

CHAPTER 02

TRADE REMEDIES UNDER THE MULTILATERAL TRADE AGREEMENTS ON TRADE IN GOODS

Prior to the formation of the World Trade Organisation (WTO) in 1994, the international organisation known as the General Agreement on Trade and Tariffs (GATT) dealt with trade in goods. This organisation, GATT, was replaced by the WTO in the “Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations”. The WTO is the current international agency which oversees the rules of international trade which cover not only trade in goods, but also trade in services and intellectual property. The actual trade agreement affecting the trade in goods, known as “GATT 1947” (as amended), forms part of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which in turn forms part of the current WTO trade agreement, also known as the Results of the Uruguay Round of Multilateral Trade Negotiations (GATT Secretariat 1994: preface, v, 2; World Trade Organization: 1999:1-6).

The World Trade Organisation (WTO) and its predecessor organisation, GATT, have promoted international trade liberalisation in order to achieve the objectives¹ as set out in the various multilateral trade agreements. Since the inception of GATT (the trade agreement), tariffs have been systematically reduced and the use of some barriers to trade in goods, like quotas and voluntary export restraints (VERs), has been

1 “Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce, ...”
(Extract from GATT 1947 Agreement, GATT Secretariat 1994:486).

“*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, ...”
(Extract from the Uruguay Round of Multilateral Trade Negotiations, GATT Secretariat 1994:6.)

curtailed (Salvatore 2001:304-310). However, signatories to the original and subsequent agreements reserved the right under the GATT, to impose trade remedies under certain circumstances. For example, non-tariff trade remedies may be imposed if products are being dumped or subsidised and safeguards may be used to protect import-competing industries under certain circumstances.

A non-tariff trade remedy, or barrier, can be broadly defined as any measure other than a tariff, that restricts imports. This would include quotas; safeguards; licensing; voluntary export restraints (VERs); prohibitions; domestic content and mixing requirements; anti-dumping duties; countervailing duties; government subsidies and other aids; government procurement policies; customs valuation, classification and clearance procedures and a variety of technical barriers to trade like health and sanitary regulations² (Economic and Social Commission for Asia 2000:6, 202-205). But some non-tariff trade remedies, for example VERs, are prohibited under the WTO Agreement. Other non-tariff trade remedies, like quotas on agricultural products³, were to be converted to bound tariffs which were limited to a maximum level. Some of these tariffs were then to be systematically reduced (Ingco 1995:1-7).

The non-tariff trade remedies allowed under the WTO Agreement are listed and explained in the various Multilateral Agreements on Trade in Goods⁴. Some of these remedies will not be discussed in this thesis because the focus of this thesis is on anti-dumping measures. The only other non-tariff trade remedies that will be discussed at any length in this thesis are countervailing measures and safeguards. The purpose of this chapter is to give some historical background to the use of these three non-tariff trade remedies and to explain why anti-dumping was chosen as the focus of this thesis.

2.1 GATT (1947) AND SUBSEQUENT MULTILATERAL TRADE AGREEMENTS

2 This list is not comprehensive.

3 The Agreement on Agriculture (GATT Secretariat 1994:39-68) deals with the various options available to WTO members in respect of agricultural products. The Agreement on Agriculture does not form part of this thesis.

4 For example, the Anti-dumping Agreement (the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994), the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards, the Agreement on Agriculture, the Agreement on Textiles and Clothing, the Agreement on the Application of Sanitary and Phytosanitary Measures.

Although countries like the US, Canada, Australia, Great Britain and members of the Commonwealth, like the Union of South Africa and New Zealand, had anti-dumping regulations or laws in place by the early 20th century, the tariff was still the main instrument for regulating imports. All countries, except Britain, had high tariffs in place by 1921 and the use of tariffs reached an all time high during the 1930s, choking world trade (Deardorff 1995:60; Finger 1993:16-17; Kenen 2000:213-214). By this time most countries had realised that the use of high tariffs, as well as the use of quotas, to protect their domestic economies was unsuccessful, because when a country increased its tariffs, other countries reciprocated with higher tariffs.

The US initiated negotiations with its trading partners during the mid-1930s, in an attempt to reduce tariffs. However, the outbreak of WWII⁵ interrupted these attempts at trade negotiations (Cunnane & Stanbrook 1983:4; Stanbrook & Bentley 1996:2). After the war, Britain and the US tried to put an international structure and machinery in place which would make it difficult for a repeat of the policies of high tariffs and quotas of the 1930s. The idea was to form three international instruments, a central bank, a development bank and a trade organisation. The International Monetary Fund (IMF) and the World Bank were successfully formed, but the international trade organisation which was planned in Havana in 1948 was never formed as the US Congress refused to approve the proposed organisation (Cunnane & Stanbrook 1983:4-5; Jackson & Sykes 1997:2-3; Stanbrook & Bentley 1996:2). Instead, the General Agreement on Tariffs and Trade (GATT), which had been drawn up at the Geneva Conference in 1947, was accepted as “the basic charter for an international trade structure” (Stanbrook & Bentley 1996:2). However, according to Leebron (1997:187), the US Congress did not approve the GATT of 1947, nor was it adopted into US legislation, which meant that the US was not legally bound by the original GATT agreement. Furthermore, even though the US authorised and implemented specific agreements negotiated during subsequent rounds of multilateral trade negotiations, it seems that the first time the GATT agreement itself was explicitly approved by the US Congress was when the Uruguay Round Agreements, which included the GATT of 1994, were adopted into US legislation (Leebron 1997:188-189, 202-209).

GATT 1947 was an attempt to harmonise international trade agreements and reduce tariffs. It was based

5 World War II began in 1939 and ended in 1945.

largely on the trade agreement which Britain and the US had agreed on before the war. Most favoured nation (MFN) treatment was to be extended to all signatories to the agreement⁶ which meant that “any advantage, favour, privilege or immunity granted”⁷ to any trading partner had to be granted to all signatories to GATT (GATT Secretariat 1994:486). MFN treatment meant that no signatory country was allowed to discriminate against another signatory country. GATT 1947 also provided signatory countries with rules that dealt with quotas, the problems of emergency situations and dumped or subsidised imports (GATT Secretariat 1994: 486; Preusse 1991:5; Snape 1991:151; Stanbrook & Bentley 1996:2).

The objectives of GATT 1947 were “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods” (GATT Secretariat 1994:486). In order to obtain these objectives, the signatories to GATT 1947, agreed to enter “into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce” (GATT Secretariat 1994:486). GATT was successful in reducing tariffs, but as tariffs were systematically reduced, signatory countries started to make more use of non-tariff barriers, especially anti-dumping and countervailing duties (Cunnane & Stanbrook 1983:6-7; Finger 1993:63; GATT Secretariat 1994:493-495; Stanbrook & Bentley 1996:3).

The original GATT of 1947 and the subsequent agreements stated that dumping “is to be condemned” and that the use of subsidies on exports which “may have harmful effects for other contracting parties” and which “may cause undue disturbance to their normal commercial interests”, should be avoided (GATT Secretariat 1994:493,509). What the GATT agreements did was provide broad specifications for an acceptable response to dumping and subsidisation. If an exporter had an artificial and unfair advantage over a domestic industry in the importing country and the imports were causing injury to the domestic industry,

6 The signatories to GATT 1947 were the Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America (GATT Secretariat 1994:486).

7 GATT 1947, PART 1, Article 1, paragraph 1.

this domestic industry was entitled to protection against such imports (Cunnane & Stanbrook 1983:2). Anti-dumping and countervailing measures were not meant to restrict international trade. They were meant to provide a possible response to trade that was deemed and proven to be unfair and injurious. Article VI of GATT 1947 (see Appendix) therefore allowed a signatory country to impose anti-dumping or countervailing duties on imports that were being dumped or subsidised (GATT Secretariat 1994:494). The GATT also provided pre-conditions which had to be satisfied before an anti-dumping or countervailing duty could be imposed. One of the most important requirements was that it had to be shown that the dumped or subsidised imports were causing injury.

