

The Chilean Experience with the “*Comisión Nacional de Distorsiones de Precios*”

Nicolás Cobo Romani, Faculty of Law, Universidad Católica de Chile

- I. Preface
- II. Public Choice
- III. Brief Overlook of Competent Authorities within Different Agreements; Antidumping Agreement; Safeguard Agreement.
- IV. History of the Chilean Competent Authority
- V. Legal Frame
- VI. Main Mission
- VII. Structure; Procedure for the designation of CNDP members; Structure of Competent Authority in other countries
- VIII. Other entities; US Competent Authority; EU Authority; Brazilian Investigating Authority.
- IX. CNDP Voting Experience
- X. Application of Measures: Measures' amendment
- XI. Technical Secretariat of the Commission
- XII. Investigating Procedure: Participation by Interested Parties; Investigating Procedure under CNDP; Initiation of an investigating process; Decision not to initiate an Investigation; Investigating procedure's amendments; Investigation's Maximum Length; Transparency; Confidential Information treatment; Public Hearing; Conciliation; Trade Agreements with particular obligations.
- XIII. Judicial Review; US law; EU law; CNDP Review.
- XIV. Statistics
- XV. Conclusions

I Preface

The purpose of this study is to analyze the Chilean experience regarding the Competent Authority, within the role undertaken by domestic entities to investigate relevant facts and data. Of particular interest to this study are the investigating procedures and measures that may be imposed, in relation to trade with third countries subject to Chilean trade remedies legislation (antidumping, countervailing and safeguard measures) and additionally we will make an evaluation about its performance.

Taking into consideration the existing legislation, jurisprudence and other countries' experiences when advisable, we will observe how the *Comisión Nacional de Distorsiones de Precios* has performed its duties.

In the past 20 years, Chile has shown an increasing commitment to regional and global economic integration. By unilaterally reducing its custom duties, from 35% in 1985 to a current 6%, Chile initiated trade negotiations with its most important trade partners in order to develop both bilateral and regional agreements. These agreements were varied in nature and include Free Trade Agreements, Association Agreements and Economic Complementations Agreements (ACE) as well.

As of today, Chile holds agreements with countries that correspond to almost 80% of global GDP. One of the consequences of this dynamic process is that today, on average, Chilean unified custom duties today are around 2%.

In this context, Chile has undertaken multilateral commitments and is a signatory of virtually every significant multilateral trade agreements.

For the application of trade remedy measures, it is necessary to undertake an investigation and analysis of instances of unfair competition at the international level which shall be made in conformity with WTO's stipulations.

Pursuant to article VI GATT, it is possible to apply countervailing duties as well as antidumping rights in order to minimize the damage to the national industry when trade remedies such as countervailing duties and antidumping rights on imported goods exist. Furthermore, safeguard measures may be applied only after following an investigation conducted by competent authorities¹ in accordance with established procedures, and after an increase of import of goods in such quantity as to cause injury or threat thereof and that proof of such has been established. Hence an investigating authority shall determine: existence of import increase, damage to the national industry and causal relation thereof.

National competent authorities, when investigating and determining trade remedies, are subject to procedural obligations regarding the domestic investigation's method and to substantive obligation related to the content of their determinations. Furthermore, with regard to the investigation for the application of a measure, national authorities are entities of domestic law and not an authority of international law². However, the determinations shall be made in conformity with the rules and conditions established in the agreements.

Competent authorities' duties involve questions of fact and law and imposes temporary limits on the investigating period. Thus, "procedural failure can have repercussions for that determination."³

Investigating procedure may have international implications if the limits established by agreements are not duly respected. Therefore, authorities are compelled to conduct their investigations in such a way that determinations may be reached whilst complying with established conditions, therefore the measures applied shall respect limitations established in the agreements.⁴

Trade remedy measures are subject to panel revision regarding its procedure and content during the investigation. Though the former is a merely a check-list review, failures may have significant consequences for the final determination. In only a few

¹ Agreement on Implementation of Article VI, article 2.2.1 footnote 3.

² Daminani Brogini Gilvan; OMC e Industria Nacional, As Salvaguardas para o Desenvolvimento Sao Paulo Aduaneiras 2004. p.157

³ "Claus-Dieter Ehlermann and Nicholas Lockhart, op. cit., p. 511

⁴ Daminani Brogini Gilvan; op. cit. p.159

cases, however, has national authority failed in following required rules, as in the case of Argentina-Footwear (EC).⁵

In this context, panels and the Appellate Body are empowered to review the determinations of competent authorities subject to certain deference. *“We wish to emphasize that, although panels are not entitled to conduct a de novo review of the evidence, nor to substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusions of the competent authorities”*⁶.

Some competent authorities have frequently failed in their analysis:

*“WTO panels and Appellate Body reports have repeatedly found that ITC has failed to ensure that non-import-related injury is not attributed to imports, but have not indicated how the ITC should comply with this provision”*⁷.

The said failures may be caused by several reasons:

(i) unclear methodology factors *“...it is not entirely clear what the panels and AB are looking for in terms of attribution. The bodies have not specified any method for ensuring non-attribution.... But are not very constructive in terms of suggesting how the ITC can better assess the injury caused by other factors”*⁸.

