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**ANTI-DUMPING AS INSURANCE  
POLICY: WHAT THE "GREY AREA"  
MEASURES TELL US**

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# Anti-Dumping as Insurance Policy: What the “Grey Area” Measures Tell Us

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## ABSTRACT

A general argument in support of trade remedies is that they act as an insurance policy that allows countries to take on deeper commitments in trade negotiations than they would otherwise be willing to make. This paper reviews both the negotiating history of major trade liberalization initiatives and the largely unexploited history of the use of so-called “grey area” measures in the pre-WTO era to manage pressures on domestic economies emanating from international trade to shed light on the extent to which this argument holds true. The negotiating history makes clear that across-the-board liberalization in the absence of perfect knowledge about the possible consequences in terms of trade pressures depends on the availability of contingent protection. Economic theory demonstrates that such an insurance role is welfare enhancing. The history of use of grey area measures in the pre-WTO period as successive waves of trade liberalizing initiatives were being implemented to manage excessive pressures in a context where the trade flows were not characterized as “unfair” but simply disruptive makes clear that they were clear substitutes for trade remedies. This history provides the linchpin that allows the identification of the on-going use of trade remedies as an implicit continuation of the management of transient trade pressures. While the use of trade remedies may be defended as welfare enhancing on these grounds, with the individual instances of application of measures analogous to claims on a pre-existing insurance policy, the paper concludes that the design of trade defense laws and the emphasis on “unfair” trade in their justification, makes them ill-suited for this role.

**Keywords:** Trade remedies, anti-dumping, insurance, grey area measures.

**JEL Codes:** F13



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## ABBREVIATIONS

ADA	Anti-dumping Agreement	VRA	Voluntary Restraint Agreement
OMA	Orderly Marketing Arrangement	WTO	World Trade Organization
VER	Voluntary Export Restraint		

# 1 INTRODUCTION

Trade rules under the World Trade Organization (WTO) promote trade liberalization but condemn “dumping”. Conversely, economists, who also generally promote trade liberalization, almost universally condemn “anti-dumping”.

This curious state of affairs reflects three general difficulties.

First, dumping as defined under the WTO rules includes both behaviors that might legitimately be condemned under established economic theories – for example, predatory practices which run afoul of competition laws – and other behaviors that are consistent with generally accepted competitive practices of firms that fall under the general rubric of price discrimination.<sup>1</sup> Since both predatory practices and ordinary competition inflict injury on firms that lose out, the injury test required under the Anti-Dumping Agreement (ADA) does not restrict the application of the instrument to cases that fall into the first mentioned category.

Second, the application of anti-dumping does not involve a motive test. Accordingly, the reason for the behavior that is punished by the application of anti-dumping measures is never explored in the course of investigations. Case handlers may suspect and even be able to identify predatory intent, but this does not enter the public record. In fact, the *only* motive that is transparent in the drama that is an anti-dumping investigation is the desire of the petitioning industry for protection.

Third, in the real world institutional setting in which anti-dumping practice has unfolded, the anti-dumping instrument is effectively substitutable for two other WTO instruments: (a) the safeguards instrument,<sup>2</sup> which allows Members to temporarily restrict imports of a product in cases where a surge in imports injures or threatens to injure a domestic industry; and (b) the provisions to renegotiate commitments.<sup>3</sup> It has been widely argued that anti-dumping is used in lieu of these alternatives to deal with import surges because the design of anti-dumping makes it more attractive to both governments and industry.<sup>4</sup> In particular, the safeguards instrument:

- cannot be targeted at imports from a particular country but rather must be applied on a most favored nation basis,

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<sup>1</sup> Ethier (1982: 489) observes that “the formal theory of dumping essentially consists only of the theory of monopolistic price discrimination between two markets.” For a recent empirical test of the extent which predatory dumping plays in the EU’s anti-dumping practice, see Bienen, Ciuriak and Picarello (2013).

<sup>2</sup> GATT Article XIX – Safeguards.

<sup>3</sup> GATT Article XXVIII – Modification of Schedules.

<sup>4</sup> See, for example, Stiglitz (1997); also, the de facto role of anti-dumping as safeguard policy since the 1980s is elaborated in Finger, Ng and Wangchuk (2001).

- allows countries whose exports are restrained to seek compensation through consultations and in the event that none is forthcoming to retaliate by raising tariffs on the country imposing the safeguard;
- requires that the measures be progressively liberalized while in force; and
- provides, under the cumulation rules for safeguards against developing country imports, terms which are more generous to the developing country.

It is left to empirical research to work out from the published factual case material and adduced circumstantial evidence what the effect of anti-dumping as applied actually amounts to. The empirical work has not been kind to the instrument; indeed, the criticism has typically been scathing: For example, Leidy and Hoekman (1990) stated that “Most international economists would agree that the rationale for an AD law and AD procedures is very weak, probably nonexistent”. Finger (1992) found that anti-dumping is little more than “ordinary protection with a good public relations program”. Prusa (2001) observed that anti-dumping is “universally decried by economists”. And Grossman and Sykes (2006) concluded that “antidumping laws make so little economic sense in general that it is difficult to offer any guidance as to their ‘proper’ administration.”