One of the weaknesses of GATT (the original 1947 and later agreements) is that the agreement had to be translated into acceptable procedures in the laws or regulations of each signatory country. The effect of this process is that anti-dumping and countervailing measures have sometimes been applied differently in different countries (Cunnane & Stanbrook 1983:5; Finger 1993:51). A further weakness of the original GATT was that it allowed the imposition of countervailing duties on a wide range of subsidies. It was not until the Tokyo Round (see section 2.1.2) that the issue of subsidies could be addressed in a way that satisfied most signatories to GATT (Cunnane & Stanbrook 1983:6; Stanbrook & Bentley 1996:5).

2.1.1 The Kennedy Round of multilateral trade negotiations (1964-1967)⁸

The Kennedy Round of multilateral trade negotiations, held from 1964 to 1967, was scheduled to deal with the further reduction of tariffs. The Kennedy Round was successful in this respect (Finger 1990:15; Kenen 2000:220). The US also placed the subject of non-tariff barriers on the agenda. The other countries that were signatories to GATT, especially the European countries, proceeded to criticise US anti-dumping and anti-subsidy legislation, accusing the US of using anti-dumping and anti-subsidy measures to harass legitimate trade (Cunnane & Stanbrook 1983:6; Finger 1993:26).

8 There were a few rounds of multilateral trade negotiations after the 1947 Geneva Conference and before the Kennedy Round, but dumping and subsidies were not on the agenda during those negotiations (Evans 1971:12-14; Stanbrook & Bentley 1996:3).

Signatories to GATT negotiated an anti-dumping agreement during the Kennedy Round, but the US President's lack of authority to negotiate and enter into agreements in respect of non-tariff barriers severely limited the scope of the negotiations (Leebron 1997:183). The resultant agreement the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade", also known as the Kennedy Round Anti-dumping Code or the 1967 Code, was not successful in controlling what was then considered to be an increasing use of anti-dumping measures (Finger 1990:15). An attempt was also made during the Kennedy Round to harmonise national anti-dumping laws, but these negotiations as well as negotiations in respect of other non-tariff trade remedies did not have much success. As a result non-tariff trade remedies/barriers were made the major concern of the Tokyo Round of multilateral trade negotiations held from 1973 to 1979 (Cunnane & Stanbrook 1983:6; Finger 1990:15).

2.1.2 The Tokyo Round of multilateral trade negotiations (1973-1979)

The Tokyo Round was more successful than the Kennedy Round as far as non-tariff barriers were concerned - the Anti-dumping Code or Agreement was revised significantly and the first Code or Agreement on Subsidies was adopted (Cunnane & Stanbrook 1983:6; Stanbrook & Bentley 1996:3). The negotiated Subsidies Code was one of the main achievements of the Tokyo Round. It provided a list of prohibited export subsidies and succeeded in getting the US to implement an injury requirement into their countervailing duty law - although the US only applied the injury requirement to "countries under the Agreement" (Carpenter 1999: IV-6; Cunnane & Stanbrook 1983:7; Gallaway, Blonigen & Flynn 1999:212; Horlick & Oliver 1989:12; Snape 1991:151-152). On the negative side, the Subsidies Code did not provide a definition of a subsidy which meant that the term "subsidy" was very broad, while another setback of the Tokyo Round was the failure to agree on a code for safeguards (Cunnane & Stanbrook 1983:8; Finger 1995:105-106; Snape 1991:140).

According to Krishna (1997:2), anti-dumping investigations increased "dramatically" during the 1980s - after the conclusion of the Tokyo Round. The increase in the use of anti-dumping measures was partly as a result of the then world economic recession (Cunnane and Stanbrook 1983:7). When the Tokyo Round

negotiations began in 1973, the world economy was growing. Non-tariff trade remedies were not used that extensively before this time, possibly because the world economy was doing well during the post-WWII period (Banks 1993:190; Feaver & Wilson 1995:209; Finger 1993:3,26,49; Kufour 1998:173; Stanbrook & Bentley 1996:8). But the world economy was in recession by the time the negotiations ended in 1979, largely as a result of the oil crises and it seems that the changing fortunes of the world economy had an impact on the use of non-tariff trade remedies - particularly the use of anti-dumping and countervailing measures. Tariffs could not be increased because of the GATT agreement, so countries made increasing use of non-tariff trade remedies to protect their industries during the recession (Banks 1993:190; Cunnane & Stanbrook 1983:7; Feaver & Wilson 1995:209; Kenen 2000:222-223; Stanbrook & Bentley 1996:8).

The US, EC, Australia and Canada were together responsible for initiating 1786 anti-dumping cases in the period between 1980 and 1989 (see table 2.1). The US also initiated a large number of countervailing investigations during the same period - approximately 400 cases. Many, almost half, of these US anti-dumping and countervailing cases were superseded by negotiated voluntary export restraints (VERs), especially in the electronics and the steel industries - Japan being the main target of these VERs (Belderbos 1997:420, 434-435; Bierwagen 1990:229; Finger 1990:8 ft3; Finger & Murray 1990:43-45,48; Rowat 1990:9; Tharakan 1997:4).

Table 2.1 Anti-dumping actions initiated by the US, EC, Australia & Canada during the period 1980 - 1989

Year	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	Total
No	133	134	267	206	202	199	248	151	149	97	1786

Source: Adapted from Krishna 1997:4

These four signatories to GATT (the US, the EC, Australia and Canada) were in fact responsible for nearly all the anti-dumping investigations initiated and reported to GATT until the mid-eighties. The countries that were targeted with the majority of the anti-dumping actions during this period were the US, the EC and

Japan (Finger & Murray 1990:51; Jackson 1990:15). Countries like New Zealand, Mexico, Argentina, South Korea and Finland began to make use of anti-dumping measures from 1986 onwards, but even then these countries initiated very few investigations compared to the four main traditional users (Jackson 1990:14-15; Moore 1999:3).

2.1.3 The Uruguay Round (1986-1994)

The extensive use of non-tariff trade remedies during the 1980s was partly the reason why non-tariff trade remedies were put on the agenda of the Uruguay Round multilateral trade negotiations which started in 1986. The increased use of non-tariff barriers while the use of tariffs and quotas was being reduced or discouraged, also raised many doubts about the purpose of these non-tariff trade remedies. Were these remedies part of a genuine attempt to encourage free and fair international trade or were they a new strategy of protection? Concern about how free, fair and competitive international trade really was, reinvigorated the debate about the role of competition laws in relation to anti-dumping and countervailing measures (Milgrom & Roberts 1990:112).

For example, a suggestion was made that anti-dumping laws be scrapped and that competition laws should be strictly applied in all countries, the argument being that if competition laws were strictly applied, this would ensure the necessary competitive environment for maximizing social welfare. However, as will be explained further in chapter 3, the world economies are not in a position to have harmonised international competition laws. Nevertheless, attempts were made during the Uruguay Round to ensure that the competition issue was included in the new agreements. Important changes which addressed the concerns of the pro-competition lobbyists in respect of the anti-dumping agreement were for example, an instruction to authorities to examine all known factors other than the dumped imports that could be the cause of injury, a suggestion that authorities impose the minimum duty necessary to remedy injury, and a suggestion that consumers and industrial user interests should be able to make their views known during an investigation, or in other words that investigative authorities should consider the public or national interest during an investigation (see chapter 4). But anti-dumping was not on the original agenda for the Uruguay Round of

negotiations. Developing countries pushed to have anti-dumping included⁹ (Leebron 1997:234). During the talks, the developed countries that had made extensive use of anti-dumping measures were severely criticised. The US in particular, came under a fair amount of criticism once again, for what was perceived to be an excessive use of both anti-dumping and countervailing measures (Leebron 1997:185,234). The Uruguay Round Anti-dumping Agreement (URAA) was based on and replaced the anti-dumping code drawn up during the Tokyo Round. The new WTO Anti-dumping Agreement contains a comprehensive set of rules and procedures that were agreed upon and which have to be followed in every anti-dumping action (Corr 1997:74-94). The URAA will be discussed in detail in chapter 4 of this thesis.