Existence of unforeseen development is a legal requirement pertaining to factual circumstance that must be demonstrated as a matter of fact, before the application of the measure.

(ii) by legal limitations to the performance of their duties: USITC is not obligated by any US legislation, regulation or other domestic rule, to examine the existence of unforeseen developments in its investigation ... and the USITC can only apply US domestic law in conducting its injury investigation⁹.

ITC has consistently failed in the said circumstance's demonstration and it *is essential for national authorities to analyze and understand Panel and Appellate Body decisions*

⁵ Claus-Dieter Ehlermann and Nicholas Lockhart; Standard of Review in WTO Law; Journal of International Economic 2004 7(3), page 511

⁶ Appellate Body in United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia (WT/DS177/AB/R and WT/DS178/ AB/R):

⁷ Irwin Douglas; Causing Problems? The WTO Review of Causation and Injury Attribution in US Section 201 Cases; NBER 2003 Working paper N9815 JEL N F1, K2, p. 2

⁸ Irwin Douglas; op.cit. p. 16

⁹ McGregor Anne; The Unforeseen Developments Claim in WTO Safeguards Cases and the Pending Panel Against US Measures on Steel: An Easy win to the EU? Sweet and Maxwell Ltd., p.164

*for the proper application of safeguard measures in the future*¹⁰.

Or (iii) due to failures when performing their task: *“Chilean domestic investigating authority did not discuss or offer any explanation in its report on injury as to why sizable and rapid decreases in prices could be regarded (...) In the opinion of the Panel, its ex post facto explanation could not cure the authority’s failure to make findings and reasoned conclusions on the matter in its report*^{11”}.

One should be neither surprised nor concerned therefore by the existence errors; however, if such failures occur repeatedly without the existence of a mechanism to address these errors, then it would be a matter of significant concern as it would undoubtedly affect the bases of the system.

II. PUBLIC CHOICE

It is also relevant to bear in mind that national authorities’ performance may involve economic inefficiencies and a wrongful allocation of resources.

A given government whilst attempting to determine measures such a safeguard, may in fact be providing an additional profit to a group with political influence. Economists J.Buchanan and G.Tullock, have described different incentives and processes that result from rents-seeking by political means rather than purely economic ones.

The political appropriation and distribution of goods is attractive because benefits are concentrated for only a few while the cost is widespread by way of taxes. Therefore, there is an economic incentive for the formation of groups with political influence – through lobbying – for programs of particular political benefit i.e. commercial protectionism.

Beneficiaries receive rents for participation in interest groups, which in turn offer political support and votes to their representatives.

Common ground used is “jobs protection”, but this may result in economic inefficiencies by maintaining obsolete industries, non-competitiveness and viable activities.

In the end the financial supporters of this rents generated by political protectionism are consumers.

When facing a dominant strategy with strong incentives to seek political protection, the *rule of law* orientation with efficient legal and judicial mechanism would eventually reduce the temptation to seek political rent by protectionist measures.

¹⁰ Yong-Shik Lee, Critical Issues in the Application of the WTO Rules on Safeguards, 34 Journal of World Trade 2000, 131 at 132

¹¹ McGregor Anne; op. cit., p.163

Furthermore, from an international perspective, the implementation of rule of law and clear procedures avoids a chain reaction of commercial measures and allows the possibility for either an *escape clause* under special circumstances or emergency actions under unfair competition behavior.

“In a system with considerably higher degree of governmental official’s discretion (t)he dangers of political manipulation and back rooms deals are so high; and often the weaker segments of the domestic economy (frequently including consumers are the ones who must pay for the resulting decisions that are made for the benefit of the more powerful producing interest. The legalistic system permits well-intentioned government officials to fend off all such pressures)”.¹²

Here follows the critical role of competent authorities in each country. *“Despite of this serious limitation, the mere existence of review has already had an important effect upon EEC antidumping proceeding.(...) The Court of Justice played an important role in this development.(...) Even, if in practice, the Court only exercises a marginal review over antidumping determinations may at one point have to be defended before the Court constitutes a powerful incentive for Community authorities to observe adequate standards to procedural due process.”*¹³

III. Brief Overlook of Competent Authorities within Different Agreements.

“In all three agreements, a national investigating authority is given a pre-eminent position in the decision-making process”.¹⁴

III.1 Antidumping Agreement:

For the determination of existence, levels and consequences of the dumping shall be made upon written request from the domestic industry or under legal representation. Additionally, the request shall provide proofs of the existence of: dumping, damage according to article VI GATT94 and the causal link between imports and damage. Competent authorities should examine the accuracy and adequacy prior to the application of measures. Agreements should set out the procedural timing and guarantees for interested parties in a detailed description.