Anti-dumping has been critiqued in a vast number of papers addressing the direct effects of measures on current trade flows (see Blonigen and Prusa 2003 for a survey); on the strategic behavior of firms, (for a recent discussion see Egger and Nelson, 2010); and, when analyzed in terms of heterogeneous firm trade theory, on the dynamic performance of protected industries (Gormsen 2008; Vandenbussche and Zanardi 2010), and on entry into trade – the “chilling effect” analyzed by Vandenbussche and Konings (2008) for EU firms and by Pierce (2011) for US firms.

The general antipathy of economists towards anti-dumping is mitigated by the observation that a measure of contingent protection is actually an essential feature in a liberal – and *a fortiori* in a liberalizing – trade regime. This argument has been articulated in at least three general forms.

First, in a game-theoretic political economy context, contingent protection (which may be instantiated by anti-dumping) is as an integral feature of a cooperative trade policy equilibrium characterized by relatively low trade taxes, on the argument this equilibrium can only be sustained by the threat of reversion to a Nash equilibrium of high trade taxes; Bagwell and Staiger (1990) provide the theoretical development while Bown and Crowley (2012) provide empirical support.

Second, given incomplete insurance markets, contingent measures such as anti-dumping can be welfare enhancing in the face of sector-specific trade shocks (Fischer and Prusa 2003).

Third, the negotiating history of trade agreements suggests that anti-dumping is an essential part of a political strategy to enable the passage of trade liberalizing measures (for a survey, see Nelson 2006).

In this paper, we shed light on the de facto role of anti-dumping as insurance by examining the motives for use of grey area measures in the pre-WTO era. These measures were discussed at length in the context of the Uruguay Round negotiations and documented by the GATT Secretariat as measures notified under Article XIX together with other measures that appeared to serve the same purpose.<sup>5</sup> Importantly, many of these measures were subsequently replaced by anti-dumping measures. Accordingly, the motivations expressed by governments in the pre-WTO era in their discussions of grey area measures serve to shed light on their motivations for anti-dumping investigations in the post-WTO era when the grey area measures were banned.

We find striking parallels between the sectoral incidence of grey area measures and subsequent applications of anti-dumping measures. From one perspective, this is problematic for anti-dumping policy – which is based on countering unfair trade – since the argument of “unfair trade” was not raised in the WTO discussions. By the same token, this belies the formal justification of anti-dumping as a counter to unfair trade practices. From another perspective, however, this evidence strongly corroborates the argument that governments use contingent protection to “sell” liberalization and provides support for the argument that anti-dumping measures may be welfare-enhancing in the sense that they are implicitly actualizing insurance policies to deal with the unknown consequence of previous trade liberalization. Viewed through this prism, the policy choices of governments that simultaneously liberalize trade and increase their use of anti-dumping are not incoherent, notwithstanding the “two steps forward, one step backward” nature of progress towards a generally liberal trade regime.

The rest of this paper is organized as follows. Section 2 briefly summarizes the three mitigating theories, section 3 describes the grey area measures and establishes the link to anti-dumping measures, section 4 discusses the implications, and section 5 concludes.

## **2 BACKGROUND: THE CASE FOR ANTI-DUMPING**

The basic trade effects of anti-dumping are straightforward. In a multilateral trade setting, measures affecting particular trade flows redirect trade: the targeted bilateral flow is reduced, supply from the origin country of the dumped product to third markets is increased (trade deflection) and supply from third countries to the destination country in which the measure is applied increases (trade diversion). There is also trade destruction because domestic shipments in the origin country of the dumped goods increase (some exports are redirected to domestic consumers), as do domestic shipments in the destination country where domestic producers take up part of the market formerly held by the dumped imports. In the general case where the domestic import-competing producers also export, their exports to markets in which they compete with the dumped product fall.

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<sup>5</sup> A list of grey area measures was prepared prior to the launch of the Uruguay Round and then incorporated in the GATT document Spec(82)18 dated 26 March 1982. The list was subsequently revised three times and served as the basis for a 1987 discussion of the issue by GATT Members: MTN.GNG/NG9/W/6, dated 16 September 1987.

In a formal analytical framework, if the anti-dumping measure is treated as a disturbance to a market-established equilibrium, optimal tariffs aside, all of these effects drive welfare losses. Of course, if the measure could be justified as an offset to a market failure – i.e., if the dumping is taken to be the disturbance and the anti-dumping measure were analyzed in terms of restoring the (unobserved) pre-dumping market-driven equilibrium – the measure might well be seen to be globally welfare-improving. This follows since the measure, if accurately calibrated, would restore an optimal market outcome that the (in all likelihood imperfect) price discriminatory practices that constitute the dumping had altered.<sup>6</sup> However, the general consensus in the literature is that the instances where anti-dumping does in fact correct for a market failure (e.g., in terms of countering predatory practices) are relatively few (Bienen, Ciuriak and Picarello, 2013). Accordingly, based strictly on the observable direct and indirect trade effects of actual measures, the conclusion is inescapable that anti-dumping is welfare detracting.