A number of other issues were agreed on during the Uruguay Round. Member countries of the WTO which still had quotas in place were to convert their remaining quotas to tariffs, and certain tariffs had to be reduced over a certain period until the tariffs were equal to an average bound rate, while others were to be phased out completely. Developing countries and countries in transition were given a slightly longer period to phase out tariffs or bring their levels of tariffs in line with average bound rates. In addition, member countries are not allowed to impose new tariffs or increase existing tariffs (Bell 1997:76; Salvatore 2001:308-310).

The Results of the Uruguay Round of Multilateral Trade Negotiations (1986 - 1994), the WTO Agreement, include a number of agreements. For example the General Agreement on Tariffs and Trade 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (also known as the Uruguay Round Anti-dumping Agreement), the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards, the Agreement on Agriculture, and the Agreement on Textiles and Clothing, which all fall under the Multilateral Agreements on Trade in Goods, as well as the

9 The number of countries involved in the multilateral trade negotiations increased significantly for the Uruguay Round of Multilateral Trade Negotiations (the Uruguay Round) compared to previous rounds. Many developing countries were involved in the negotiations for the first time. Prior to the signing of the Uruguay Round, only 25 countries were signatories to the GATT Anti-dumping Code, whereas 128 countries signed the Uruguay Round Anti-dumping Agreement (Carpenter 1999:IV-4; Corr 1997:75; Jackson 1995:118).

Understanding on Rules and Procedures Governing the Settlement of Disputes¹⁰ (Corr 1997:51 ft1, 60).

Some of the Uruguay Round Agreements are less flexible than previous GATT agreements. For example, the Uruguay Round Agreement on Safeguards prohibited grey-area measures for the first time (GATT Secretariat 1994:321; Van den Bossche 1997:95). These grey-area measures were agreements between the importing and the exporting country to limit imports into the importing country. A few examples of these types of measures were voluntary export restraints (VERs), orderly marketing arrangements and export-price or import-price monitoring systems. Voluntary export restraints (VERs), which were allowed under the Tokyo Round, were used a lot by the US during the 1980s, especially against Japan (Bierwagen 1990:229; Rowat 1990:9). A VER in effect meant that the exporter was limited to a specified quota, but as already mentioned, VERs are no longer allowed (Corr 1997:64; Deardorff 1995:60; Finger 1990:18-21; Preusse 1991:6).

Another improvement on previous agreements was the Uruguay Round Agreement on Subsidies and Countervailing Measures (SCMs). The Agreement on SCMs provides a definition of a subsidy and limits countervailing measures to specific types of subsidies. A countervailing action against a member country must also include an injury test, although no injury test is required if the exporter is not a member of the WTO. The use of countervailing measures decreased after the inception of the Uruguay Round so it seems that the new provisions in the Agreement on Subsidies and Countervailing Measures (SCMs) may have made it more difficult to impose countervailing measures (Corr 1997:73).

An especially important contribution of the Uruguay Round was the improvement to the dispute settlement process (Van den Bossche 1997:95). The Understanding on Rules and Procedures Governing the Settlement of Disputes sets out which procedures are to be used. Apart from a short insert in the Uruguay Round Anti-dumping Agreement, the dispute settlement process is a unified mechanism dealing with all the subjects of the Uruguay Round Multilateral Trade Negotiations. As a result it was expected that there would be less controversy about the procedure of disputes, which in turn would prevent disputes being

10 Other agreements include the Agreement on Trade-related Investment Measures, the General Agreement on Trade in Services, and the Agreement on Trade-related Aspects of Intellectual Property Rights (Corr 1997:51 ft1, 60).

blocked for technical reasons (Jackson 1995:118-119). The dispute settlement understanding also put a bit more pressure on member countries to conform to the results of any disputes which affect them (Jackson 1995:118-121). But only members of the WTO are bound or protected by the Uruguay Round Agreements. Countries that are not members of the WTO and which may be targeted by for example non-tariff trade remedy actions, have no recourse to the Dispute Settlement Body of the WTO. For example, China was one country that was particularly affected by not being a member of the WTO prior to its accession at the end of 2001 to the world body.

A recurring problem with this and other rounds of negotiations is the fact that international agreements or treaties are not self-executing (Leebron 1997:212). For example the US Congress was not bound to integrate sections of GATT into US legislation if those sections were not consistent with US legislation, even though the US was a signatory to GATT. So even though representatives of member countries signed the WTO Agreement, there is no guarantee that the various agreements are incorporated into the laws of member countries' exactly as they appear in the signed Agreement. Each member country has the right to translate the agreements into their own law - as long as the translation is WTO compatible - a process which has contributed to quite a few loopholes being created.

2.1.4 *The Doha Development Agenda (2001-)*

The current round of multilateral negotiations is known as the Doha Development Agenda. Twenty-one subjects were put on the work programme during the fourth¹¹ WTO Ministerial¹² held in Doha in 2001. The subjects listed in the ministerial declaration of the Doha Development Agenda are: implementation -

11 Five Ministerial Conferences have been held since the establishment of the WTO. The WTO Ministerials are: Singapore 9 - 13 December 1996, Geneva 18 - 20 May 1998, Seattle 30 November - 3 December 1999, Doha 9 - 14 November 2001 and Cancún 10 - 14 September 2003 (WTO 2004d).

12 "The topmost decision-making body of the WTO is the Ministerial Conference, which has to meet at least every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements" (WTO 2004d).

related issues and concerns; agriculture; services; market access for non-agricultural products); trade-related aspects of intellectual property; relationship between trade and investment; interaction between trade and competition; transparency in government procurement; trade facilitation; anti-dumping; subsidies; regional agreements; dispute settlement understanding; trade and environment; electronic commerce; small economies; trade, debt and finance; trade and transfer of technology; technical cooperation and capacity building; least-developed countries; and special and differential treatment (WTO 2001j; WTO 2004a).

Export subsidies on agricultural products are a particularly sensitive issue and the US and EU have been criticised by many other countries, especially developing countries, for the subsidies paid to their farmers (BRIDGES weekly trade news digest 2004c:9). Although there have been a few anti-dumping cases involving agricultural products, agricultural issues tend to be governed by agreements like the Agreement on Agriculture, the Agreement on the Application of Sanitary and Phytosanitary Measures and in some instances the Agreement on Subsidies and Countervailing Measures (WTO 2004b). The types of issues countries argue about are farm subsidies in exporting countries; quotas, tariffs, safeguards or standards in importing countries; fishing quotas; market access and genetic engineering (BRIDGES weekly trade news digest 2004a:3-4; 2004b 5-6). But it is not the purpose of this thesis to investigate whether or not the agricultural package is abused or is open to abuse, so the issues that are peculiar to agricultural products will not be elaborated on even though agriculture is one of the major stumbling blocks between developed and developing countries in the current negotiations (BRIDGES weekly trade news digest 2003b:3-4; 2003c:1-3; Roitinger 2004).

Trade in textiles and clothing, specifically cotton, is also cause for much dissent between developing and developed countries, but is also covered by its own agreement, the Agreement on Textiles and Clothing (BRIDGES weekly trade news digest 2003b:3; WTO 2004c; Roitinger 2004). The Agreement on Textiles and Clothing incorporated restrictions under the Multi-fibre Arrangement (MFA). Although the Agreement focussed on the phasing-out of MFA restrictions, many restrictions still remain. Anti-dumping measures have been imposed in a few cases involving clothing and textiles, but as will be seen in chapter 7 this is not a sector in which anti-dumping features very prominently.

