industry through formal and informal means has guided the trade policy and its instruments in Japan all along.

Until the adoption of the WTO Antidumping Code in the mid 90s, the MITI approach involved direct intervention for swift resolution through inter-industry meetings and negotiated settlements, rather than the use of instruments like antidumping. These methods both satisfied growing demands to protect declining industries, and helped it avoid criticism of import restrictions by adopting ambiguous 'grey area' measures that fell between free and managed trade<sup>25</sup>.

Although the law providing for antidumping actions was enacted as far back as in 1920s, amended in 1951 and the operational part enacted in 1967, MITI was reluctant to operationalise the law. In the 80s, industry bodies like the Japan Textile Industry Federation and Federation of Japanese Economic Organisations, affected by the opening up of the internal market to manufactured goods and under significant import pressure, took the initiative and formulated a draft guideline in consultation with the Ministry of Finance, and the law was operationalised in 1986. However, MITI's bureaucrats still seek to settle dumping cases through inter-industry meetings, bilateral VERs and traditional 'administrative guidance'. Formal AD complaints are lodged only after the industry associations and the government bureaus have investigated an injurious-import complaint and are convinced of its legitimacy.

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Japan's policy in the agriculture sector, arising from developments in its political economy, is much more complex than that of its manufacturing sector. The post World War II Occupation Forces and the Japanese government together reformed the land-holding pattern, transferring ownership of 5 million acres of agricultural land from non-farming landlords to the former peasant tenants. However, far from increasing food production, the small holdings proved unsustainable, and farmers began to migrate to other sectors. This led to an unprecedented dependence on agricultural imports, mainly from the US, which further eroded the agriculture sector<sup>26</sup>.

The beneficiaries of this policy were US corporations with an interest in exporting agricultural surplus, major Japanese corporations, including zaibatsu trading companies with their complex networks that largely control agricultural imports, Japanese business organisations eager to expand their export market for manufactured goods, and financial and corporate combines led by the Federation of Economic Organisations<sup>27</sup>. Three agricultural surplus-commodity agreements were signed as part of the drive to 'liberalise' agricultural imports<sup>28</sup>. The US also influenced Japan's agricultural import policy through its food-aid policy, staging a nationwide campaign jointly with the Japanese government to encourage the Japanese to change their staple from rice to bread<sup>29</sup>. The liberalised multilateral trading system under GATT agreements also benefitted the major multinational corporations in Japan<sup>30</sup>. In 1995, Japan became the world's largest importer of food grains, soybeans, pork and poultry; and the largest net importer of agricultural products, with the US enjoying a 40% market share of Japanese food imports<sup>31</sup>, more than US\$6 billion annually<sup>32</sup>. However, 'rice' was still a very sensitive

issue, and the tariff was set at a prohibitively high level of about 450%. Under the Uruguay Round, Japan finally agreed to a minimum access formula of gradually increasing rice imports from 4% to 8% of its annual domestic consumption over a six-year period starting in from 1995<sup>33</sup>. Immediately after the lifting on the ban on rice imports, the government announced a sweeping reform plan to raise the international competitiveness of Japanese agriculture<sup>34</sup>.

Japanese farmers have at last awakened to the fact that they have been manipulated in a variety of ways by both the government and the corporates. The post Uruguay Round agricultural trade liberalisation measures triggered protests across the country against deleterious governmental agricultural policies that negatively affected both consumers and farmers in Japan. The grassroots level popular organic farming movement has led to a rethinking of economic, ecological, socio-political and cultural values, and a process of creating new social relations<sup>35</sup>.

## Evolution of Protection Measures

Tackling uncomfortable imports and sudden surges of imports had been a matter of concern for nation states prior to GATT. The issue was handled through various measures like VERs and Orderly Marketing Arrangements and other tariff and non-tariff means. The issue of contingent protection against sudden rise in imports injurious to domestic industries due to progressive lowering of tariff and non-tariff barriers under the multilateral arrangement was incorporated into the GATT charter through the 'Safeguard mechanism' under Article XIX of GATT.