This of course results in the puzzling conclusion that governments that otherwise appear to be following economically sensible policies and reducing border trade barriers (often in the face of opposition from special interests) are, from time to time and to all appearances quite randomly, also bowing to special interests and providing unwarranted protection – and typically protection that is several times higher for the given product than the liberalization achieved over the entire history of the GATT.

As noted, three general arguments have been advanced which potentially reconcile these conflicting tendencies. These are briefly described in turn below.

## **2.1 Supporting a liberal trade equilibrium**

Since economic theory shows that the prime beneficiary of trade liberalization is the liberalizing country itself, the evident importance of reciprocal trade negotiations requires explanation – as Bagwell and Staiger (2004: 205) ask: “What is the problem that a trade agreement might solve?” They answer this rhetorical question in terms of the implications of trade taxes for terms of trade – i.e., optimal tariff theory. Although governments in general and trade negotiators in particular do not employ this language, if the imposition of trade taxes can improve a country’s terms of trade, as is possible under optimal tariff theory, parties to a trade liberalization agreement might defect and impose higher tariffs than were negotiated. In this context, the availability of a contingent measure of protection serves as a necessary discipline to preserve the low-trade-tax equilibrium that the governments have negotiated in order to attain the mutual benefits of trade.

Bown and Crowley (2012) provide an empirical test of this theory, based on a political economy model developed by Bagwell and Staiger (1990), which seeks to explain cooperative trade

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<sup>6</sup> For a detailed discussion of the implications of treating dumping as the disturbance and anti-dumping as a correction for market failure, see BKP Development (2012), Vol. 1: at 30.

agreements between two large countries. Using data for increases in US import tariffs against 49 countries under anti-dumping and safeguard measures over the 1997-2006 period, they show that, in a dynamic, repeated trade-policy-setting game, a cooperative trade policy equilibrium characterized by relatively low trade taxes can be sustained by the threat of reversion to a Nash equilibrium of high trade taxes. In their baseline specification, they find that:

- a one standard deviation increase in the recent growth of bilateral imports increases the probability of an anti-dumping tariff by 35%;
- a one standard deviation increase in the inverse of the sum of the import demand and export supply elasticities increases the probability of an anti-dumping tariff by 88%; and
- a one standard deviation increase in the standard deviation of import growth reduces the likelihood of an anti-dumping measure by 76%.

Importantly, they find that inclusion of various political economy measures identified in the literature does not affect the key findings.

Notably, this set of results is not directly associated with specific liberalization events – that is, they apply as a permanent aspect of the political economy of trade.

Accordingly, there is a small body of theory and evidence that contingent measures such as anti-dumping serve a welfare-enhancing purpose, distinct from the narrowly evaluated (and generally negative) impacts on trade when the measures are applied.

## 2.2 Insurance against unforeseen trade pressures

Under conditions of imperfect information, negotiators undertaking binding agreements risk committing to arrangements that turn out to be damaging to their country's interests. Reflecting the sensitivity of negotiators to this risk – for which formal insurance markets provide no coverage – the GATT has from the beginning included an escape clause and a renegotiation provision if injury is caused by legitimate trade expansion,<sup>7</sup> and provided for anti-dumping or countervailing duties if injury is caused by condemned practices such as dumping or subsidization by a partner country of its exports.

An example of this situation is provided by an explicit statement by the Australian government concerning one of its safeguard measures:

Complete domestic electrical refrigerators/freezers currently are subject to a most-favoured nation rate of 35 per cent ad valorem phasing to 30 per cent on 6 July 1984. Following inquiry by the Industries Assistance Commission (IAC), it has been found, however, that importers are avoiding paying this rate by importing dual purpose gas/electric absorption type refrigerators without their

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<sup>7</sup> Historically, what was commonly referred to as the “escape clause” was Article XIX of the original GATT, “Emergency Actions on Imports of Particular Products,” or safeguard clause. This provision, which allowed temporary restrictions on imports where domestic industries faced “serious injury”, was used in some 150 actions over the entire pre-WTO period from 1947-1994 (Bown and Crowley 2005: Table 1). The provision for the renegotiation of commitments also fell into the category of an insurance policy against unsustainable trade pressures.

electrical fittings, thus qualifying for a lower rate of 25 per cent applying to non-electrical refrigerators, then adding electrical components at minimal cost and selling them in Australia as what are regarded for tariff purposes as electrical refrigerators. There is no commercial market in Australia for gas refrigerators as such; and the import of dual purposes gas/electric type refrigerators is a means of using a loophole in the Australian Customs Tariff to circumvent the assistance arrangements applying to domestic electrical refrigerators. *This loophole was unforeseen at the time the binding on electrical refrigerators was negotiated.*<sup>8</sup> (emphasis added)

A formal theory of the role of contingent trade protection as welfare-improving insurance in the presence of missing insurance markets was introduced by Eaton and Grossman (1985), with subsequent development by Staiger and Tabellini (1987) and Dixit (1987, 1989a, 1989b). Building on this base, Fischer and Prusa (2003) using a general equilibrium model show that, with incomplete insurance markets, contingent measures can be welfare enhancing when the economy is subject to sector-specific trade shocks.

