

Will GATT Enforcement Control Antidumping?

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Abstract

Why has the GATT dispute settlement process been so ineffective in disciplining the use of antidumping; what are the sources of this ineffectiveness and the likelihood that the process will become effective in the future? The paper concludes that GATT enforcement is not likely to provide effective discipline over national use of antidumping. Both the bureaucratic and the legal momentum of the GATT dispute settlement process are toward innocuous findings of procedural error that can be corrected without lifting the antidumping order under review. A legalistic approach implies a protectionist answer.

I. Introduction

During the 1980s antidumping measures were increasingly used to restrict imports. In consequence, a number of these actions were appealed by the victim countries to the GATT, and to date GATT panels have completed their deliberations in five cases.¹ In each of the five the panel found the antidump-

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1. Formally, only the EEC anti-circumvention regulation panel was appointed by the GATT Council. The other four were appointed by the GATT Committee on Antidumping Practices and Procedures.

ing action to be in violation of the GATT or the GATT code on antidumping, but so far, not one of these improper² antidumping actions has been lifted.

We will attempt to gauge in this paper why the GATT dispute settlement process has been so ineffective to now in disciplining the use of antidumping. Our objectives are to identify the sources of this ineffectiveness and to evaluate the likelihood that the process will become effective in the future.

The following section documents the increased use of antidumping as an instrument of protection – an increasing number of actions by an increasing number of countries. Section III reviews the outcomes of recent GATT dispute settlement cases on antidumping actions, and Sections IV and V take up the why of the lack of impact of these processes on national antidumping actions. Our focus there will be on the five cases in which panels have completed their findings and recommendations. We conclude, in the final section, that GATT enforcement is not likely to provide effective discipline over national use of antidumping. Both the bureaucratic and the legal momentum of GATT dispute settlement is toward innocuous findings – focus on procedural errors that can be corrected without lifting the antidumping order in question.

II. Increased Use of Antidumping

Over the GATT's first thirty or so years, antidumping actions by national governments were a minor problem. Few national actions were taken and only one was challenged at the GATT as illegal. This complaint, raised by Italy against Sweden in 1954, was resolved quickly by Sweden changing the regulations that had been questioned (Hudec [1975], p. 284).

A. Increased Antidumping

Through the early 1960s, GATT member countries (in total) undertook fewer than a dozen antidumping actions per year. However, by the latter half of the 1970s the United States alone averaged thirty-five cases per year, and as Table 1 shows, the frequency across all GATT member countries is now

2. As will be elaborated below, the findings of only one of the five have been approved as an official GATT decision. Thus when we state that an antidumping action is "improper" we do not mean that it has been found to be, strictly speaking, "illegal" under the GATT.

Table 1
Antidumping Initiations, July 1985 - June 1992
 (by country in which the case was prosecuted)

Country, group \ Time	J85- J86	J86- J87	J87- J88	J88- J89	J89- J90	J90- J91	J91- J92	All Yrs
Numbers of cases								
Developed Countries	169	134	110	99	81	134	198	925
United States	63	41	31	25	24	52	62	298
Australia	54	40	20	19	23	46	76	278
European Community	23	24	30	29	15	15	23	159
Canada	27	24	20	14	15	12	16	128
Developing Countries	3	1	3	14	14	17	39	91
Poland	0	0	0	0	0	24	0	24
All Countries	172	135	113	113	95	175	237	1040
Percentages								
Developed Countries	98	99	97	88	85	77	84	89
United States	37	30	27	22	25	30	26	29
Australia	31	30	18	17	24	26	32	27
European Community	13	18	27	26	16	9	10	15
Canada	16	18	18	12	16	7	7	12
Developing Countries	2	1	3	12	15	10	16	9
Poland	0	0	0	0	0	14	0	2
All Countries	100	100	100	100	100	100	100	100

Source: GATT, *Basic Instruments and Selected Documents*, Annex Table "Summary of Antidumping Actions, [date]" 1985-86 through 1991-91 volumes.

more than two hundred per year. Some forty countries, including a number of developing countries, have antidumping regulations in place,³ and in 1991-92, fourteen of them were active antidumpers.