¹² Jackson John and Vermulst Antidumping Law and Practice a Comparative Study quoted by Mendonça de Barros Maria, Antidumping e Protecionismo Aduaneiras 2004. p. 90

¹³ Jackson John and Vermulst. Op. cit. p 64

¹⁴ Claus-Dieter Ehlermann and Nicholas Lockhart, op. cit., p. 508

Investigating authorities' duties pursuant to Appellate Body: *"In our view, the duties of investigating authorities, under Article 2.1 of the Anti-Dumping Agreement, are precisely the same, whether the sales price is higher or lower than the "ordinary course" price, and irrespective of the reason why the transaction is not "in the ordinary course of trade". Investigating authorities must exclude, from the calculation of normal value, all sales which are not made "in the ordinary course of trade". To include such sales in the calculation, whether the price is high or low, would distort what is defined as "normal value".*¹⁵

III.2 Safeguard Agreement:

Pursuant to article 2.1 of the Safeguard Agreement, these measures, may only be applied if a member has determined through an investigation conducted by a competent authority and the provision set out in articles 3 and 4 of said agreement¹⁶.

Procedure must be previously established, must ensure transparency and provide to all interested parties appropriate means and the opportunity for public hearings. The safeguards procedure reproduces the structure of the Antidumping Agreement.

Chilean law has duplicated most of Safeguard Agreement stipulations. With minor differences, Chile has applied not only WTO stipulations, but Chilean law has made the application of safeguards even more restrictive. For example, instead of a 4-year period for the application of a measure, Chile applies only one year with the possibility of only one-year extension, but only when circumstances allow the use of this right.

IV. History of Chilean Competent Authority¹⁷:

The Chilean competent investigating authority is empowered by law 18525 to investigate the existence of price distortion on imported goods and the way those distortions may produce significant damage, either existing or potential, to the national industry. Among its faculties, it is empowered to receive complaints related to price distortions of imported goods from international markets and then, after conducting the investigation¹⁸, may recommend to the President the adoption of measures only if, pursuant to the backgrounds obtained during the investigation, it has duly proved the concurrence of three fundamental conditions, corresponding with the Chilean commitments under WTO and requested by the Chilean legislation: i) existence of a

¹⁵ Appellate Body Report on US - Hot-Rolled Steel, paras. 145 - 146

¹⁶ There was no similar requirement under article XIX of GATT 1947

¹⁷ Statistical Data 1981-2002, September 2003 by Comisión Chilena de Distorsiones de Precios, Banco Central de Chile.

¹⁸ In certain cases a preliminary recommendation may be suitable under critical circumstance that delay may increase damage.

distortion that affects the price of imported goods; ii) serious injury either existing or imminent to the national industry and iii) causal relation between the price distortion and damage.

The Commission suggests to the President through the Ministry of Finance, when suitable, the application of minimum custom values, tariff surcharges, antidumping rights or Countervailing Duties.

After the creation of the Chilean competent authority in 1981, several modifications were implemented to its structure, competence, rules and procedures.

In 1981, Chile ratified the Agreement of the Interpretation and application of articles VI, XVI and XXIII from GATT, to this end a Subsidies Commission was created¹⁹ in conformity with the adherence of Chile to the “Subsidies Code of GATT”. By this regulation the Chilean Central Bank was appointed as the competent authority to initiate and perform investigations established by GATT and decide whether or not to apply countervailing duties. Furthermore, the Central Bank had the faculty to establish rules for the procedure of any given investigation.

Initially, exclusively Central Bank’s employees integrated the Subsidies Commission. However, in 1985, representatives from the Ministry of Finance, the Ministry of Economy, the Ministry of Foreign Affairs, Customs Office and the National Economic Prosecutor’s Office were incorporated.

Subsidies Commission performed its duties from 1981 to September 1986. At that point, several modifications were added and a Commission in Charge of Investigating the Existence of Price Distortions on Imported Goods was established²⁰. This Commission maintained the same structure, and it carried out its duties until 1989. During this period, two institutions developed their work in parallel: on one hand the Commission in charge of investigating the existence of price distortions on imported goods and on the other hand the Subsidies Commission, in charge of export subsidies investigations.

In January 1990,²¹ additional legal amendments were added, the Subsidies Commission was removed and its tasks were transferred to the National Commission in Charge of Investigating the Existence of Price Distortions on Imported Goods.²² Additionally it appointed the National Economic Prosecutor as chairman and its regulations were amended. The Commission continues to function to this day²³.

¹⁹ Supreme Decree N° 742, year 1981 from Ministry Finance

²⁰ Created by law 18525, year 1986

²¹ Law No 18908, year 1990

²² Statistical Data, November 1994 by Comisión Chilena de Distorsiones de Precios, Banco Central de Chile.

²³ Law No 18840, year 1989

The National Commission in Charge of Investigating the Existence of Price Distortions, hereafter the “CNDP”, was additionally modified according to the WTO commitments undertaken by Chile.

In 1992,²⁴ the CNDP was empowered to recommend antidumping duties, and in 1999, with the Safeguard Agreement, accordingly, it received the mandate to recommend safeguard measures to the President of Chile²⁵. Furthermore, in 1993,²⁶ a Regulation for the CNDP was established and in May 1999, the existing minimum custom value was subsequently revoked subject to its recommendation. In the same year, the CNDP was empowered to recommend the application of safeguard measures in a form of ad valorem tariff surcharges.

In 1995, a new member was included, a representative of Ministry of Agriculture.