This argument is of course not a justification for any specific form of contingent protection, but rather for the availability of an effective form of contingent protection. Nonetheless, insofar as anti-dumping is the instrument of choice for effecting the contingent protection, its net welfare effect must be assessed in this broader framework.

### 2.3 Diffusing political opposition to trade liberalization

Closely related to the insurance role that anti-dumping plays in a pure economic welfare sense, is the role that this instrument has played in facilitating the conclusion of trade liberalizing agreements by diffusing political opposition.

Dam (1970) observes that the inclusion of contingent protection in GATT rules from the beginning greatly increased the extent of liberalization achieved in the early GATT rounds precisely by diffusing domestic political opposition toward trade liberalization. Indeed, a significant portion of the early agreements concerned themselves with contingent measures and surveillance to ensure compliance with the agreements.

Egger and Nelson (2010) agree, observing that, “To the extent that the Liberal trading system that began to emerge in the late-1930s and was institutionalized in the GATT/WTO system relied on US leadership, and that leadership was conditional on the various reciprocal trade acts and their more modern descendants, it is clear that administered protection played a central role in underwriting the system as a whole.”

Nelson (2006: 573) reviews the history of this argument in the context of US policy-making:

“Going back to Viner, the academic literature on antidumping has recognized that antidumping law was often adopted as part of a strategy of tariff reduction or protection resistance. However, it was only with the adoption of the Reciprocal Trade Agreements Act of 1934 (RTAA) that antidumping

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<sup>8</sup> Australia: Notification to the Safeguards Committee in respect of Non-electrical domestic refrigerators and freezers. GATT Doc. L/5529, 17 August 1983.

became part of a system explicitly linking administered protection to liberalization ... The architect of the RTAA, Secretary of State Cordell Hull, realized that Congress would not agree to a program of systematic trade liberalization without a number of assurances that American industry would be protected from serious injury. From the RTAA to the present, omnibus trade legislation makes this link explicit by presenting both tariff cutting authority and the details of the administered protection mechanisms in the same legislation. It seems clear that no one involved in the politics of the RTAA saw it as transformative. On the contrary, it was simply a practical measure to accomplish the tariff reduction that had long been part of the Democrat party's core agenda." (internal references omitted).

Fischer and Prusa (2003: 751) connect their argument regarding the insurance role of anti-dumping to the negotiating history:

"Trade negotiators have long argued that the inclusion of the most popular sector-specific tool – antidumping actions – is a precondition for the approval of any trade agreement. The main result of the paper affirms this intuition by showing that there is an insurance role for antidumping that had not been considered in the theoretical literature".

Finger and Nogués (2008) summarize case study evidence that the availability of anti-dumping and safeguards was essential to enable governments to remove a multitude of instruments of protection in seven Latin American countries—Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, and Peru—although they note that the “economic content” of the rules was not helpful—it was the administrative content which facilitated trade liberalization as a process.

India's history of trade liberalization, which is bound up with a surge in the use of anti-dumping, is consistent with this history. In the early 1990s, in the context of a balance of payments crisis, India reduced tariffs sharply on a unilateral basis and relaxed or removed a wide range of non-tariff trade-restrictive controls. At the same time, it became a heavy user of anti-dumping.<sup>9</sup> The heaviest use of anti-dumping was during the initial period of reforms when India moved from a tightly controlled, near autarkical trade regime with a simple tariff average of 113% and comprehensive import licensing towards a largely decontrolled regime with tariffs cut to roughly one-third their initial levels. The secondary phase of liberalization in the 2000s, which saw the dismantling of the remaining import licensing measures and a further reduction in tariffs by half, was accompanied by a less intense use of this instrument.<sup>10</sup>

The EU eliminated a vast number of quantitative trade restrictions which was only possible because of the availability of contingent protection. In this regard, the WTO's 1995 Trade Policy Review of the EU notes:

"All 6,318 quantitative restrictions applied by the member States against imports of non-textile products from third countries, including some 4,700 restrictions vis-à-vis China, were abolished by Council Regulation 519/94 of 7 March 1994."<sup>11</sup>

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<sup>9</sup> In fact, the World Bank's Antidumping Database (Bown 2010) lists 629 individual cases initiated by India since mid-1992, just ahead of the USA with 619 over the same period. Over this period, imports of goods as a share of GDP rose from 8.8% in 1990 (Panagariya 2004) to 25% in 2008 prior to the global crisis.

<sup>10</sup> A contrasting interpretation of this liberalization episode is provided in Vandebussche and Zanardi (2010); they interpret the Indian experience in the 1990s as one of anti-dumping measures largely offsetting the gains from liberalization, rather than enabling the liberalization that did take place.

<sup>11</sup> WT/TPR/S/3, 30 June 1995, Part IV, paragraph 19.