GATT framers realised very early in the multilateral trade regime that trade liberalisation would require periodic adjustment to take into account specific industry problems. The original GATT agreement provided that tariffs reductions that led to such problems could be renegotiated. Over time, countries whose tariffs had been bound under GATT commitments have used different instruments to deal with troublesome imports: re-negotiations were virtually replaced by negotiated VERs, which in turn gave way to antidumping. The safeguard mechanism built into the GATT framework, which was supposed to be used to evoke political support within the domestic constituencies for greater trade liberalisation, gradually turned into major protectionist instruments in the hands of the trading partners, being used more as retaliatory actions than true contingent protection measures.



## *GATT Safety Valves*

Article XIX on 'Emergency Actions on Import of Particular Products', generally referred to as the 'escape clause' or the 'safeguard clause', provided a country that had an import problem with quicker access to the redressal mechanism. The Safeguard provision of GATT 1947 contained provisions for handling troublesome increase in imports in the form of new restrictions and re-negotiation of compensating agreement with its trading partners. Under this article, if the imports caused or threatened to cause serious injury to domestic producers, the country could take emergency action to restrict those imports. If subsequent consultation with exporters did not lead to satisfactory compensation, the exporters could retaliate. GATT also included a long list of other provisions that allowed import restrictions, and over time, these provisions have proven to be quite fungible. Whatever the reason behind the government's need to raise tariff rates, the action could be given legal cover under any number of provisions. These actions were subject to MFN principles i.e. tariff reduction or increase or imposition of import restriction had to apply to imports from all countries.

The GATT provision on emergency action required the country taking emergency action to consult the exporting countries before initiating action but allowed action to come first in 'critical circumstances'. During GATT's first decade and a half, most actions by countries opening their economies to international competition were re-negotiations under Article XXVIII, supplemented by emergency action under Article XIX. But gradually the action shifted over time towards a higher proportion of emergency actions. By 1963, every one of the 29 GATT member countries that had bound tariff reductions under the GATT had undertaken at least one re-negotiation – in total 110 re-negotiations<sup>36</sup>. Over time these provisions were replaced by others like negotiated VERs, as in the textiles sector under MFA.

However, over the years, the GATT-contracting parties expressed dissatisfaction about the safeguard provisions, and the Tokyo round negotiations singled out the improvement of the multilateral emergency safeguards system as a priority area for reforms. A special committee of the GATT continued negotiations on this issue for years. Meanwhile, VERs, bilateral arrangements and antidumping duties became increasingly common devices for protection of domestic industries, with antidumping becoming the 'road most taken'<sup>37</sup>. Between 1958 and 1987 only 26 cases of safeguard-like actions were taken whereas 1,558 antidumping actions were initiated between 1980 and 1989. Antidumping allowed derogation of MFN

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principles and singling out of particular exporters for action. The action under AD was unilateral and required no compensation or re-negotiation as in the case of safeguards. Moreover, the injury test was easier to prove in AD investigation (material injury and unfairness), than in Safeguards (serious injury). Threat of formal action under the antidumping law also put pressure on exporters into accepting VERs in the form of 'Price Undertakings'.

The Uruguay Round negotiations made the safeguards system more flexible. The non-discrimination rule can now be relaxed in exceptional circumstances. However, the injury test, i.e., 'serious injury' or 'threat of serious injury', to be demonstrated on the basis of 'objective evidence', remained a requirement. Moreover, the new safeguard code does not foresee any compensation and the retaliation allowed during the first three years of the measure can only be applied provided the safeguard measure has been taken as a result of an absolute increase in imports. An important achievement of the new safeguard agreement is that it stipulates the phasing out of the 'grey area' measures of protection like VERs, and 'orderly marketing arrangements'. But this could prove difficult as most grey area measures are disguised and not subject to official notification or publication. Thus, AD action continues to be the easier option and its use is unlikely to diminish.