V. LEGAL FRAME

Several legal bodies cover the regulation and procedures for the investigation and determination of measures when trade remedies exist:

- Supreme Decree No 16, January 5, 1995, Ministry of Foreign Affairs.
- Law 18525²⁷, related to the importing goods²⁸ and amendments contained in laws 18840, 18908, 19065 and 19155.
- Decree No 575 of the Ministry of Finance²⁹ which approved the Regulation for article 11, law 18525.
- Article VI GATT, became valid by Supreme Decree No 229, Ministry of External Relations.
- Law Decree No 3567, 1980 of the Ministry of Foreign Affairs³⁰ which approved the Agreement related to the interpretation and application of articles VI, XVI and XXIII of GATT.
- Regulations have been included in Trade Agreements with Canada, Mexico, EU, USA, Korea, China, EFTA and Peru.
- As panels' review have ruled on the legitimacy of the national authorities' determinations and investigations, this body is required then to refer to the findings and

²⁴ Law No 19155

²⁵ The safeguard replaced the existing tariff surtaxes since 1986.

²⁶ Decree of Ministry of Finance, year 1993

²⁷ apply only to the extent that their provisions do not conflict with Supreme Decree No.16

²⁸ published in the Official Gazette in June 30, 1986

²⁹ published in the Official Gazette in August 20, 1993

³⁰ published in the Official Gazette in January 30, 1981

opinions of the panels and of the Appellate Body on the issues of the adequacy of reasoning as well as on the proper scope of data. Competent authorities should consider those findings and opinions an essential guide to their investigations³¹.

VI. Main Mission:

Due to the level of deference granted in the WTO law to national decision entities, Standard of Review plays a central role³² in defining the powers of national authorities in the trade field, which enhances the quality and legitimacy of the governmental decision-making process as a whole³³.

In fact, as Appellate Body has confirmed, panels shall “make an objective assessment of the facts of the matter³⁴”. “The Panel’s position does not give the complete deference to the national authorities’ decisions yet it does not deny their discretion to make determinations either, as long as reasonable explanations are given³⁵”.

One of the considerations that must be taken is the process by which the measure was adopted at domestic level³⁶. Therefore “*panels should accord a considerable degree of discretion to national authorities in the determination and assessment of facts,*” (and) “*...respect the parameters of the national authority’s own investigation.*”³⁷

Regarding antidumping agreements, “*...panels should consider whether the national authority conducted the factual evaluation in an appropriate way,*” (which) “*...was balanced, impartial, and open-minded in its evaluation of the facts*”³⁸.

With regard to the determination made upon safeguard investigations, it offers following: ³⁹

- (i) to provide an adequate explanation regarding all issues of fact and law that ground their conclusions over the conditions for the application of safeguard measures, because that would be the point to be considered in an eventual controversy;
- (ii) to publish their conclusions according to article 3.1 of safeguard Agreement.

³¹ Yong-Shik Lee, Safeguard Measures: Why are they not Applied Consistently with the Rules?, Journal of World Trade 36(4) 2002, p.645

³² “...Standard of review question is recurring and delicate, and one that to some extend goes to the core of an international procedure that (in a rule-based system) must assess a national government’s actions against treaty or other international norms.” Petersmann Ernst-Ulrich and Otino Federico; The WTO Dispute settlement system: 1995-2003. Kluwer Law International, 2004. p.139

³³ Claus-Dieter Ehlermann and Nicholas Lockhart, op. cit., p. 492-493

³⁴ Claus-Dieter Ehlermann and Nicholas Lockhart, op. cit., p. 495 Appellate Body Report, EC- Hormones, para 117.

³⁵ Yong-Shik Lee, Safeguard Measures: Why are they not Applied Consistently with the Rules?, Journal of World Trade 36(4) 2002, p.644

³⁶ Claus-Dieter Ehlermann and Nicholas Lockhart, op. cit., p.496

³⁷ Claus-Dieter Ehlermann and Nicholas Lockhart, op. cit., p.502

³⁸ Claus-Dieter Ehlermann and Nicholas Lockhart, op. cit., p.504

³⁹ Daminani Brogini Gilvan; OMC e Industria Nacional, As Salvaguardas para o Desenvolvimento Sao Paulo Aduaneiras 2004. p.162

VII. Structure: The CNDP is comprised of the following members:

- National Economic Prosecutor⁴⁰, who also acts as the chairman;
- Two representatives of the Central Bank, designated by its Board;
- One representative of the Ministry of Finance;
- One representative of the Ministry of Agriculture;
- One representative of the Ministry of Economics;
- The National Customs Director;
- One representative of the Ministry of Foreign Affairs

These members are substituted with alternates in accordance with the law or by the persons designated by the respective institution by resolution published in the Official Gazette, when applicable.

Procedure for the designation of CNDP members:⁴¹

The representatives of the Central Bank, the Ministries of Finance, Agriculture, Economics and Foreign Affairs are designated by resolution of the respective institutions, and published in the Official Gazette.

For the position of the National Economic Prosecutor and National Customs Director, a particular legislation exists for their appointment process. Therefore the National Economic Prosecutor acts as part of their general duties.⁴²

With regard to other representatives, they are appointed by resolution of their respective institution, published in the Official Gazette and assume additional duties. Each Ministry holds direct supervision of their representatives. None of the CNDP's members receives remuneration for their attendance at the sessions of the CNDP.

Two main aspects should be considered when deciding about investigating authority structure: technical background and autonomy from political influence.