More recently, the accession of China to the WTO, which involved the dismantling of a massive array of individual protectionist measures both within China<sup>12</sup> and in some cases on the part of WTO Members against China, was also contingent on the inclusion of special contingent protection measures.<sup>13</sup> In China's WTO accession, it was the United States that played the major role in exacting special terms in the form of extraordinary contingent protection measures: as noted by Ma (2004), except for minor changes, the Transitional Product-Specific Safeguard Mechanism is the same as the relevant part ("Product-Specific Safeguard") in the Protocol Language of the US-China WTO Market Access Agreement of 15 November 1999.

### 3 GREY AREA MEASURES

A major complicating factor in evaluating the role of contingent measures is the gap between the rhetoric of "unfair trade" in which the use of anti-dumping is formally justified and the models that economists and political scientists have developed that ascribe a valuable, welfare-enhancing role to these instruments, but have nothing to do with "unfairness" in trade. There is an important indirect source which helps to reconcile this situation, namely the discussions held at the WTO in connection with the so-called "grey area measures".

Grey area measures were frequently used tools to manage import surges in the pre-WTO era. The main forms were voluntary export restraints (VERs), voluntary restraint agreements (VRAs), and orderly marketing arrangements (OMAs). As well, an additional array of informal measures were often used. These were described variously as:

- Import quotas (including global and individual quotas)/quota restrictions;
- Import restrictions/quantitative restrictions;
- Import embargoes/temporary embargoes/embargoes for products below certain reference prices;
- Import licensing/individual licensing/suspension of import licenses;
- Requirements for pre-approval of shipments ("visa administratif préalable");
- Duties subject to threshold prices/additional levies above certain quantity limits/increased duties/compensatory charges;
- Import restrictions through surveillance systems and administrative guidance to importers;
- Protective measures to prevent circumvention of measures;
- Agreement on levels for trade for certain products;
- Export forecasts by exporting countries;
- Policies of general moderation of exports;
- Indicative basic prices;

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<sup>12</sup> Erixon, Messerlin and Sally (2008) observe that, "In 2005 [China] reported that 1,416 national standards had been abolished as a result [of WTO accession commitments.]"

<sup>13</sup> China's WTO Accession Protocol included special provisions allowing the use, with essentially full flexibility, of the "non-market economy" status in anti-dumping investigations, of the "Transitional Product-Specific Safeguard Mechanism" for 15 and 12 years from the date of China's entry into the WTO; and of the extended clothing and textiles safeguard, which was used by the EU (and the USA); see Bown (2007: note 27).

- Price monitoring systems; and
- Regular inter-industrial discussions.

With the entry into force of the WTO Agreement in 1995, new grey area measures were banned and in-force measures were required to be brought into conformity with the Safeguards Agreement or phased out within four years. All WTO Members had the right to one exception which was allowed an extra year for phase-out; only the European Communities elected to make use of this option.

In the pre-WTO era, almost half of the anti-dumping and anti-subsidy initiations (348 of 774) over the period 1980-1988 were superseded by negotiated restraints (Zlate, 2002). Indeed, some observers argue that anti-dumping was abused to obtain VERs or VER-like outcomes during the late years of GATT. Messerlin (1996: 231) notes the transformation of protection measures from one form to another, with VERs and anti-dumping often constituting part of the chain:

“The last two decades have witnessed shifts from tariffs to VERS, from VERS to antidumping, from antidumping to anticircumvention and local content, and from local content to distribution regulations.”

Accordingly, there was no clear distinction in the pre-WTO era between the use of these measures and the use of trade remedies. Moreover, following the ban on grey area measures, many observers believe that the action simply shifted more or less fully into the trade remedy area.

This connection between trade remedy actions and grey area measures is of particular interest for the present study since the motives for use of grey area measures were discussed at length in context of the Uruguay Round negotiations. This discussion was documented on the basis of a list prepared by the GATT Secretariat of measures notified under Article XIX together with other measures that appeared to serve the same purpose.<sup>14</sup>

The Committee on Safeguards received the following notifications:

- a) 38 measures notified under Article XIX which affected 28 different product categories;
- b) 41 cases of voluntary export restraints and orderly marketing arrangements, some of which were notified under the procedures of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance; these cases affect 15 different product categories;
- c) 54 other import measures of a safeguarding nature, some of which were notified to the GATT under the procedures of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, affecting 30 different product categories.

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<sup>14</sup> The list of grey area measures was originally prepared prior to the launch of the Uruguay Round and incorporated as annexes in the GATT document Spec(82)18 dated 26 March 1982. The list was subsequently revised three times and served as the basis for a 1987 discussion of the issue by GATT Members: MTN.GNG/NG9/W/6, dated 16 September 1987. The discussion here is based on the third revision: Spec(82)18/Rev.3 dated 22 May 1984.

In most instances of notifications under Article XIX, increased imports, particularly in relation to domestic production, were cited as the reason for the action. The Secretariat observed that information was also occasionally provided with respect to injury or threat of injury to domestic industry. While the Committee did not attach a discussion regarding the motives for each and every VER/OMA included in the list, for those cases where a discussion was provided, the commentary was similar to that of the safeguards discussion – focusing on relieving trade pressures, not countering unfair trade.