## *Antidumping as Contingent Protection Measure*

Antidumping as a contingent protection measure has been around in the world trading system since the early twentieth century<sup>38</sup>. The early laws of Australia and the US followed the spirit of competition of their times, addressing concerns of monopolisation by foreign firms and injury to domestic industry. Subsequently the focus of antidumping policy

In response to pressure from developed countries, the antidumping code was amended twice. The changes made in the Tokyo and Uruguay rounds enabled countries to apply antidumping to a much broader range of cases and contributed to rapid increase in the use of antidumping initiations and policies in the subsequent years.

changed from *monopolisation* to the broader concern of *fairness*, when the US enacted a new law in 1921. Soon other countries included the fairness concept in their antidumping laws. Under the broad concern for fairness it was deemed unfair that a foreign firm or cartel, operating from a protected home market, could subsidise low-priced exports through the gains from high-priced home market sales, or that it could export production surplus below cost in time of slack home demand. Thus the political economy considerations and domestic lobbying powers became more significant factors in the trade protection mechanisms under the garb of defence against unfair trade. As described in previous sections, the shift from other measures to antidumping in the US and the EU was propelled by the domestic pressures of the times.

The antidumping rules included in the 1947 GATT agreement were based on the national antidumping laws, especially that of the US, with the objective of restraining national antidumping actions, rather than encouraging new entrants to GATT to set up their own antidumping system. As the tariff rates were lowered over time following the original GATT agreement, antidumping duties were increasingly imposed. With the inadequacy of Article VI of GATT to govern their imposition becoming increasingly apparent, contracting parties to GATT negotiated a more detailed code, the Agreement on Antidumping Practices, in the Kennedy Round, and most existing national antidumping laws were brought in line with the GATT rules after 1967. However, the US never signed the Kennedy Round Code, and as a result, it had little practical significance. The EU, when it was founded in 1957, had adopted antidumping rules, at the same time abolishing antidumping action between its member countries. Antidumping became a major issue in international trade

during the 70s and 80s, as it gradually took the place of other trade barriers that were being dismantled in the context of trade liberalisation.

The 1947 GATT Agreement defined 'dumping' as the practice whereby the 'products of one country are introduced into the commerce of another country at less than the 'normal value' of the product' and permitted antidumping duties only when such action caused or threatened 'material injury' to the domestic industry. However, in response to pressure from developed countries, the antidumping code was amended twice. The amendments made in the Kennedy round required that the dumped imports be 'demonstrably the principal cause of injury' for the duties to be imposed. However, the Tokyo Round revised the position again rendering such demonstration of principal cause of injury unnecessary and expanded the definition of 'less than fair value' to capture not only price discrimination but also below cost prices. The Uruguay Round further changed the causal aspect of dumping and injury to 'proximate cause' of injury from the original concept of 'demonstrably the principal cause of injury'. The changes made in the Tokyo and Uruguay rounds enabled countries to apply antidumping to a much broader range of cases and contributed to rapid increase in the use of antidumping initiations and policies in the subsequent years.

### *Uruguay Round and Antidumping Negotiations*

In the Uruguay Round negotiations (1986-94), the US sought to strengthen the Antidumping Code by addressing some of the problems that had become apparent in the past decade<sup>39</sup>. These included issues like circumvention and regulation of the procedures used in antidumping action in view of the increased use by developing countries. While many trading partners actively sought to weaken the code to reduce existing disciplines on their dumping, US negotiators supplemented their efforts to avert these changes with arm-twisting legislation, including the Super 301, forcing opposing developing countries like India into submission. However, the net result was a new code, which in general weakened the existing discipline on dumping.