⁴⁰ National Economic Prosecutor is designated by President of Chile.

⁴¹ - Chairman to the Commission- Enrique Vergara Vial (regular)
- Alternate representative- The legal designated substitute
- Central Bank representative- Gloria Peña Tapia (regular)
- Alternate representative- Juan Eduardo Chackiel Torres
- Central Bank representative- Andrea Tokman Ramos (regular)
- Alternate representative- Rodrigo Fuentes San Martín
- Ministry of Finance representative- Raúl Sáez Contreras (regular)
- Alternate representative- Juan Araya Allende
- Ministry of Agriculture representative- Igor Garafulic Olivares (regular)
- Alternate representative- Raúl Opitz Guerrero
- Ministry of Economics representative- Ana María Vallina Hernández (regular)
- Alternate representative- Lucía Cangas León
- Customs National Service representative- Karl Dietert Reyes (regular)
- Alternate representative- The legal designated substitute
- Ministry of Foreign Affairs representative- Jorge Culačovski Drobny (regular)
- Alternate representative- Alvaro Espinoza Soto

⁴² Decree Law 211 article 39 and Decree 575 article 2

From the CNDP's members, representatives from the Central Bank appear to have more independence from political influence, giving the fact that since 1989, the Chilean Central Bank holds a legal autonomy from political decisions, a fact which can be confirmed by looking at historical voting records. Investigations revealed that in several cases, the two representatives did disagree with CNDP's majority vote when making a decision to begin an investigation or apply a measure.

It must be emphasized that in the Chilean case there is no involvement from the Congress in the designation of Commission's members.

A closer consideration of the structures of other countries should be undertaken regarding the selection of their respective members and technical backgrounds in order to maintain impartiality during the investigation and determination procedure.

VII.1 Structure of Competent Authority in other countries:

We may find basically two alternatives:

a) The competent authority **acting as a single body** such as in Argentina, Chile, and Brazil. Usually this single body belongs to the Executive Branch, and it is comprised of technicians under political influence.

Argentina: The competent authority is the *Comisión Nacional de Comercio Exterior*, is a related institution to the Secretary of Industry, Trade and Mining from the Ministry of Economics and Public Works⁴³.

The Argentinean authority is integrated by five board members appointed by the Executive Branch pursuant to a proposal of the Ministry of Economy.

b) As an alternative, we may find authorities with a **bifurcated structure** with two separated bodies with different faculties. The two divide their investigations tasks into import increase and damage to the national industry. This is also the case of USA, which counts with the USITC and US Department of Commerce and the Canadian system.

Canada: Its competent authority has a bifurcated system; the Deputy Minister of National Revenue is the person responsible for the decision in order to initiate an investigation and make a preliminary determination of damage. After this preliminary determination is made, the Deputy Minister shall submit a notification to the Secretary

⁴³ Decree No 766/94 <http://www.mecon.gov.ar/cnce/> (last visit on August 20, 2006)

of the Canadian International Trade Tribunal, an independent quasi-judicial body⁴⁴. This Tribunal begins an injury investigation and provides its final determination.

Although there are entities that incorporate a revision from a second entity, an effective judicial reviewing opportunity is very advisable.

However, an important characteristic can be found in entities with the exclusive mission to develop activities within a restrictive scope such as the Chilean CNDP; however, President of CNDP has duties related to antitrust matters and other entities with wider tasks, for instance Brazil or Peru. The latter is structured as the *Comisión de Fiscalización de Dumping y Subsidios* that belong to an entity in charge of antitrust and protection of Intellectual Properties, INDECOPI.

There are some authors that have criticized the current existing structure and suggest that “faculties of CNDP should be undertaken [instead] by the Chilean Antitrust Court (*Tribunal de la Libre Competencia*) and task from Technical Secretariat should be performed by National Prosecutors Office⁴⁵”. This, they claim, would provide more guarantees for interested parties of a procedure less affected by political influence.

VIII. Other entities: we will observe different alternatives from developing and developed countries to determine whether some interesting distinctions can be found. We have selected from the Chile`s most significant trade partners:

VIII.1 US Competent Authority has two institutions, each addressing a different question: a) US Trade Department of Commerce, which investigates whether foreign producers of a similar product are receiving a subsidy or selling at an inferior price from the fair value and the margin; and b) US International Trade Commission (USITC), that undertakes the investigation if the US industry is materially injured or threatened with material injury by reason of the imports under investigation.

When both entities reach an affirmative determination, the Department of Commerce issues an antidumping duty order to offset the dumping or a countervailing duty order to offset the subsidy⁴⁶.

With regard to Safeguards, the ITC conducts an investigation and if an affirmative determination is made, it recommends a relief to the President. The final decision whether to apply a measure, its duration and type belongs entirely to the President.

⁴⁴ <http://www.ftaa-alca.org/Wgroups/WGADCVD/english/020100.asp> (last visit on August 20, 2006)

⁴⁵ Romero Guzmán Juan José; “Salvaguardias a la Harina de Trigo: una Herramienta Equivocada para un Propósito Discutible. From Sentencias Destacadas 2005: una mirada desde la perspectiva de las políticas públicas. Libertad y Desarrollo”, 2006. p.37

⁴⁶ http://www.usitc.gov/trade_remedy/index.htm (last visited in August 20, 2006)

The USITC⁴⁷: ITC is a non-partisan, independent, quasi-judicial federal agency established by Congress with a wide range of trade-related mandates. Its budget is submitted directly to the Congress. ITC is comprised of six commissioners who are appointed by the President and confirmed by the Senate with a maximum nine year period.