For example, in respect of its OMA with Korea in respect of color television receivers, the United States commented on surges in imports and the need to give time for the US industry to improve its competitive position through investments:<sup>15</sup>

“As the earlier OMA was negotiated to allow United States firms and workers time to adjust to international competition without market disruption caused by sudden surges in import penetration, Korea, following a determination by the USITC that termination of the OMA would adversely affect United States television producers, agreed to extend the arrangement for two more years until 30 June 1982.

The United States industry worked to improve its competitive position during this period. In 1981, the television industry in the United States invested US\$15.4 million in building and leasehold improvements, a 65.1 per cent increase over 1980.”

Japan, in articulating its VER in respect of automobile shipments to the United States refers only to volumes of exports:<sup>16</sup>

“since there is fear that in fiscal year 1984, just after the end of the voluntary export restraint there may be a sharp increase in car exports to the United States leading to confusion surrounding the United States auto industry, which plays an important role in the United States economy, the Japanese Government will implement a transitional measure to prevent this.”

The EEC, in its VER in respect of manioc/tapioca, traded a volume restraint for no tariff increases while promising assistance to the Thai agricultural sector affected:<sup>17</sup>

“The agreement states that Thailand will limit its exports of manioc in 1982 to 5 million tonnes. In 1983-84 Thailand's exports should stabilize at that same figure of 5 million tonnes, although there is extra flexibility of 10 per cent for the two years. In 1985-86, the quantity will be established at 4.5 million tonnes annually with the same 10 per cent flexibility clause.

The Community, for its part, has agreed to limit, for the quantities agreed upon, the levy applicable to imports of manioc from Thailand to a maximum amount of 6 per cent ad valorem, i.e., the present rate. In addition, the Community has promised to increase its cooperation with Thailand. It will do everything possible to grant assistance for certain rural development projects, especially in manioc-producing regions, the poorest in Thailand.”

The EEC negotiated a VER quota restraint on black and white television receivers from Korea in 1983, with no mention of the factors underlying the action. In 1988, the action moved to color televisions and into the anti-dumping area as the number of East Asian countries from which televisions imports were growing had expanded. The initial investigation into Korea was terminated and the final duties on Hong Kong and Chinese products were relatively small at 4.80% and 15.30% respectively. However, the case was almost immediately broadened to all color television sets and the basis of the calculation of dumping margins was changed by using

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<sup>15</sup> Spec(82)18/Rev.3 dated 22 May 1984, Annex B: at 31.

<sup>16</sup> Ibid. at 33.

<sup>17</sup> Ibid. at 34.

constructed normal values. Vermulst and Driessen (1995, at 296) comment sceptically on the transition in the arguments by the European Commission as follows:

“This was one of the biggest cases in the history of EC anti-dumping law, with more than twenty-nine foreign producers cooperating in the proceeding. The Commission found that all CTVs constituted one like product. This finding was somewhat inconsistent with an earlier case in which the Commission had decided that small screen televisions, i.e. televisions with a diagonal screen size of more than 15.5 cm but not greater than 42 cm had constituted a separate like product. A second important difference with the previous proceeding against small screen colour televisions (SCTVs) from Korea, China and Hong Kong was that this time, the Commission, in all cases, based normal values on constructed normal value. The reason given by the Commission was that there were differences in broadcasting standards involved. Of course, such differences had also existed in the original proceeding but in that proceeding, were considered an insufficient reason not to use domestic prices.”

The EEC VER on steel exports to the United States, commented on the objective of stabilizing the market:<sup>18</sup>

“The objective of the arrangement is to facilitate restructuring within the United States steel industry and to create a period of trade stability.”

The EEC action to restrain imports of industrial tunny referred simply to “the critical situation still persisting in the national market concerned for this product.”<sup>19</sup>

The range of rationales for safeguard and grey area measures offered by countries using them included the desire to guarantee domestic producers stable prices where production conditions were cyclical, to provide “breathing space” for producers facing structural adjustment, to allow affected communities to adjust, and in some cases simply to protect incomes. However, importantly the word “dumping” appears only twice in the WTO documentation of these measures while the word “unfair” does not appear at all. GATT members discussed the use of the measures to manage the frictions raised by the across-the-board liberalization that was then in full swing under the multilateral process.

Exporting countries that accepted VERs offered a number of reasons why they found it preferable to enter into an agreement rather than insisting on their GATT rights. It was suggested by various parties that VERs or other bilateral restraints allowed solutions to be worked out that corresponded to the particular nature of the problem in each case, and often involved less risk to exporters than taking their chances in investigations. In some cases, exporting countries apparently accepted importing countries’ arguments that time was necessary to allow positive structural adjustment in the importing country; in other cases, however, exporters did insist on their GATT-negotiated rights.

The heterogeneity of the sectors targeted by grey area measures is strikingly similar to the heterogeneity observed in anti-dumping cases. Reviewing the history of US grey area measures, Coleman and Yoffie (1990: 138) emphasize the heterogeneous nature of the products concerned:

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<sup>18</sup> Ibid, at 35.