WTO members agreed to negotiations on the Anti-Dumping and Subsidies Agreements during the Doha

Round in order to clarify and improve disciplines under these agreements “while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase.” The ministers specifically mentioned fisheries subsidies as one sector important to developing countries and where participants should aim to clarify and improve WTO disciplines (WTO 2001j:6, para28). A number of other suggestions which have been submitted to the WTO will be discussed in chapter 8.

The Doha Development talks ended in deadlock during the 2003 Ministerial Conference in Cancún, Mexico, with WTO members failing to reach consensus on a number of issues, especially the "Singapore issues" (trade and investment; trade and competition policy; transparency in government procurement and trade facilitation¹³). International trade is therefore still governed by the agreements signed during the Uruguay Round. Numerous meetings have been held since Cancún in an attempt to get negotiations back on track. In the process, more emphasis has been placed on agriculture, industrial market access, cotton and developing countries' concerns. Apart from trade facilitation, the Singapore issues seem to have taken a back seat (BRIDGES weekly trade news digest 2004e:2; 2004f:5).

2.2 NON-TARIFF TRADE REMEDIES CURRENTLY IN USE

The adoption of the Uruguay Round Agreements meant that the use of quotas was to be phased out, tariffs were to be reduced or in some cases phased out, and the use of non-tariff barriers like VERs was no longer allowed. According to the Uruguay Round there are three non-tariff trade remedies that may be used; anti-dumping actions, countervailing actions and safeguards.¹⁴ The circumstances and conditions

13 The first Ministerial since the WTO entered into force on 1 January 1995 was held in Singapore, and it was during this Ministerial Conference that these four issues were first placed on the table for negotiation.

14 Trade remedies may be used under special conditions for example restrictive import measures may be taken for balance-of-payment purposes. As these are only under very special circumstances, no further reference

under which these non-tariff trade barriers may be imposed are spelt out in the applicable agreements in the Uruguay Round Agreement; namely the Uruguay Round Anti-dumping Agreement (URAA), the Agreement on Subsidies and Countervailing Measures (SCMs) and the Agreement on Safeguards. But these non-tariff trade remedies are not a new phenomenon. They were being used before the General Agreement on Tariffs and Trade (GATT) was signed in 1947.

Canada enacted the first anti-dumping law in 1904. In the US, the initial anti-dumping regulations (1916) were based on the anti-trust law, the Sherman Antitrust Act of 1890, under which predatory dumping was declared an illegal act (Carpenter 1999:IV-3; Viner 1966a:239-240). Countervailing measures in the US were regulated under the United States Tariff Act of 1890. Under this Act, countervailing duties were imposed on imports that were being subsidised and according to Viner (1966a:168-173), were mandatory during that period. What is new is the extent to which these trade remedies have been used since the 1980s. The substantial tariff reductions negotiated during the Uruguay Round (1986-1994) more than likely contributed to the continued and extensive use of the non-tariff trade remedies that are allowed under the agreements (Stanbrook & Bentley 1996:8).

Most countries that use non-tariff trade remedies tend to make use mostly of anti-dumping actions (Finger 1993:25; table 2.3). The US has been the main exception. As can be seen from table 2.2, during the period 1980 to 1986, the US used countervailing actions almost as often as it made use of anti-dumping actions. In the same table there is also a category of actions called “other” which was peculiar to the US. Actions that fell under this heading were cases known as 301¹⁵, 406 and 337 cases. The 301 cases were usually those that related to unfair trade practices especially those pertaining to services, investments and intellectual property. The 406 or market disruptive cases were those against imports from communist countries, while 337 cases were mainly against patent infringements (Finger 1990:5-7,13).

will be made to these other possibilities (GATT Secretariat 1994:27-31).

15 The numbers 301, 337 and 406 refer to sections of the US Trade Act of 1974.

Table 2.2 Number of non-tariff trade remedy cases initiated by the US, EC¹⁶, Australia and Canada during the period 1980-1986

	Safeguards	CV actions	AD actions	Other	Total
US	28	282	351	259	920
Australia	4	21	456	0	481
Canada	4	16	293	0	313
EC	9	7	294	0	310
Total	45	326	1394	259	2024

Notes: CV actions = countervailing actions

AD actions = anti-dumping actions

Source: Finger 1990:9

Safeguards actions were not used frequently by any country probably because it was relatively more difficult to impose safeguards than it was to impose anti-dumping or countervailing duties (Finger 1993:3; Corr 1997:66). According to most interpretations of the Agreement on Safeguards, which is based on Article XIX of GATT 1947, safeguards are an emergency measure which may only be imposed if there is *serious* injury to the domestic industry of the importing country. The use of safeguards increased during 2001 and 2002 (see table 2.3), but the recent safeguards imposed by the US government against steel imports were judged to be in violation of the WTO agreement in a preliminary ruling by the Dispute Settlement Body of the WTO (Pruzin 2003:1). The US withdrew the safeguard measures in December 2003, after being threatened by the EU, Japan China and others with retaliatory action (Creamer 2004; Drajem 2003).

16 The URAA was signed by the European Community (EC) and the regulation based on the agreement, The Basic Regulation, is an EC regulation. The European Union (EU) was established under the Maastricht Treaty of 1992. The powers of the EC were extended in certain areas under this treaty. The terms EC and EU, while strictly speaking not exactly the same, can be and are often used interchangeably (Farr 1998:7).

Table 2.3 Trade remedy cases initiated 1980-2003

	Anti-dumping cases by Industrial Countries *	Anti-dumping cases by Developing Countries**	Total Anti-dumping Cases	Total Countervailing Cases	Total Safeguard Cases
1980	133	0	133	14	6
1981	134	0	134	23	8
1982	267	0	267	153***	8
1983	206	0	206	35	5
1984	202	0	202	61	7
1985	199	0	199	43	4
1986	248	5	253	33	7
1987	151	23	174	13	...
1988	149	47	196	5	...
1989	97	14	111
1990	82	14	96
1991	134	41	175	...	5
1992	198	39	237	...	3
1993	207	38	245	...	3
1994	164	83	247	...	0
1995	73	84	157	10	2
1996	73	151	224	7	5
1997	117	126	243	16	3
1998	80	176	256	25	11
1999	158	197	355	41	14
2000	125	169	294	18	26
2001	156	210	366	27	53
2002	78	233	311	9	132
2003	72	138	210	15	13

Notes: * Industrial countries: Australia, Canada, EC member countries, Japan, New Zealand and the US.

** Developing countries, including countries in transition: Argentina, Brazil, Bulgaria, Chile, China P.R., Chinese Taipei, Colombia, Costa Rica, Czech Republic, Ecuador, Egypt, Guatemala, India, Indonesia, Israel, Jamaica, Korea Rep of, Malaysia, Mexico, Nicaragua, Panama, Peru, Philippines, Poland, Singapore, Slovenia, South Africa, Thailand, Trinidad & Tobago, Turkey, Uruguay and Venezuela

*** Of the 153 countervailing cases that were initiated in 1982, 145 were initiated by the US.

... Data not available

Data may still be updated by the WTO, especially for 2003.

Sources: Finger 1991:178; 1998:26; Finger & Schuknecht 1999:52; Kempton & Stevenson 1999, 2000; Krishna 1997:4; Stevenson 2001, 2002, 2003; WTO 2003a; WTO 2003k; WTO 2004g; WTO 2004m

The US, a country that used countervailing measures quite frequently during the 1980s, also used anti-dumping measures more often than countervailing measures during the 1990s (Carpenter 1999: E-3-E-5). It has been suggested that countries use anti-dumping more frequently than the other non-tariff trade remedies because it is relatively easy to file a successful complaint (Corr 1997:74). Another interesting development during the late 1980s, after the Uruguay Round negotiations got under way, was the entrance of developing countries like Mexico, Brazil and Argentina, onto the anti-dumping stage (Finger & Schuknecht 1999:36; table 2.3).