The increased use of antidumping measures has raised questions about them. Three widely accepted conclusions are particularly troubling:⁴

3. GATT Secretariat estimate.

4. The increased use of antidumping has occasioned a wave of research, focused more or less on learning how (administratively) the instrument works and of judging the appropriateness of the resulting actions. The findings of this research are surveyed in Finger [1993a] especially chapters 2 and 3, and in Finger [1993b]. The conclusions reported in the text are substantiated in those surveys.

1. National regulations allow antidumping action in a broad range of circumstances. The point is stated by different authors in different ways, *e.g.*, that such regulations are biased toward finding dumping and toward overstating dumping margins (Bierwagen [1991], Litan and Boltuck [1991]) or that antidumping is just ordinary protection with a good public relations program (Finger [1993a]).
2. The investigation process itself tends to curb imports. This is because exporters bear significant legal and administrative costs, importers face the uncertainty of having to pay, once an investigation is completed, backdated antidumping duties (Finger [1981], Staiger and Wolak [1993]).
3. As a consequence of these traits, almost half of antidumping actions are superseded by negotiated export restrictions before they come to a formal, legal, ending (Finger and Murray [1990]).⁵

III. Antidumping Actions Taken to GATT

The increased use and apparent misuse of antidumping led exporters to complain to their governments, these governments, in turn, took up the actions against their exporters with the governments who had taken the antidumping actions. Since 1989, fifteen national antidumping actions have become the subject of GATT dispute settlement procedures.⁶ (The cases are listed in Table 2.) Of the panels appointed by the GATT or the Antidumping Committee to examine antidumping actions, five have completed their findings and recommendations. In summary form, the outcomes and results of these five cases have been as follows:

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5. The larger the case (the greater the value of imports covered) the higher the likelihood that it will be superseded by a negotiated restraint.
 6. The most recent four cases are requests for consultation with the United States on recent US antidumping duties on steel imports. The strategy of the US steel industry in the early 1980s was to use antidumping petitions to force exporters to negotiate voluntary export restraints. These restraints, against every significant exporter except Sweden, who refused and was hit by antidumping actions, were put in place in 1985. When their initial five-year life came to an end, President Bush negotiated extensions for two and a half years. Before these extensions expired the US industry was preparing to petition for the antidumping actions that have recently been appealed to GATT.

Table 2
Antidumping Cases Taken to GATT Dispute Settlement

Applicant	Respondent	Subject	Most recently reported action
Japan	United States	Provisional antidumping measures on steel products	Consultation requested 16 Jun 1993
Sweden	United States	Provisional antidumping measures on cut-to-length steel plate	Consultation requested 7 Apr 93
EEC	United States	AD investigation on steel products	Consultation requested 2 Mar 93
Brazil	United States	AD and CVD actions on steel products	Consultation requested 10 Feb 93
Brazil	Mexico	AD investigation on textiles	Consultation requested 16 Oct 92
Brazil	Mexico	AD proceedings on electric power transformers	Consultation requested 15 Oct 92
Brazil	EEC	Antidumping investigations on cotton yarn from Brazil	Consultation requested 3 Sep 91
Japan	EEC	AD proceedings on audio tapes and cassettes	Panel established 26 Oct 92
United States	Canada	AD duties on beer	Panel established 9 Jul 92
Sweden	United States	AD duties on stainless steel plate	Panel established 27 Apr 92
United States	Korea	polyacetal resins (duties)	Panel report adopted 27 Apr 93
Mexico	United States	AD duties on cement and clinker	Panel report circulated 07 Sep 92 Adoption requested 26 Oct 92 26 Apr 93
Norway	United States	salmon, fresh and chilled (duties)	Panel report circulated 30 Nov 1992 Adoption requested 26 Apr 93
Sweden	United States (duties)	seamless ss pipes and tubes 20 Aug 90 Adoption requested 27 Apr 92	Panel report circulated
Japan (under the GA, not under AD code)	EEC	regulation of imports of parts and components	Panel report adopted 16 May 90. Issues of implementation raised, most recently 3 Dec 92

Sources: GATT Council, *Status of Work in Panels and Implementation of Panel Reports*, C/183, 4 June 1993; GATT Committee on Antidumping Practices, *United States – Provisional Antidumping Measures Against Imports on Certain ... Steel Products*, ADP/100, 16 June 1993.