According to the GATT secretariat, the Uruguay Round achieved greater clarity and more detailed rules on the methods of determining that a product is dumped, the criteria for determining that the dumped import caused injury to the domestic industry, the procedure to be followed in initiating and conducting investigations, and the implementation and duration of AD measures. In addition, the new agreement clarified the role of the dispute settlement panel<sup>40</sup>. However,

the Uruguay Round Antidumping Agreement made no attempt to correct the weakness of the economic principles on which GATT/WTO treatment of antidumping is based. It failed to restrict the collusive and rent seeking behaviour of domestic industries taking the shelter of this instrument in the name of contingent protection. The investigation process remained heavily loaded against the foreign firms, and it failed to bring in adequate discipline to create a level playing field. The new code also failed to distinguish between 'international price discrimination' and 'below cost pricing' without predatory intention from those which intended predation and monopolisation and required action. The Uruguay Round's attempt to discipline the imposition of new restriction depends entirely on procedural, not substantive constraints<sup>41</sup>. The weakening of the new code and the ambiguities built into the very definition of 'dumping' and 'material injury' without providing any guiding principles for the same have led to the proliferation of AD initiations worldwide in the post Uruguay Round era. These ambiguities have also enabled and provoked trade conflicts, as antidumping has been used by members to retaliate against other countries' measures.

### ***Post Uruguay Proliferation of Antidumping Actions***

The world witnessed a dramatic increase in AD activities during the 1980s and 90s. During the 80s, about 1600 cases were filed, twice as many as in the previous decade. While the antidumping regime of the 70s and 80s was dominated by the developed countries, the 90s saw rapid adoption of AD policies by the developing countries, especially after the Uruguay Round (Exhibit 1).

In 1990, developing countries accounted for less than 10% of

the AD cases initiated, but by 1995 they accounted for 43% and by 2000 the figure had reached 50%. The number of countries that had adopted GATT antidumping codes and implemented antidumping legislation went up from 25 in 1994 to 144 in 2002 – a surprising number of whom had no prior experience, with another 30 countries waiting for accession to WTO (the WTO Agreements require that all must join the Antidumping Agreement and ensure adoption of conforming legislation). Most of the developing countries have informed WTO of their AD regulations. Pervasive use of AD actions by both developed and developing countries while attempting to lower other forms of trade restrictions may be viewed as the emergence of a new form of protectionism in the garb of 'contingent protection' or 'safety valve' protection.

A notable feature of the proliferation of AD laws in the developing countries has been the changing pattern of the targets of this instrument. Companies of the developed economies, particularly the US, have increasingly become the targets of antidumping measures worldwide (9%), trailing only China (11%)<sup>42</sup>. Developing countries have also started using these instruments against each other. Between 1995 and 1999 two third of the cases initiated by the developing countries were against other developing countries or economies in transition. Since AD actions have significant trade chilling effects<sup>43</sup>, this is likely to significantly affect the trade between developing countries. Alarmed at the proliferation of antidumping actions, which could distort global trade, several developing countries including India raised the issue of implementation of WTO antidumping codes in the Doha ministerial conference. However, the proliferation of AD might have helped developing countries to move

<b>Exhibit 1      Initiation of Antidumping Actions 1995-99 – Developed vs Developing Countries</b>				
Initiating Economies	Affected Economies			Total
	Developed Countries	Developing Countries	Transition Economies	
Developed Countries	126	244	129	499
Developing Countries	252	258	201	711
Transition Economies	4	0	4	8
All Members	382	502	334	1218

Source: WTO Annual Report, 2001

The number and proliferation of antidumping measures do not provide an adequate picture of the extent of the impact of antidumping action on trade. Frequent investigations, even if the complaints are finally rejected, amount to a kind of harassment of the defendant because of the uncertainty and cost of such actions.

towards a more liberalised regime<sup>44</sup>, and as long as the traditional users of the AD system continue to use it against developing countries, it is useful for developing countries to have the ability to hit back<sup>45</sup>.