As will be explained in detail in chapter 3, dumping could be the result of a number of factors, for example price discrimination, subsidies, selling at below cost or excess capacity. While the subsidisation of exports could be seen as a special case of dumping, it is clear from the agreements that the signatories to GATT¹⁷ saw dumping and subsidisation as two separate problems to be addressed by two separate measures.¹⁸ An applicant applies to have an anti-dumping duty imposed on a product that is being dumped. So, in an anti-dumping action it must be shown that the exporter is dumping (Stanbrook & Bentley 1996:5). A countervailing duty “shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise” (GATT Secretariat 1994:494). Countervailing actions are targeted at products that are being subsidised by government and it seems to be implicitly assumed that such an exporter would be dumping because of the subsidy, so there is no need to show or determine dumping during the investigation (Stanbrook & Bentley 1996:5). As the main focus of this thesis is the determination of dumping, countervailing actions fall outside the main focus of the study.

17 GATT (1947 as amended) (GATT Secretariat 1994:485-558).

18 Article XVI of GATT deals specifically with subsidies, while the problem of dumping is explained in Article VI of GATT. There are two additional and separate agreements which form part of the WTO Agreement, one dealing with dumping and anti-dumping measures, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 which specifically “governs the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations”; the other dealing with subsidies and countervailing measures, the Agreement on Subsidies and Countervailing Measures (GATT Secretariat 1994: 168,264).

2.2.1 *Anti-dumping measures*

According to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, better known as the Uruguay Round Anti-dumping Agreement (URAA), an applicant bringing an anti-dumping application has to follow certain procedures. An anti-dumping application would include, apart from other information, evidence of dumping¹⁹, evidence of injury and a causal link between the dumping and the injury (GATT Secretariat 1994:175-177). An extremely important step in the process of an anti-dumping action is to determine whether or not the imported products are being dumped. And, as explained briefly in chapter 1, two values are needed in an anti-dumping action to determine whether or not an exporter is dumping - the *normal value* (NV), and the *export price* (P_x). It will become evident in this and in later chapters that the *normal value* is often the key to a dumping case (Ryan 1996:113). The determination of dumping becomes complicated if the product that is being exported is not sold at all in the home market of the exporter or is sold only in very small quantities²⁰ in that market.²¹ The result of both these situations is that there is no reliable normal value with which to compare the export price.

According to paragraph 1(b) of Article VI of GATT, if the normal value based on selling prices in the domestic market of the exporter is an unreliable value, then the export price is to be compared with “either (i) the highest comparable price for the like product for export to any third country in the ordinary course

19 According to the URAA, a product is being dumped or “introduced into the commerce of another country at less than its normal value” and “... a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country” (GATT Secretariat 1994:168; WTO Secretariat 1995:220). If the export price of a product is less than the normal value of that product (after due allowance has been made “for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability” [WTO Secretariat 1995:220]), then the product is being dumped. If a product is being dumped and if this dumping is causing material injury, or if there is a threat of material injury to an industry in the importing country or if the establishment of an industry is being materially retarded by the dumping, then the authorities of the importing country are allowed, after following the necessary procedures, to impose an anti-dumping duty on the offending product.

20 According to the URAA if the home sales in the exporting country are less than 5 per cent of “the sales of the product under consideration to the importing Member” then the home sales are not a sufficient quantity to determine the normal value, unless evidence suggests the contrary (GATT Secretariat 1994:168).

21 Anti-dumping Agreement, PART I, Article 2, paragraph 2.2.

of trade, or (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.” Paragraph 2.2 in the URAA makes the same provision in the event of an unreliable normal value (GATT Secretariat 1994:168, 493; WTO Secretariat 1995:220).

The method described in paragraph 1(b)(i) of Article VI has not often been used. It is argued that if an exporter is dumping in one country, the chances are that it may be dumping in other countries. So the price of exports to a third country may not be a good reflection of the cost of production in the exporting country (Messerlin 1991:47). The method provided for in Article VI, paragraph 1(b)(ii) has been used extensively. This method has become known as the constructed-value method. The logic of this method is that the full cost of production including allowances for administrative, selling and general costs as well as for profits, per unit is calculated. In this way a correct or as near correct as possible proxy normal value based on the cost structure of the exporting country, is determined, against which the export price is compared. But this method is open to a certain amount of manipulation and abuse and has been criticised for these reasons (Waer 1993:78-79; White 1997: 119). The constructed-value method will be discussed in detail in chapter 5.

These two methods, exports to a third country and the constructed-value method, were used to solve the problem of an unreliable normal value when the exporting country was a market economy. But when member countries of GATT began trading with state-controlled or centrally-planned economies, the determination of the normal value became an even bigger problem. The prices of products under central planning did not reflect the true cost of production as understood in market economies. So selling prices of products in the home market of a centrally-planned economy (CPE), could not be used to determine the normal value for those products. In addition, the unreliable cost information made it impossible to use the constructed-value method to determine a normal value. Likewise, the export price to a third country was just as suspect as all the other prices and could also not be used to determine the normal value. But a workable alternative was found. The cost structure of a third economy which was a market economy, and which was as similar as possible to the exporting country, was to be used to determine the normal value against which the exporting price could be compared (Corr 1997:81; Ehrenhaft 1990:305; Horlick & Oliver 1989:14-18; Horlick & Shuman 1984:808, 819; Messerlin 1991:47; Olechowski 1993:173; Ryan 1996:113-114; Wang 1999:122). This method which became known as the analogue (in the EU) or

surrogate (in the US) method, will be discussed in detail in chapter 6.

Many of the previous centrally-planned economies were classified as non-market economies (NMEs) when these countries began to change their economies to incorporate market principles. Although these countries were no longer centrally planned they were also not market economies. NMEs were treated in the same way in which CPEs were treated. Prices in these countries were still regarded as being unreliable and so an analogue or surrogate country's cost structure was used to determine the normal value in most anti-dumping actions against NMEs.

2.2.2 *Countervailing measures*

The Uruguay Round Agreement on Subsidies and Countervailing Measures (the SCM Agreement) is an agreement on the interpretation and application of Articles VI, XVI and XXIII of GATT. The SCM Agreement disciplines the use of subsidies and regulates the actions to counter the effects of subsidies, in other words the imposition of countervailing measures (Corr 1997:68-74; WTO 2001a:4). In many respects the procedure set out in the Agreement on Subsidies and Countervailing Measures is the same as the Uruguay Round Anti-dumping Agreement²². For example, countervailing duties may only be imposed on like products and only if those products are causing material injury to the domestic industries in the importing country. The SCM Agreement prescribes the procedure that has to be followed during an investigation and also sets time limits on the various stages of the investigation. A sunset clause is also applicable to countervailing duties and members of the WTO are allowed to approach the Dispute Settlement Body if the situation warrants such intervention (GATT Secretariat 1994: 278-314).

Countervailing duties may only be imposed in response to the subsidisation of exports. In order that a countervailing duty be imposed on a product it must be shown that there is a subsidy and that the subsidy causes material injury. If an exporter is dumping, for example because it is practising price discrimination,

22 The Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

the applicant cannot apply for protection under the subsidies and countervailing measures agreement. Such an application would be dealt with under the Anti-dumping Agreement. There is no need to show whether or not the product is being dumped in a subsidies and countervailing action. In other words, there is no need to compare the normal value to the export price. This difference is important in the context of this thesis, because the focus of this thesis is on the determination of dumping, and particularly on the normal value. So apart from the explanation in this section, subsidies and countervailing measures will not be discussed in any detail in this thesis.