Table 3
Outcomes: Antidumping Cases Appealed to GATT Panels

1. EEC Anti-circumvention regulation

Conclusion:

- (a) EEC anti-circumvention duties and decisions to accept undertakings in lieu of imposing such duties are inconsistent with ...

Recommendation:

The EEC bring its regulations into conformity with its obligations under GATT. The Panel noted that the EEC would be in conformity if it did not apply the anti-circumvention regulation against GATT member countries.

2. United States – Stainless steel tubes from Sweden

Conclusion:

- (a) Initiation of the investigation was inconsistent with US obligations ...
 (b) The relevant code provision is an essential procedural requirement. The infringement could not be corrected retroactively.

Recommendation:

The United States revoke the antidumping order and reimburse antidumping duties already paid.

3. United States – Cement from Mexico

- (a) Initiation of the investigation was inconsistent with US obligations ...
 (b) The infringement could not be corrected retroactively.

Recommendation:

The United States revoke the antidumping order and reimburse antidumping duties already paid.

4. United States – Salmon from Norway

Conclusion:

- (a) On several points of methodology in determining the margin of dumping, the United States acted inconsistently with its obligations ...
 (b) Appropriate methodology would not necessarily result in a determination of no dumping (rather than a different margin.) Therefore the Panel could not recommend that the United States revoke the antidumping duty order and reimburse any duties paid or deposited.

Recommendation:

The United States reconsider the affirmative final determination on dumping and bring its measures with respect to imports of Salmon from Norway into conformity with its obligations...

5. Korea – Polyacetyl resins from the United States

Conclusion:

On several points of methodology of determining injury, Korea acted inconsistently with its obligations ...

Recommendation:

Korea bring its measure (the imposition of these antidumping duties) into conformity with its obligations ...

Note: Strictly speaking, a panel suggests or recommends that the GATT CONTRACTING PARTIES or the Antidumping Committee (as is relevant) request that the country In this table we have used simpler wording.

- (1) In each of the five the panel found the antidumping action in question to be in violation of the GATT or the GATT antidumping code.
- (2) As of this writing [July, 1993] each of the five antidumping actions is still in place.
- (3) Only one panel report has been adopted as an "official" GATT or Antidumping Committee conclusion and recommendation.⁷
- (4) The last two panels have come to conclusions-recommendations distinctly different from those of the first three. The first three concluded that the antidumping duty in question should be removed. The last two have come to the conclusion that the antidumping action in question involved a violation of the GATT or the Antidumping Code, but their recommendations allow for the possibility that the antidumping need not be removed.
- (5) Failure of the panel's report to be adopted is in one instance because the *winner* is not satisfied with the decision. (This relates to point 4, above.)

If the system is gravitating toward the sort of innocuous finding described in point (4) above-procedural error that can be fixed without removing the antidumping duty then the GATT dispute settlement process is not likely to check the increased incidence of antidumping restrictions. We will however argue that this pessimistic outcome is the most likely one, that the institutional dynamics of the system is toward this sort of decision. The central tendency of GATT's decisions on antidumping actions is to find a technical error that does not mandate the antidumping duty be removed. Both the bureaucratic and the legal dynamics of the system push in this direction.