## Patterns of Protectionist Measures and their Implications

The rise in the use of trade remedial measures like antidumping as a protectionist instrument and the pattern of their use indicates the policy response of the nations to increasing demand for veiled protectionism in the face of growing trade liberalisation under the multilateral trading system. However, the impact of such measures on the domestic, as well as international trade and consequent policy responses has intrigued trade analysts. The number and proliferation of antidumping measures in force do not provide an adequate picture of the extent of the impact of antidumping action on trade. Frequent investigations, even if the complaints are finally rejected, amount to a kind of harassment of the defendant because of the uncertainty and cost of such actions. Trade literatures analyse the i) Welfare Effects; ii) Trade Effects; iii) Price Effects; and iv) Tariff Jumping FDI Effects of antidumping actions.

A study of the impact of antidumping action by Tharakkan<sup>46</sup> showed high import incidence for the US and low incidence for the EU. However, the latter could be ascribed to the stringency or the trade diverting effect of the measure itself. The Commission of the EU argues that although the absolute value of trade covered by definitive antidumping measure in 1996 was €2,919 million, it affected only around 0.6% of the total imports of the Union<sup>47</sup>. However, subsequent studies

indicate that in the case of the EU, imported quantities of the products affected by the antidumping action fell by 36% in the third year after initiation and prices increased by 12% in the fifth year. According to one study<sup>48</sup>, imported quantities declined by 73% and unit values increased by 32.7% for imports with high-calculated dumping margins. Prusa<sup>49</sup> corroborates this through regression analysis, which found that antidumping has a larger impact on quantities than on prices. He finds that an affirmative AD determination causes quantity to fall by almost 70% during the first three years following the duty. Even when the case was rejected, the imports fell by 15 to 20%.

In an analysis of US antidumping duties levied up to 1995 and subjected to sunset review subsequently, Moore<sup>50</sup> found indications that foreign firms with high margins had permanently left the US market, leaving domestic firms unconcerned about possible foreign re-entry into the market. Vandebussche et al<sup>51</sup> support this 'trade diversion' effect of antidumping actions.

The effects of antidumping action on the strategic behaviour of firms and governments and its implications for profits, employment and welfare are now receiving increasing attention. Research indicates that in certain sectors (e.g. electronics in the EU) there has been a coincidence between antidumping action and onward investment, although other factors (such as the expansion of the EU and availability of subsidies) cannot always be disentangled<sup>52</sup>. Tharakkan suggests that Antidumping as well as other policies in the EU and US have substantially increased the incidence of manufacturing investment by Japanese electronic firms these two regions. Belderbos<sup>53</sup> finds that an affirmative AD decision raises the FDI probability from 19.6% to 71.8% in the EU but only from 19.7% to 35.95% in the US. However, using antidumping rules for triggering foreign direct investment and employment is viewed as a 'beggar-thy-neighbour' policy.

Furthermore, antidumping laws produce a chilling effect on imports, especially since both the probability and the amount of duty are relatively high. For example, the proportion of affirmative outcomes of antidumping investigations between 1987 and 1997 was 51% for all countries, and more than 60% for the US, Canada and the EU<sup>54</sup>. The percentage of investigations leading to provisional measures – which may be equally chilling to foreign exporters – is 60% on average, and more than 80% for the US and the Canada. Average *ad valorem* AD duties lie between 30 and 40%, which was higher than the average import tariffs.

US antidumping/countervailing duty action, second only to



the MFA among the welfare-loss generating protectionist instruments, is estimated to lead to welfare losses of up to US\$ 4 billion annually. Though these figures look small compared to the GNP of the US, they grossly underestimate the effects of the protectionist measures as they fail to take into account the self-imposed restraints. The cost of such measures by countries like Mexico and Argentina are likely to be a significant proportion of their GNP. Three-quarters of all antidumping filings are consistent with the 'club effect' and half are consistent with 'retaliation incentives' indicating that political economy factors play a major role in the antidumping mechanism<sup>55</sup>.