The Uruguay Round Agreement made two important contributions in respect of Subsidies and Countervailing Measures. For the first time a definition of “a subsidy” was provided and, it was clearly stated that only subsidies that were specific “in accordance with the provisions of Article 2” of the Agreement would be subject to prohibition or countervailing measures (GATT Secretariat 1994: 264-265). The definition of a subsidy has three basic elements, there should be i) a financial contribution which is made ii) by government or any public body and iii) this financial contribution must confer a benefit on the receiver of the subsidy. According to the Agreement, in order for a subsidy to fall under the definition covered by the Agreement, in other words if a subsidy is “deemed to exist”, it has to contain all three of these elements. A subsidy that is for example supplied by a private organisation does not qualify as a subsidy under this definition even though it is a financial contribution that confers a benefit (GATT Secretariat 1994: 264; WTO 2001c:2). In order for a subsidy to be specific it has to distort “the allocation of resources within an economy” (WTO 2001d:2). Such a subsidy would distort the “natural comparative advantage balance” (Feaver & Wilson 1995:229-231). According to Article 2 of the SCM Agreement, in order for a subsidy to be specific it has to be specific to either an enterprise, an industry or a group of enterprises or industries in other words, regionally specific. A widely available subsidy is assumed not to distort the allocation of resources within an economy and would therefore not be classified as specific.

The SCM Agreement also divided subsidies into three categories, subsidies which are non-actionable (green light), those which are actionable (yellow light subsidies) provided their prejudicial or injurious effects can be proved, and those which are expressly prohibited (red light subsidies) (Corr 1997:68-69; Stanbrook & Bentley 1996:6). Non-actionable or green light subsidies are permissible and must be notified to the SCM committee as such (Finger 1995:106). These subsidies would include government support for

certain research and development and other industrial research, subsidies to underdeveloped regions and compensation to adapt to specific environmental regulations (Corr 1997:69). A countervailing action may not be brought against a green light subsidy, however, the categorisation of a subsidy as non-actionable or green light may be challenged. Countervailing actions may be brought against products that are subsidised with a yellow light subsidy but material injury (actual or threatened) must be proven. The applicant in such an action may or may not be granted the protection of a countervailing duty. Prohibited or red light subsidies include those which have an effect on trade conditions like export subsidies and import substitution subsidies (Corr 1997:69-71; WTO 2001f:1-2). Such subsidies are not allowed and an importing country should have no problem getting a countervailing duty imposed on products that are subsidised by a red light subsidy²³. The SCM Agreement states further that an injured party may consult with the exporting country in an attempt to reduce the subsidy before the investigative process begins (GATT Secretariat 1994:284). If consultation between the parties does not provide a solution then the injured party may request, through an investigation, that a countervailing duty be imposed on the relevant products.

Subsidies which were in existence when the SCM Agreement came into effect and which were classified as prohibited by the Agreement, were to be phased out over a period of time. Countries with economies in transition were given 7 years to phase out any prohibited subsidies or bring their subsidy programmes into conformity with the SCM Agreement (Stanbrook & Bentley 1996:6). Those countries in transition and which were members of the WTO, also received preferential treatment in respect of actionable subsidies provided their subsidies were notified to all the members of the WTO. Developing countries were given 8 years to phase out prohibited subsidies although certain developing countries for example least-developed country members (LDCs), were exempt from the rules on prohibited export subsidies and were provided with special and differential treatment when they are subject to countervailing duties (WTO 2001e:2). But such preferential treatment was only granted to countries that were members of the WTO. Countries that are not members of the WTO do not benefit and are not protected by the agreements signed by members. For example, the US has to conform to the injury requirement during a subsidy investigation, but only in respect of member countries (Gallaway *et al* 1999:212; Horlick & Oliver 1989:12). And while a “failure

23 Other categories of fisheries subsidies are currently being negotiated as part of the Doha Development Round (BRIDGES weekly trade news digest 2003a:3-4).

to respect either the substance or procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure”(WTO 2001b:2), it is only member countries that may use the WTO dispute settlement procedure to seek withdrawal of a subsidy or to change a countervailing duty.

2.2.3 Safeguards

The Agreement on Safeguards established rules for the application of safeguard measures. This agreement was based on and incorporated measures provided in Article XIX of GATT, the Escape Clause. This Agreement was intended to “re-establish control over safeguards and eliminate measures that escape such control” - for example, the agreement prohibits the use of grey area measures (GATT Secretariat 1994:315; WTO Secretariat 1995:515). It had become necessary to provide clarity around the issue of safeguards as some signatories to GATT were using a variety of grey area measures like bilateral voluntary export restraints (VERs) which were not covered by GATT (WTO 2001g:2).

A safeguard is an measure that a member of the WTO may impose in order to protect a domestic industry against a sudden surge in imports that causes or threatens to cause *serious* injury to that industry. A safeguard is a temporary emergency measure that may only be imposed after an investigation and only if the increase in imports is the cause of the serious injury²⁴. But there is no need to show that there has been any unfair trade practice like dumping or subsidisation (Cunnane & Stanbrook 1983:8; Finger 1990:5; GATT Secretariat 1994:315-324). While the safeguard is in place the domestic industry in the importing country has the opportunity to adjust to the changing trade circumstances. A safeguard may consist of a quantitative import restriction or of a duty imposed on the products, which is in place for a maximum of 4 years. However, the safeguard is phased down at regular intervals during the period it is in place. A safeguard may be extended for a further 4 years after a review if injury persists and if the domestic industry

24 The US seemed to be attempting to change the interpretation of the Agreement in their latest safeguard cases against a number of iron and steel exporters. These cases were disputed and the results of the Dispute Settlement Body were appealed by the US (Pruzin 2003). The WTO ruled against the US and the safeguard measures were withdrawn in December 2003 - but only after US trading partners threatened to impose sanctions against the US (Drajem 2003; WTO 2003m:170-172).

can show it has begun adjusting (Corr 1997:62-63; WTO 2001h:2).

The various rules that apply to safeguards, which will not all be mentioned, make this type of trade remedy less popular than either anti-dumping or countervailing duties. A safeguard must be implemented in a non-discriminating way, restriction should apply to all imports irrespective of source. Another rule provides for the possibility of compensation to the exporters for their loss of trade as a result of the imposition of safeguards²⁵ (GATT Secretariat 1994:319-320). The Agreement also provides for a number of exceptions to some of its rules, making a special exception for developing countries (Corr 1997:63; WTO 2001i:2). These measures have not been used that often until recently²⁶, anti-dumping measures being the preferred trade remedy for many years (Corr 1997:66; table 2.3). But more important in the context of this thesis, there is no need to prove dumping to have a safeguard imposed which means that safeguards are not relevant to the determination of dumping, the subject of this thesis. Safeguards will therefore not be discussed any further.

2.3 THE NEW PROTECTIONISM IN THE TRADE IN GOODS

Some economists call the use of anti-dumping and countervailing measures the new protectionism (Corr 1997:82; Hindley 1991:38-39; Horlick 1993:7; Nivola 1993:34-36; Palmetier 1993; Yarrow 1987:79). While it is true that these measures are a form of protection, the ideal is that they should only be used as protection against unfair trade practices²⁷ (Stegemann 1991:381; Tharakan, Vermulst & Tharakan 1998:1036). And the right to use certain non-tariff trade remedies in response to unfair trade practices is condoned in GATT. But what is an unfair trade practice?

25 Agreement on safeguards, Article 8.

26 The number of safeguard investigations initiated increased sharply during 2002 (see Table 2-3). Many of these cases involved groups of steel products and a number of developing countries began to use safeguards extensively (Stevenson 2002:5; 2003:5-7).

27 Although it could be argued that safeguards should also be included under the label “the new protectionism”, safeguards are used against fair trade.

Briefly, an unfair trade practice would be either dumped or subsidised exports that cause injury to import-competing industries. Another way of defining an unfair trade practice would be if an exporter has an artificial advantage as opposed to a comparative advantage over the import-competing industries. Such an advantage could be artificial if for example the exporter has market power in its domestic market or the exporter is being subsidised (Stanbrook & Bentley 1996:6-7; Sykes 2003:1). As Finger (1990:19-21) pointed out, the multilateral trade agreements are based on the belief “that domestic producers had a higher claim than foreign producers to the domestic market”. Given this point of view, it would be quite justified to impose a duty on a product that is being exported by a firm or industry which has an artificial advantage over and causes injury to an import-competing industry (Nivola 1993:38).