IV. The Bureaucratic Momentum: GATT Requests and National Regulations

What happens when the GATT Council or Antidumping Committee concludes that a national antidumping action violates the GATT or the Antidumping Code? In practical terms, the answers in the United States and

7. Traditionally the GATT and the Antidumping Committee reach decisions by consensus, hence on country can block a panel's report from being adopted as the decision of the institution. This is often, but not always, the country found by the panel to be in the wrong.

in the European Community are similar, though the presence of legal detail makes the US case easier to explain.⁸

The structure of US antidumping law, like that of other US trade remedies laws is as follows. Under specified circumstances the administering agency in the US government will initiate an antidumping investigation. If, through that investigation the named administering agency determines that certain conditions exist (dumping and consequent injury to a domestic industry; and how to determine each of these is specified in scores of pages of law and hundreds of pages of administrative regulations), then an antidumping order is put in place (*i.e.*, antidumping duty is imposed on specified imports.) Similarly, if other specified investigations determine other specified conditions to exist, the antidumping order is lifted.

To say much the same in a different way, the US Constitution gives to the US Congress the authority to regulate US foreign trade, and the Congress has delegated to the Executive the authority *in certain circumstances* to change such regulations. But a GATT or Antidumping Committee conclusion or request is not one of the circumstances in which Congress has given the Executive the authority to act. Such a conclusion or recommendation is not one of the conditions that lifts an antidumping order – or even justifies the opening of a review.

Thus the straightforward answer to “What happens?” is that nothing happens. In US law, nothing follows automatically from a GATT conclusion that a US antidumping action was taken inconsistently with US obligations under the GATT or the Antidumping Code. Likewise for EEC antidumping regulations.

Though a GATT finding that a US action was in violation has no legal impact in the United States,⁹ it will bring pressure on the Executive branch to bring the United States into compliance. For one thing, the finding would be an embarrassment. An international organization of which the United States is a founding member (and in which Executive branch officials represent the United States government) has formally found the United States to

8. Jackson, Louis and Matsushita [1984] analyze how GATT and the GATT codes fit into national legal systems.

9. Likewise in the EEC and in many other jurisdictions.

be in violation of the organization's rules. And as a practical matter, the situation weakens the position of the US government to press a foreign country likewise in violation to remove a restriction that might be of commercial interest to the United States.

Pressure from the US Congress would be in the other direction. The authority of the GATT over US trade law has been a hotly contested battlefield in the ongoing struggle between the Executive and the Congress over the shape of US trade policy. For example, the Congress in the 1979 trade act made a good faith effort to make the changes that the US Executive had negotiated at the Tokyo Round, but the Congress stated explicitly in the act that if any conflict of interpretation were to occur, the trade act and not the GATT or codes was the authority. A change of US policy triggered by a GATT finding would be a victory for the Executive in this struggle.

The Congressional politics of trade policy also comes to bear. The antidumping law has been constructed amendment by amendment in response to pressures from particular interest groups.¹⁰ Constituent service is the lifeblood of Congressional politics, and fixing a powerful constituent's trade problem by adding to the definition of injury or of dumping is an important part of this politics. In this context, the Congress would not be charitably disposed toward interference from a GATT panel decision – particularly one based on a technicality such as the US investigation having verified the standing of the petitioner during the investigation rather than before initiating the investigation. That was the basis for the panel's finding against the US antidumping duty on imports of stainless steel tubes from Sweden.

Another important consideration is that, as I.M. Destler [1992] has pointed out, antidumping and the other trade remedies laws provide "protection for Congress" – protection from having to deal with the specifics of deciding which industries receive protection and how much. With the trade remedies in place, a member of Congress pressed by a constituent industry for protection can refer the industry to the administering trade remedies agencies. Or if the constituent is powerful and has gone through the trade remedies process without success, advise the constituent to develop an appropriate trade remedies amendment and submit it the next time a trade bill is in the

10. This point is elaborated and documented in Finger [1992].

works. Thus the trade remedies not only create a vehicle for constituent service, they provide members of Congress a system for managing the delivery of that service.

A request from a GATT panel to remove an antidumping duty conflicts with that system. As U.S. law is written, removing the duty would require a specific vote of the Congress, but for the several reasons just reviewed, the US Congress is not likely to respond.