## Post Uruguay Response and Negotiations

The US position opposing any new AD negotiation was reflected in subsequent WTO ministerial conferences, and was one of the factors in the breakdown of the Seattle ministerial conference in 1999<sup>56</sup>. The EU, the second largest user of antidumping actions, also opposed any move to make major changes to antidumping agreements. The Bush administration ultimately bowed to international pressure and agreed to antidumping being recognised as an important implementation issue in the Doha round. However, Congress passed the Trade Promotion Authority legislation in 2002, instructing the President to preserve the ability of the US to enforce rigorously its trade laws, including the antidumping laws<sup>57</sup>. Although the issue remains unresolved, the new negotiation provides an excellent opportunity for far reaching changes to plug the serious flaws in the rules and investigation procedures.

## Political Economy and Institutional Mechanism for Trade Remedy: US, EU, and Japan

As has been stated earlier the US shift from other measures to antidumping was propelled by the strong political economy forces and the desire of Congress to regain control over trade policy from the executive. Bodies like the United States Trade Representative (USTR) and the International Trade Commission (ITC), which are directly under congressional control and well insulated from executive intervention, ensure that AD investigation and action is largely out of executive control and presidential veto. One study<sup>58</sup> indicates a pattern of insider buying of the stocks in two months preceding the filing of AD complaints, indicating a lack of transparency and the creation of perverse incentives.

US antidumping/countervailing duty action, second only to the MFA among the welfare-loss generating protectionist instruments, is estimated to lead to welfare losses of up to US\$ 4 billion annually. These figures grossly underestimate the effects as they fail to take into account the self-imposed restraints.

In the EU, the Directorate-General in charge of External Relations of the EC is involved in all stages of the investigation including the decision to initiate a proceeding. In principle, the Council of Ministers, the main legislative body of the EU, has the sole authority and competence to impose antidumping duties. Before taking a final decision through a vote, the Council interacts with the advisory board consisting of the representatives of member countries, through the EC Trade Commission, which administers AD actions. Therefore, the system is not free from political and industrial lobbying by the interest groups and the decisions of the EC in AD cases do indicate domestic industry bias to a very large extent.

In comparison with the US and EU, the Japanese administrative institution for antidumping has been weak and insufficient. There is no permanent organisation that has the responsibility for enforcing antidumping procedure in Japan<sup>59</sup>. Furthermore, an investigation is not conducted by a sole agency but by a body comprising officials from plural agencies. Thus, when an investigation is to be initiated, an investigation body is formed by several officials from the MOF, the Ministry that has jurisdiction over the industry concerned, and MITI. Unlike the US system in which the DC and ITC have jurisdiction over the separate procedural parts, the MOF and MITI have overlapping jurisdiction on AD proceedings. The Japanese system of intra-industry consultation and counselling by the bureaus has a sobering effect on possible protectionist lobbying.

## Conclusion

Domestic political economy appears to have an overwhelming influence on the protectionist policies of nation states in

The GATT/WTO rules do not distinguish economically sound trade restrictions from ordinary protection. The challenge for national governments is to identify and adopt a trade remedy system that makes economic and political sense, incorporating dimensions that advance the national economic interests and help integrate the economy into the global system.

international trade. It has been established that the so-called 'safety valve' mechanisms built into the multilateral trading system in order to achieve broad political consensus in the domestic constituencies have actually turned into major trade protection mechanisms under the garb of trade remedy provisions. The political economies in the home countries are the driving forces behind the building up of the institutional and legal frameworks, which allows political pressure and lobbying influence of varying degrees on the political and executive leadership to pursue such protection measures.

GATT/WTO provisions for these contingency protections in the form of antidumping action and safeguard provisions are fungible. At different times members use different instruments to handle the protection issues depending upon the political economy considerations and domestic lobbying powers. The institutional mechanism built to handle the trade interests of the domestic constituencies also largely depends upon these considerations. At the same time, the GATT/WTO rules do not distinguish economically sound trade restrictions from ordinary protection. The challenge for national governments is to identify and adopt a trade remedy system that makes economic and political sense, incorporating restrictions that advance the national economic interests and political dimensions that help integrate the national economy into the global system.

*The views expressed are purely academic and the personal views of the author and in no way reflect the Government of India's views or position on the subject.*

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Reprint No 05404