The problem, as stated in chapter 1, seems to be that an anti-dumping or countervailing duty could be imposed on imports that are being *fairly* traded. The imposition of such measures would then be nothing else but protectionism against free and fair trade. It is argued that the anti-dumping agreement for example, has been very subtly and sometimes not so subtly, legislated into certain countries’ statutes so that the essence and intent of the agreement has been changed (Eymann & Schuknecht 1993:222; Finger 1993:51-52; Leebron 1997:224-237; Lutz 1994:124; Nivola 1993:92-93; Palmetier 1993). In addition, as Stegemann (1991:379) pointed out, “... international law that was intended as a ceiling tends to become a floor for the policies of the participating jurisdictions ... because the domestic law makers and administrative authorities respond by moving towards making maximum use of import restrictions permissible under the internationally agreed rules or interpretations”.

The reality is that complaints abound about the use of non-tariff trade remedies. Countries have been accused of protectionism, investigative authorities of bias and legislators of interpreting the various agreements so that the balance is swung back in the favour of their domestic industries. The US and the EU in particular, have both been criticised for their use of anti-dumping and countervailing measures. Initially the one accused the other, but since the Uruguay Round, developing countries are criticising industrialised countries of using these measures, especially anti-dumping measures, to the advantage of their economies - at the expense of other countries, often developing countries or countries in transition. Non-tariff trade remedies, also referred to as administered, regulatory or contingent protection, differ from traditional tariffs and import quotas in that non-tariff trade remedies tend to be imposed selectively

(Grimwade 1996:98; Stegemann 1991:376-380; Tharakan 1993:597). Because non-tariff trade remedies are aimed at restraining the most aggressive sources of import competition, they tend to protect a relatively small number of sensitive industries²⁸, for example the iron and steel, chemical, electronics, textile and agricultural sectors (Corr 1997:55; Stegemann 1991:380). Nivola (1993) and Palmetter (1993) suggest that US trade laws in particular are biased against certain imports, and that in some cases the application of non-tariff trade remedies are nothing else but protection for unproductive industries, especially during times of recession.

2.4 ANTI-DUMPING - THE MAIN CULPRIT

Although countervailing measures and VERs were used quite a lot during the 1980s, anti-dumping has been the non-tariff trade remedy used the most often since the mid-1980s (see table 2.3 in section 2.2 of this chapter). Anti-dumping policy has therefore become the main concern of critics of the new protectionism (Corr 1997:82; Horlick 1993; Krishna 1997:10; Martin 1999:895, 902-903). Even though Article VI of GATT (1947 as amended) states that dumping is to be condemned, the anti-dumping agreement merely provides an accepted mechanism that may be used against injurious dumping. The agreement does not regard dumping as illegal, nor does the agreement suggest that anti-dumping duties should be mandatory. Although individual countries' laws do prohibit dumping, according to the Anti-dumping Agreement, there is no obligation on the import-competing industry to lodge anti-dumping applications (Cass, Boltuck, Kaplan & Knoll 1998:74-75; Ethier 1987:937). In addition, the procedure that must be followed in an anti-dumping investigation was ostensibly designed so that anti-dumping duties would only be imposed on exporters guilty of injurious dumping. But it has been alleged that many anti-dumping measures have been imposed unfairly on exporters that were not dumping, and that the procedures followed in some anti-dumping investigations have not been consistent with the spirit of the anti-dumping agreement (Corr 1997:82; Stegemann 1991:376-377). As Stegemann (1991:376-377) put it, some parties have managed to "to stretch the rules or take advantage of a loophole".

28 See chapter 7 for more detail.

Part of the problem lies in the fact that such international agreements are not self-executing. An international agreement or treaty has to be made law in each member country according to the acceptable process in that country. In the process of translating the agreement into a country's law an international agreement can be interpreted differently to what was originally intended in the signed agreement (see ch 4). The investigative authorities could therefore be acting within the anti-dumping laws or regulations of their country, even though these actions could be inconsistent with the WTO agreement. For example, the EC included the practice known as "zeroing" in their anti-dumping regulations (see ch 4). This practice has subsequently been declared inconsistent with the URAA by the WTO Appellate Body - but it has taken a number of years to reach this decision (EC v India 2001:13-16, 21 paragraph 66, 27). Another part of the problem, according to Stegemann (1991:378), lies in the way the agreements were and still are negotiated. When one or more of the signatories to GATT initiate an innovative anti-dumping practice, this practice is either challenged or emulated. If enough users agree that a particular new practice should be permitted, such a practice is then included in the anti-dumping agreements of the future. A good example is the cost-based or less-than-fair-value approach to dumping which evolved during the 1970s and which formed the basis of the constructed-value approach as detailed in PART I Article 2 of the URAA (Nivola 1993:92-93). The constructed-value approach will be discussed in detail in chapter 5 of the thesis.

This thesis looks at the determination of dumping because this is a stage of the investigative process during which the results of an anti-dumping investigation could be manipulated²⁹. It is important to bear in mind that a negative or *de minimis* dumping result means that there is no or insignificant dumping. And if there is no or insignificant dumping, there is no case. It would therefore be to an applicant's advantage to ensure that the result of the determination of dumping calculation is such that the anti-dumping investigation can continue. When referring to the Tokyo Round Anti-dumping Code, Rowat (1990:9) suggested that "... it is the area of substantive methodology in the calculation of dumping where the protectionist tilt is most apparent and important." The changes in the URAA did not really reduce this protectionist tilt (Hoekman & Mavroidis 1996:27; Martin 1999:902-925). As will be seen in this thesis, it is possible for an applicant in an anti-dumping action to capture the dumping margin and thereby influence the results of the anti-dumping investigation. So the possibility of capturing the dumping margin means that an exporter that has

a comparative advantage over the import-competing industry could be unfairly targeted with an anti-dumping measure.

2.5 THE ECONOMIC IMPACT OF ANTI-DUMPING

One of the arguments in favour of anti-dumping measures is that dumping distorts international trade (see ch 3). But anti-dumping measures could also distort international trade (Anderson 1993:101-105). If anti-dumping measures are imposed against fair exports it means that exporters that have the comparative advantage in certain products may be blocked from exporting those products.

2.5.1 *The welfare effect*

Anti-dumping measures have an economic welfare effect on the importing and exporting countries. In the country of import, it is the importer of a product that pays the anti-dumping duty and it is the consumers in that country that must ultimately pay the higher price for the imported or end product. The applicant in an anti-dumping action does not bear any of the political or social costs of anti-dumping measures, just the legal costs (Finger 1993:66). Sometimes importers enter into price raising agreements with their aggrieved domestic competitors, but this reduces competition. The result is that anti-dumping policies often protect the interest of select producers at the expense of other domestic producers and of the consumers in the importing country (Anderson 1993:105-115; Banks 1993:184-185; Dutz 1993:206; Feaver & Wilson 1995:211; Finger 1993:64-66; Gallaway *et al* 1999:228; Hoekman & Mavroidis 1996:30-31; Martin 1999:904-905; Nivola 1993:34-35; Stegemann 1991:380).

Finger (1993:69-70) argued that a comprehensive cost/benefit analysis of the effect of any trade remedy should be carried out during an investigation. In other words the net welfare effect of both the dumping and anti-dumping measures should be calculated. Otherwise the trade remedies that are imposed may be unfair.

If the domestic cost of import restriction is greater than the domestic gains of that restriction, then the imports should be allowed. But more often than not, neither the positive effects of dumping nor the negative effects of the anti-dumping measures on the importing country are considered in anti-dumping actions.