No more than three commissioners may be members of the same political party. The Chairman and the Vice Chairman are designated by the President and serve for a statutory two-year period. The Chairman may not be of the same political party as the preceding Chairman, nor may the President designate two commissioners of the same political party as the Chairman and Vice Chairman. This would imply an important consideration to maintain political balance.

VIII.2 EU⁴⁸: Investigations are carried out by Commission officials. The Commission has the power to initiate and terminate proceedings and to impose provisional antidumping and countervailing duties and, under certain conditions, safeguard measures also accept undertakings offered by foreign exporters or governments and finally, hold the responsibility to prepare proposals for the adoption of measures by the Council.

The Council of Ministers is responsible for the adoption of final measures upon a proposal of the Commission (anti-dumping and anti-subsidy). Safeguard measures applied by the Commission may be appealed to the Council that may repeal or modify them.

VIII.3 Brazilian Investigating Authority: From the Ministry of Development, Industry and International Trade, there is a *Secretaria de Comércio Exterior* (SECEX⁴⁹) and beneath this the *Departamento de Defesa Comercial* (DECOM⁵⁰). One of the competences of SECEX is to advice exporters subject to investigations of trade remedies abroad. SECEX became an entity to execute policies and guidelines from the *Câmara de Comércio Exterior* (CAMEX), whilst trade defence actions are dependent on SECEX through DECOM, a subordinate entity. The latter is entitled to develop administrative procedures from antidumping and safeguard.

Among DECOM's tasks are: examine merits and legal basis in order to begin defence of domestic production through an investigation related to dumping, subsidies or

⁴⁷ US ITC The Year in Review 2004.

⁴⁸ Van Bael & Bellis; Anti Dumping and other trade Protection Laws of the EC; 2004 Kluwer Law International p.6

⁴⁹ Secretary of International Trade

⁵⁰ Department of Trade Defence

safeguards complaints; own initiation of investigation processes and recommend the application of trade remedy measures established in WTO's related agreements.

DECOM renders a report to the GTDC (*Grupo Técnico de Defesa Comercial*) with proposal of application of antidumping, countervailing, provisional and definitive duties, safeguard measures either definitive or provisional and commitments in the investigation of dumping and subsidies. The structure of GTDC is comprised of representatives of each entity that belong to *Câmara de Comércio Exterior* (CAMEX): Ministries of Development, Industry and External trade, who act as the chairperson, External Relations, Finance, Agriculture, Fishing and Planning and Budget and Civil House. The GTDC may invite further governmental representatives. Technical opinion from DECOM regarding application of measures or prices commitments shall be submitted to the GTDC for consensus approval, if no agreement exists.

Before the application of any measure, there is a compulsory consultancy to the CAMEX. Among the duties of CAMEX are: establish guidelines and procedures for investigating unfair competition practice and determine antidumping, countervailing either definitive or provisional duties or safeguards. There is one additional committee that provides advice to the CAMEX, the *Comite de Gestão*, which also provides technical appraisal before the evaluation of the CAMEX. This committee shall supervise and evaluate the impact of any measure, barrier or administrative requirement that may be applied in international trade.

The *Comite de Gestão* is comprised of representatives of the same ministries of CAMEX plus the under-Secretary General of integration affairs from the External Relations Ministry, a special representative of the Presidency for MERCOSUR issues, Secretary of External Trade from Ministry of Development, Industry and Trade, Secretary of the Tax Service from Ministry of Finance, Secretary of International Affairs from the Ministry of Finance, Central Bank's director of International Affairs as well as the President of BNDES⁵¹.

All of these entities belong to the Executive Branch and therefore are entirely subjected to its supervision and control.

Presumably it appears to be less independent from political decisions than other commission's structure, although a case to case analysis should be performed.

⁵¹ Antidumping, Subsídios e Medidas Compensatorias; Guedes Josefina e Pinheiro Sílvia 3a Edição. Aduaneiras 2002 p.74-77

IX. CNDP VOTING EXPERIENCE:

The minimum qualified majority required to have a valid session is four members. Law establishes specific and public procedure for adopting a decision. For the approval of each session, the law requires simple majority of present members, in the case of a tie vote, the President shall break the balance.

A qualified majority of three-fourths is required when applying a safeguard measure in case that measure results in a tariff beyond the level consolidated at WTO.

A minority vote is registered in the minutes for the record and the basis provided.

Recent experience has shown that the Central Bank's representatives maintained a more technical and independent role within the CNDP. In fact, considering the period 2000 – 2005, in 19 investigating processes, the Central Bank's representatives did not support the majority vote, due to the following reasons:

- No evidence of the existence of subsidies gave reasons to begin an investigation⁵².
- Against the application of a provisional measure given the lack of proof of critical circumstances and damage situation has not been demonstrated⁵³.
- Against to opening an investigation for certain products because there was no evidence of import increasing and damage⁵⁴.
- Against the decision to instruct the Technical Secretariat for collection of data, because this should be specified⁵⁵.
- The idea to withdrawal of an existing measure was supported before the conclusion of the entire period designated because the Central Banks' representatives considered that enough evidence already exists to recommend the measures' removal⁵⁶.
- The length of a measure was not agreed upon⁵⁷.
- The proposed level of measure to be recommended to the President was agreed upon⁵⁸.