The Executive would be in a much better situation if the Antidumping Committee pointed out procedural shortcomings and made the amorphous request that the United States “bring its measure into conformity.” To understand the situation the US Executive would then face, suppose this request – the United States bring its measures into conformity – had been in the case of stainless steel tubes from Sweden. In this case the panel found the United States at odds with the GATT rules on the matter of when the US investigators verified that the petition had in fact been made “by or on behalf of” a domestic industry. The US investigators had done so *during* their investigation rather than *before* they began it.

The GATT request could then be corrected by a pro-forma reconsideration, in which the investigators carefully and for the record considered the evidence that the petition had been made by or on behalf of a domestic industry, then formally initiated the investigation. By virtue of this reconsideration, the US measure would be in conformity with the panel’s conclusion, the antidumping duty would still be in place, and Executive branch officials would have avoided a confrontation with Congress.

V. The Legal Momentum: Trade Remedies in the GATT

A panel outcome that can be accommodated without removing the antidumping duty that has been found in violation is not just the easy way out. The legal momentum of the system likewise presses toward findings that hinge on procedural issues without seriously questioning that imports have been dumped and the industry injured. This is because the conditions under which antidumping rules allow import protection are broad. Because the substantive dimension is broad, imposing procedural detail is the only way to limit antidumping actions. But because the substance of the rules

justifies widespread restrictions, the procedural details that limit antidumping action will seem arbitrary – in conflict with the basic thrust of the rules.

A. The GATT Origins of Trade Remedies

To understand the logic of the trade remedies in the GATT, one must go back to GATT's beginning. The post-World War II deliberations on institutional arrangements for the world economy were successful in establishing the International Monetary Fund and the World Bank. However, the proposed International Trade Organization which would regulate international trade was not to be. There was a reluctance among governments to accept institutionalized restrictions on the conduct of countries' national trade policies.

At the same time the ITO negotiations over the "rules" of the trading system were unsuccessful the community of nations reached agreement on a significant package of reciprocal tariff reductions. The document or contract that gave legal effect to this agreed exchange of market access (tariff cuts) was the General Agreement on Tariffs and Trade. It is important to remember that, functionally speaking, the GATT was not the "agreement," it was the paperwork to put that agreement into place.

The first functional part of the agreement delivered the goods, the agreed exchange of tariff cuts. The legal mechanics of doing so was a commitment by each participating country to allow other participants access to its market at least as favorable as the schedule of its import restrictions that the country annexed to the agreement. When agreement involved reductions of tariffs, the negotiated reductions were reflected in this schedule. Each schedule, the parties agreed, would be subject to MFN treatment within the group.

The second functional part of the contract defined the circumstances under which a country might go back on the access it had guaranteed to its trading partners in the first part, *e.g.*, restrictions to safeguard the balance of payments, antidumping and countervailing duties. The third functional part deals with dispute settlement or restitution – what a country can do when it senses that some benefits to it under the contract have been compromised.

Note please the structure of the "trade remedies" provisions of the GATT:

- they state explicitly that a country may impose new import restrictions,
- they attempt to limit application of this permission by specifying the circumstances in and procedures by which a country may impose new restrictions.

B. Substantive Standards for Antidumping Are Broad

The basic concept underlying the trade remedies is injury to competing domestic producers from import competition. This is, economies, a close parallel to comparative disadvantage, hence allowing for import restrictions wherever there is injury is a broad allowance.

GATT article VI, that allows antidumping duties, requires more than injury, it also required that the imports that cause injury are being priced unfairly, or dumped. But national politics has added so many new dimensions to what may be considered dumping that virtually any international transaction can be found to be dumped. (Boltuck-Litan [1991] provide extensive documentation.) These national changes have been added in large part to the international code. The 1979 Tokyo Round antidumping code provides broader scope for restrictions than did the 1968 Kennedy Round code, the Uruguay Round draft would broaden the present code even more.¹¹

While anti-trust law is constrained by economic logic, antidumping law is not. Ronald A. Cass [1993], a prominent legal scholar and former Chairman of the U.S. International Trade Commission, has made the following observation:

In putting flesh on the statutory bones of antitrust constraints on predation and price discrimination, both courts and the relevant enforcement agencies... have been influenced by the substantial body of positive economic writings on these subjects. If decisions do not always conform to mainstream commentators' views on how predation should be identified or when price discrimination is anticompetitive, there is ample attention to issues economic theory suggests are central to the analytical task. International trade law, in contrast, has been strikingly imperious to even the most elementary aspects of economic analysis. Antidumping law is exemplary. (pp. 880-1)

11. This point is documented Finger-Dhar [1993].

C. Many Possibilities for Procedural Error

The legal basis for an investigation of dumping duty is a detailed examination of price data, involving literally hundred of choices as to how to adjust for one factor or another: differences in product characteristics between the export and the home market sales, differences in credit terms, in dealing through a distributor versus selling directly to users, exchange rate variations, *etc.* Likewise, an investigation of injury involves many such considerations, and administrators, in order to avoid being drowned in detail, must depend on rules of thumb.¹²

An antidumping investigation is thus a long sequence of technical adjustments, not guided by any overarching economic or legal sense of objective. Furthermore, the GATT code has significant "transparency" requirements: if an investigation specifies what it did in each instance in which an adjustment is made, it runs the risk of being at odds with what the panel concludes is the relevant detail in the code. And if the investigation is vague about these adjustments, it risks violating the transparency requirements.

D. Free Trade, Not Protection Depends on the Loopholes

While it is instinctive to presume that those seeking import restrictions have been winning by deceit and trickery, cynically exploiting loopholes and pressing vulnerable members of Congress to introduce new ones, the opposite is more nearly true. Free trade, not protection depends on the loopholes and technicalities. We will present here a pair of examples.¹³

The loopholes on which the Executive branch used to depend on were not subtle. Before 1974, there was no time limit for completing a countervailing duty investigation. The US Treasury Department, then the administering agency, often used this loophole, defeating requests for an import restriction by never completing the investigation. In 1974 Congress imposed deadlines, the GATT antidumping code of 1979 provides for them.

The Congress has broadened the meaning of dumping and of injury in many ways, most of which make sense if one accepts the basic premise of

12. Hudec, Kennedy and Sgarbossa [1993] provide documentation.

13. A more detailed treatment is provided in Finger [1992].

the law. The treatment of “cumulation” is an example. Some years back, a US industry losing sales to a vigorous Korean industry could establish that it was injured and gain import relief. But the same US industry, if being nibbled to death by the combined effects of fifty competitors, could not gain relief. Injury from each of the fifty would be considered separately, and not one would be significant enough to reach the threshold of “material” injury needed to gain import relief. Eventually Congress amended the antidumping law to make “cumulation” necessary, *i.e.*, to provide the same relief for a US industry beset by a school of piranhas as was already available to an industry disabled by one shark. Cumulation is now provided for in the antidumping code.

VI. Conclusions: A Legalistic Approach Implies a Protectionist Answer

The conclusion is obvious – and ominous. The GATT dispute settlement process seems unlikely to provide discipline against the increasing number of antidumping restrictions against imports. Both the bureaucratic and the legal momentum of GATT dispute settlement are toward innocuous findings of procedural error that can be corrected without lifting the antidumping order in question.

Changing the bureaucratic momentum of the system is possible, but it would not be easy. It would require greater resolve on the part of member countries’ GATT delegates to see that GATT rules are enforced – a greater willingness to stand up to domestic pressures to bend GATT rules into accord with the demands of national politics.

Changing the legal momentum of the system will be even more difficult. Interpreting the GATT in a legalistic way compels one to interpret it as a statement of rights to impose antidumping duties. The substantive criteria for action are broad – the injury concept justifies protection for anyone to whom it is worth the time to ask for it. The constraints on antidumping actions are artificial – loopholes and procedural technicalities – so legal reform means getting rid of them.

In sum, where do the GATT articles on trade remedies lead us? If you take a legalistic view, you come to a protectionist conclusion.

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