Any welfare effect (positive or negative) on the exporters or the exporting country are totally ignored by the investigative authorities during an investigation. The negative effect of anti-dumping measures on exporters may be reduced somewhat if exporters increase their export prices. Then the additional rent from the higher price would accrue to the exporter. In other words some of the benefit which could be gained by the importing country from the revenue received from the anti-dumping duty, can be transferred to the exporter (Gallaway *et al* 1999:219-220,234-235). But this means higher market prices and less competition in the importing country (Olechowski 1993:172-175; Smith 1994:56).

2.5.2 *The effect on international trade, competition and world prices*

Protectionism tends to be beggar-thy-neighbour and often invites retaliation. The danger of retaliation was clearly illustrated during the tariff war of the 1920s and 1930s. The effect of the tariff war on international trade was devastating and was the impetus of the trade negotiations that formed the GATT (Kenen 2000:213-214). Economists have expressed concern about the possible chilling effect on international trade of the current protectionist tendencies (Stegemann 1991:380-381). According to some, the protectionist nature of anti-dumping measures could be more damaging to international trade than the dumping they ostensibly prevent (Cunnane & Stanbrook 1983:3; Krishna 1997:10). The protectionist nature of anti-dumping becomes especially apparent during times of recession, as the use of these measures tends to be countercyclical (Corr 1997:58; Stegemann 1991:379). Finger (1993:24-25, 64-66) in particular, has long been a critic of anti-dumping. He and others, argue that anti-dumping is bad for comparative advantage - market prices are increased and foreign competition is decreased.

An added problem is that if the affected exporters are situated in developing or non-market economy countries, then the protectionism of anti-dumping (or countervailing) duties could impact on the ability of

these countries to export. Many developing countries rely on export-oriented trade strategies to promote economic development and growth. But it seems that it is not enough for developing countries to have a comparative advantage in order to trade. These countries must sometimes do more than encourage exports of the products in which they have a comparative advantage - they have to concentrate on sectors that have weak political influence in developed countries (Eymann and Schuknecht 1993:238). Developing countries have started to adopt their own anti-dumping regulations and countries like India, Argentina and Brazil have become prolific users of anti-dumping themselves (Finger 1998:10; Stevenson 2002:2; table 7.2). The potential of retaliation by developing countries has thus increased and developing countries have become a force to be reckoned within the WTO negotiating forums³⁰. It is hoped that these two factors may contribute to a reduction in the use and misuse of anti-dumping actions, instead of tit-for-tat retaliation which would result in an ever increasing use of anti-dumping as protection (Finger 1993:viii-ix).

The role of China as a major global importer as well as an important exporter could impact on the use of anti-dumping as protection. China is making no bones about the fact that it intends to “make full use of anti-dumping as a weapon for trade protection” even though it opposes the abuse of anti-dumping and intends to abide by the anti-dumping rules (China: Biggest int’l anti-dumping victim 2000; China increases anti-dumping suits over imported products 2002). There is no contradiction in this stated intent - as will be show and explained in detail in this thesis. China can just follow the example set by other users of anti-dumping - cheat on the agreement while staying within the law.

2.5.3 *Uncertainty*

Because it is possible under certain circumstances for an applicant in an anti-dumping investigation to capture the dumping margin (see chs 4 to 7), importers and exporters can never be sure of the result of anti-dumping actions until the relevant investigative authorities have made their decisions (Anderson 1993:101; Grimwade 1996:100). Exporters can therefore never really be sure whether or not they will

30 Developing countries (the G20) were instrumental in the deadlock that occurred during the last Ministerial Conference in Cancún, Mexico (BRIDGES weekly trade news digest 2003b:2-4).

be the target of anti-dumping actions and resultant measures, even when they believe they are not dumping. The possibility of a duty being imposed could create uncertainty for the exporters as well as the importers and act as a credible threat to discourage competing imports - especially during times of recession (Anderson 1993:101; Feaver & Wilson 1995:209; Kolev & Prusa 2003:897; Grimwade 1996:99). This type of uncertainty particularly affects non-market economy countries because of the way in which the normal value is calculated in anti-dumping investigations against these countries (see ch 6) (Tharakan 1993:580-582). As Belderbos (1997:431) puts it, the uncertainty created “makes exporting a risky strategy”.

Exporters could respond in a variety of ways to such a credible threat. For example, they may decide to increase export prices in order to try to avoid potential anti-dumping actions - reducing price competition for the import-competing industries (Gallaway *et al* 1999:219-220). Some exporters may try to find other markets which means that the competition is completely removed. But this is usually only an option if export volumes are small, then an exporter can usually find another market quite easily (Fraser & Bloomberg 2001:3). Another alternative is that exporters may decide to relocate their production facilities in the foreign market in order to avoid possible anti-dumping actions (Haaland & Wooton 1995:4). Assembly operations that are set up in the importing countries in order to circumvent anti-dumping measures are known as screwdriver plants (Grimwade 1996:101). This tendency to relocate production facilities resulted in an increase in Japanese foreign direct investment (FDI) in the US and the EU during the 1980s (Belderbos 1997:419-423, 432, 450-451).

2.5.4 *The harassment effect*

It is not necessary to go through the whole process of an anti-dumping investigation in order to influence the decision of competitors. According to the harassment effect, the mere lodging of anti-dumping applications could distort trade between countries and between products (product shifting) (Anderson 1993:101-104). Potential importers could be discouraged from importing products if they know that certain import-competing industries are prepared to lodge anti-dumping applications (Anderson 1993:101;

Finger & Murray 1993:248). The mere lodging of an application could also have a harassment effect on exporters³¹. If exporters know that the import-competing industry is prepared to initiate anti-dumping actions this knowledge could influence the exporters's actions. In fact just the existence of anti-dumping laws could have a harassment effect (Belderbos 1997:432).

2.6 CONCLUSION

Various authors argued that the prevention of dumping in its different forms has become part of “the new protectionism”, and that the anti-dumping agreement in particular has provided an escape valve for protectionist sentiments while the use of conventional methods of protection, tariffs and quotas, have been reduced under GATT and the WTO (Cass *et al* 1998:80; Corr 1997:82; Cunnane & Stanbrook 1983:3; Ethier 1987:937; Finger 1993:24-25, 64-66; Krishna 1997:10; Stegemann 1991:376-378). In spite of all the negative effects that anti-dumping measures can have on international trade, there is still incentive to cheat on the anti-dumping agreement, and the power of the state can be used to reduce or eliminate legitimate competition, which was not the stated intent of GATT (Finger 1993:64-66). But a point that needs to be considered, is that in order to promote free and fair international trade, the signatories to GATT, and the subsequent multilateral trade negotiations, agreed to reduce and phase out tariffs and quotas. In order to persuade producers to accept general tariff reductions there had to be some type of protection which could be used when necessary (Winters 1992:141). Non-tariff trade remedies fill that role. Without going into the economic arguments for and against trade liberalisation, the fact remains that without the existence of non-tariff trade remedies, tariffs and quotas would probably not have been reduced and phased out as they were. The multilateral trade negotiations were just that - negotiations. The agreements that came out of these negotiations were compromises between the countries involved, and these compromises did not come easily. In addition, many countries were not included during the earlier Rounds of negotiations. Many developing countries have only been involved in the negotiations since the Uruguay Round.

31 According to Feaver and Wilson (1995:209) the harassment effect seems to impact more on the importers than on exporters.

It would seem therefore, that anti-dumping measures (and other non-tariff trade remedies) have a role to play in the attempt to liberalise international trade. But the misuse of especially anti-dumping measures has raised concerns that retaliation could increase protectionism to the detriment of international trade and the world economy. It will become apparent during the detailed discussion of the URAA in chapter 4 that there are a number of ways to manipulate the result of an anti-dumping investigation. And it has become necessary to find ways to reduce the potential of such manipulation. One stage of the investigative process that needs to be tightened up is the determination of dumping, which has become a complex exercise. The determination of dumping will be discussed in detail in chapters 4 to 7. But the concept “dumping” needs to be explained in more detail first. This will be done in the next chapter.