Only in few situations have other CNDP's members disagreed with majority vote:

- President of the CNDP only once in six years decided to abstain from the majority vote in order to initiate an investigation and apply provisional measures⁵⁹.

⁵² Session 267; November 4, 2004

⁵³ Session 260, July 5, 2002

⁵⁴ Session 252, December 17, 2001

⁵⁵ Session 249, October 27, 2001

⁵⁶ Session 236, April 3, 2001

⁵⁷ Session 239, April 24, 2001

⁵⁸ Session 229, December 22, 2000

⁵⁹ Session 268, December 3, 2004

- Representative from Agriculture Ministry only once in a six years period decided against the majority, that a safeguard measure should be applied because enough evidence existed⁶⁰.
- In only one case, representatives from Ministers of Economy and Agriculture were in support of the application of dumping measures⁶¹.

X.1 Application of Measures: Pursuant to the Chilean law,⁶² the President may order the application of safeguard measures established in article XIX from GATT only when previous affirmative report from the CNDP exist. Furthermore, antidumping and countervailing duties may be applicable only after said affirmative report from the CNDP⁶³.

X.2 Amendment measures⁶⁴: Procedure maintains, at any time, the possibility to review the need for the continued imposition of the duty. To this end, CNDP may recommend to the President that an existing provisional measure be modified or withdrawn.

CNDP may recommend through the Ministry of Finance, when sufficient information exist, in order to modify or withdraw the application of tariff surcharges before time has elapsed. For that purpose, a hearing opportunity for all interested parties shall be performed⁶⁵. In addition, safeguards may also be modified or withdrawn at any time⁶⁶.

XI. Technical Secretariat of the Commission⁶⁷: The Technical Secretariat of the Commission was established in 1986 by law 18525, based in the Central Bank and appointed by the Central Bank's board⁶⁸.

Among its tasks⁶⁹ are to provide the formats previously approved by the CNDP for the submittal and reception of the complaint. A preliminary review from all information will allow CNDP to provide an early formality admission.

Subject to the CNDP's instructions, the Secretariat shall collect all information related to price distortion of imported goods; receive complaints over price distortions of goods in international markets; prepare technical reports that shall contain backgrounds for

⁶⁰ Session 216, July 28, 2000

⁶¹ Session 245, July 6, 2001

⁶² Law N°18.525 article 7

⁶³ Law N°18.525 article 8

⁶⁴ Law N°18.525 article 9

⁶⁵ Decree 575, 1993 Ministry of Finance, article 18

⁶⁶ Decree Ministry of Finance 909 article 20

⁶⁷ López Ayllón, Sergio Vega Cánovas, Gustavo Editores Las Practicas Desleales de Comercio en el Proceso de Integración Comercial en el Continente Americano: La Experiencia de América del Norte y Chile capítulo II, p. 18

⁶⁸ Since 1989 Chilean Central Bank holds constitutional autonomy from the Executive branch

⁶⁹ Decree N°575, 1993, Ministry of Finance, article 9

the verification, analysis and quantification of distortion subject to an existing complaint and an impact examination over the national market and the causal relation between price distortion and damage or threat thereof.

The Secretariat⁷⁰ shall receive all communication addressed to the CNDP, forward notifications, citations, publications and communications that the CNDP delivers. Additionally, CNDP will dispose publication proceeding from the Secretariat.

XII. Investigating Procedure: Countries shall offer to affected parties an objective procedure with opportunities to participate with fully bilateral audience and within a transparent procedure; public notice of investigations, debate and on previously established rules and practices, avoiding an arbitrary process. The procedure shall at all times consider that *interested parties performed a central role in investigations; and they have to be primary sources of information for competent authorities.*⁷¹

However; “*Appellate Body (...) subsequently found that it is not sufficient for the national authorities to rely on the information submitted by the parties. It ruled that they have an affirmative duty to seek out pertinent information necessary to assess the injury to the domestic industry.*”⁷²

XII.1 Participation by Interested Parties: Investigating authorities shall provide the opportunity by appropriate means for interested parties to present their approach. This has a broad and unrestricted interpretation⁷³ (importer, exporter, producers, countries’ various representatives and consumer associations).

Each legislation may determine the exact definition of interested parties; however members may include further national or foreign parties, such as i) Producer of a similar product, ii) Government from exporting country and iii) Exporters, Foreign producers or Importers of product affected by the investigation, trade associations.

Among Interested parties it is important to add consumers, including exporters or foreign producers, trade or business associations whose majority members are producers, exporters or importers of such products; governments of exporting members and producers of the like product in the importing member or trade and business associations.⁷⁴

⁷⁰ The Technical Secretariat is conducted by Mr. Gonzalo Becerra Martínez.