<sup>19</sup> Spec(82)18/Rev.3 dated 22 May 1984: Annex C; at 45.

“the United States has employed VERs to protect capital-intensive (automobiles) and labor-intensive (apparel) businesses, differentiated products (machine tools) and commodities (steel), and concentrated industries (automobiles) as well as fragmented sectors (machine tools).”

The same is true of the EU. The members of the present-day European Union used such measures in respect of a vast range of goods.<sup>20</sup> Many other products were also caught up in grey area measures imposed by other countries.<sup>21</sup> Importantly, many of the sectors that were targeted by grey area measures were subsequently targeted by anti-dumping, as observed by Messerlin (1996).

The second main observation from the history of grey area measures is the very prominent roles of Japan and to a lesser extent Korea, the “surge” countries of the 1970s and 1980s, as the most frequently targeted exporters. Alongside the general liberalization under the GATT Rounds, the era of grey measures also featured the integration of the rapidly growing East Asian countries into what had previously been largely a North Atlantic trading system. The grey area measures were used to manage this major structural adjustment in the global trading system.

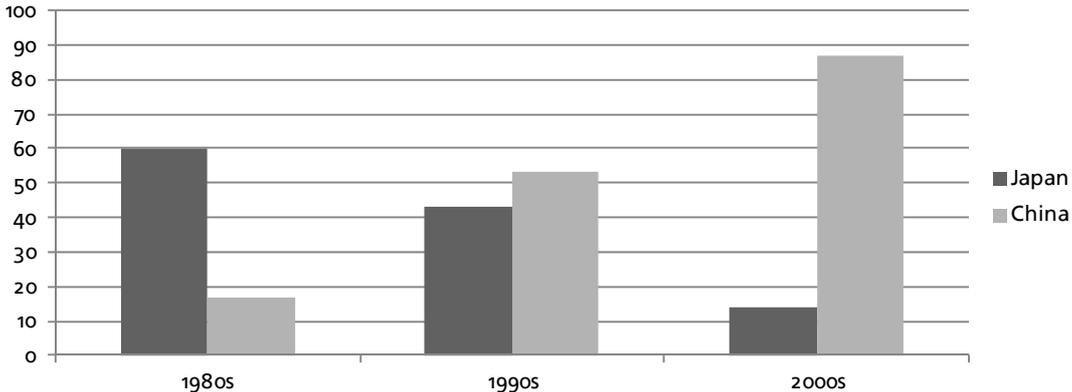
China has since replaced Japan and the other East Asian “Tigers” as the surging economy that is integrating itself rapidly into the global system – and it has also displaced them as the main target of anti-dumping actions. This is brought out best with reference to US anti-dumping actions against Japan and China in particular, since data for US actions for the early 1980s are most easily available (see Figure 1).

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<sup>20</sup> The EU list is as follows: Apples (five EEC measures in respect of five countries); Automobiles (four EEC measures on behalf four EEC members in respect of automobile imports from Japan); Black and white TVs from Korea; Certain electronic piezoelectric quartz watches with digital display; Certain Fabrics; Certain species of timber; Certain textile products; Cheese/cheese and curds (seven separate measures, including five by Spain and two by the EEC); Colour TV sets from Japan; Colour TV tubes from Japan; Cultivated mushrooms in brine; Dried grapes; Motorcycles of a cylinder capacity of 50cm or less; Flatware (cutlery) (three separate measures by three EEC members, all against Korea); Footwear (five separate measures against three countries); Forklift trucks from Japan; Fresh or chilled garlic; Frozen cod fillets; Grooved carped shells and other mollusks; Hard coal and hard coal products; Jute products (two separate measures against different countries); Jute yarn; Light commercial vehicles (two separate measures, both against Japan); Sheep and goats/sheep and goat meat (11 separate measures targeting 13 different countries); Steel (15 measures targeting 15 countries); Synthetic rubber; Tableware and other articles of a kind commonly used for domestic or toilet purposes, of stoneware (two measures); Tunny for industrial purposes; Video tape recorders (four measures, all against Japan); and Yarn of synthetic fibres.

<sup>21</sup> See MTN.GNG/NG9/W/6, dated 16 September 1987. Notable by its omission from both the GATT list and the summary by Coleman and Yoffie is the case of semiconductors. The US-Japan rivalry in this sector resulted in a series of VERs adopted by Japan and eventually in the bilateral US-Japan Semiconductor Trade Arrangement (STA) that was signed on 1 September 1986. This agreement led to a GATT challenge by the EEC in respect of the aspect of the STA which involved undertakings by the Government of Japan to monitor cost and export prices on the products exported by Japanese semi-conductor firms from Japan to third country markets, and the exhortations for Japan to open its market to foreign companies which in the opinion of the EEC favoured US interests. Consultations were held on 20 November 1986 and 29 January 1987; the issue was not resolved and went before a panel. The panel found that external monitoring was not consistent with GATT but upheld the measures to open the Japanese market. For a discussion of this episode see Flamm and Reiss (1993).

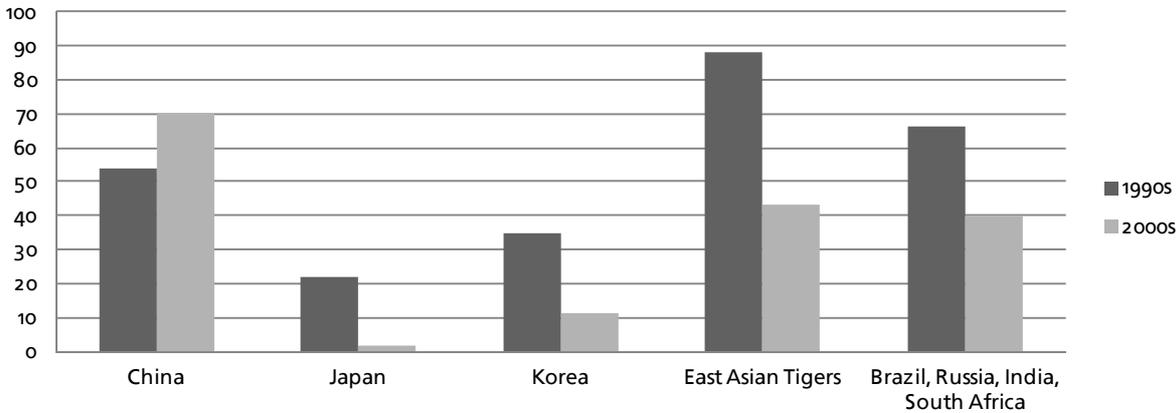
**Figure 1: US Anti-Dumping Cases versus Japan and China, 1980s, 1990s, and 2000s, number of cases**



Source: World Bank, Global Anti-Dumping database (GAD-USA).

The pattern for the EU is far less clear as data for the full period are not available on the World Bank’s database – the EU data are available for only 1987 and onwards. The transfer of trade pressures from Japan and the other dynamic East Asian economies during the “Asian Miracle” era of the 1980s and 1990s to China in the 2000s is evident; however, EU actions fell off in the 2000s against the other surging major emerging markets, namely Brazil, Russia, India and South Africa (Figure 2).

**Figure 2: EU initiations of anti-dumping investigations versus dynamic emerging market economies, 1990s, and 2000s, number of cases**



Source: World Bank, Global Anti-Dumping database (GAD-EU).

Taking all the evidence into account, this comparison suggests that, in the 2000s, the steep increase in the number of anti-dumping measures targeting China reflected the same attempt to manage trade pressures as was achieved by the use of safeguards and grey area measures in the pre-WTO era. In short, anti-dumping was used to deal with the frictions in lieu of the diplomatic measures used to help manage the integration of the other dynamic East Asian economies in previous decades.

## 4 CONCLUSION

To summarize the foregoing, the negotiating history of major trade liberalization initiatives makes clear that across the board liberalization in the absence of perfect knowledge about the possible consequences in terms of trade pressures is contingent on the availability of contingent protection. Economic theory demonstrates that such an insurance role is welfare enhancing.

The history of use of grey area measures in the pre-WTO period provides important support for this position. In that era, which featured successive waves of trade liberalizing initiatives and the integration of major new trading economies into the trading system, grey area measures were frequently applied to manage excessive pressures in a context where the trade flows were not characterized as “unfair” but simply disruptive. The patterns of use of grey area measures and the pattern of use of anti-dumping when the grey area measures were abolished suggest that the grey area measures were substitutes for anti-dumping and other formal contingent protection measures. This history supports the identification of the on-going use of anti-dumping with the management of excessive pressures of adjustment related to the on-going liberalization of trade and deepening integration of economies under globalization.

While the role of anti-dumping as effectively an insurance instrument has been acknowledged in the trade policy literature, not all observers are convinced that the actual pattern of use is actually particularly consistent with this purported role of anti-dumping. Many have expressed concerns about its capture by protectionist interests (investigations can be conducted even when there is little evidence of unfairness), a concern expressed well by Bhagwati (1988: 48) who observes that:

“The dramatic rise of such unfair-trade cases is itself *prima facie* evidence of their use for the harassment of successful foreign suppliers. But the evidence in support of the capture theory is [even] more compelling”.

Moreover, while the use of anti-dumping may be defended as welfare enhancing on these grounds – with the individual instances of application of measures analogous to claims on a pre-existing insurance policy – the design of anti-dumping and the emphasis on “unfair” trade in its justification, makes this instrument ill-suited for this role.<sup>22</sup>

In terms of further research, there would be value in mapping the flow of cases from one form to another to confirm the sense obtained from examining the texts.

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<sup>22</sup> Finger and Zlate (2003) observe that: “GATT/WTO rules offer a number of provisions that might be described as escape valves, antidumping has become by far the most frequently used one. Yet as a tool to help governments to maintain a political momentum toward openness, antidumping has few of the qualities of a good management tool.”

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