⁷¹ Daminani Brogini Gilvan; OMC e Industria Nacional, As Salvaguardas para o Desenvolvimento Sao Paulo Aduaneiras 2004. p. 158

⁷² Yong-Shik Lee, Safeguard Measures: Why are they not Applied Consistently with the Rules?, Journal of World Trade 36(4) 2002, p.645 (Wheat Gluten, WT/DS166/R para 53-55)

⁷³ Supreme Decree 16, Ministry of External Relations

⁷⁴ Antidumping Agreement, Art. 6.11, 6.12 and SCM Agreement, Art. 12.9, 12.10

A broad interpretation is given in Chile to the opportunity for consumers; public hearings usually count with a wide range of representatives both domestic and foreign interested parties. However, civil society and consumers' representatives have not generally attended the audiences.

XII.2 Investigating Procedure under CNDP:

Initiation of an investigating process: The initiation of procedure may be requested by the following means:

- i) Own initiative: CNDP may initiate the investigating procedure when in presence of antecedents that may be so justify by resolution of a majority of present members⁷⁵. In this case, the same generic investigating procedure will be applicable.
- ii) By interested party's request:⁷⁶ An interested natural or a legal person may submit a written complaint to the Technical Secretariat attaching the completed format⁷⁷, backgrounds and proofs of existence of price distortion, the way the said distortion produces damage or threat thereof, either present or imminent, to the domestic industry and the causal link between imports and the purported damage.

XII.3 Decision Not to initiate an Investigation: Pursuant to the Uruguay Round and in order to avoid unnecessary investigations that may only affect trade, the CNDP performs a preliminary examination to confirm the seriousness and formalities of the complaint.

If a complaint submitted with the pre-established format, completed according to Technical Secretariat does not comply with formalities established in article 10, Decree Law 575, it shall be returned to interested party within ten business days from the filing date.

Since the investigation before the CNDP is an administrative procedure and not a judicial one, the observation of terms has not been extremely rigid and it has been customary that CNDP ordered to obtain further information or documents beyond the timeframe.

After a preliminary examination, CNDP may declare a claim as not admissible if the following aspects are considered absent:

- i) Lack of significant representation: the representative level must be justified by an

⁷⁵ Law 18525, 1993 Ministry of Finance, article 9.

⁷⁶ Decree law 575 article 10

⁷⁷ Format contains three sections: general backgrounds, price distortions and damage and causal link.

important number of domestic industries (more than 50% of total production of a similar product). No investigation will be initiated when domestic producers that support the request are less than 25% of the total production of a similar good from the domestic industry.

Bear in mind that no legal representation is required for the parties to act before the CNDP, which conform an exemption of law 18120. The decision to be assisted by attorneys relies entirely upon the parties. As a matter of fact, we may observe that in many cases there were no legal advisors assisting the parties in previous proceedings.

ii) The minimis because the level of dumping is less than 2% or the subsidy is less than 1% ad valorem.

Additionally, the petitioner may unilaterally withdraw their complaint. (from 1981 to 2005 that occurred only three times).

This decision to reject the initiation of investigations will only be applicable through a petition before the President of the CNDP.

XII.4 Pursuant to session 265 (March 2004), the CNDP agreed the following investigating procedure amendments:

When in a safeguard investigating procedure, prior to the public audience, the facts that ground the decision for the application or rejection of measures shall be informed no less than ten business days in advance of the audience's date, regarding statistical information and background related to imports, damage and methodology and adjustments for statistical preparation.

These amendments imply an important improvement and provide additional certainty for the parties about the boundaries of the discussion on a given claim.

XII.5 Investigation's Maximum Duration. Unless under special circumstances, investigations shall be finished within twelve months and no longer than 18 months after initiation⁷⁸. Reviews, when applicable, should not take longer than twelve months.

Available data from CNDP demonstrate that average number of days between date of initiation of investigation and that of the final determination from 1981-1989, was 126 days and from 1999 to 2002, was, on average, 101 days and therefore within the legal limits.

⁷⁸ Antidumping Agreement, Art. 5.10 and SCM Agreement, 11.11

With regard to Chilean law timeframe, CNDP's shall finish its investigation within 90 days after the publication in the Official Gazette⁷⁹.

Timeframes of CNDP's procedures are not intend to be rigid and may be modified, when the case or the parties require an action beyond the original period.

XII.6 Transparency: The decision in order to initiate an investigation shall be informed to the Ministry of External Relations to notify potentially affected countries. The initiation of an investigation shall be published in the Official Gazette with relevant information specified⁸⁰.

All sessions shall, upon approval, be transcribed in minutes, then be made public and freely available for all interested at the Central Bank's library for any interested party. Although this may appear sufficient and in compliance with WTO's standards, panel decision disagreed and considered that sessions would be insufficient only "*making publicly available*" and shall also be published.⁸¹

Moreover, CNDP's members have decided in March 2004⁸² to publish, on its institutional web site, minutes related to subsequent investigations. As of today, this decision has not been implemented and it would be advisable as a matter of better transparency to include this fact in the incoming investigations as well as any future session from the CNDP with proper protection of confidential information when necessary.

With regard to confidential information, 30 days after publication, interested parties shall provide Technical Secretariat with all relevant information with specification of being treated as confidential.

Within 90 days of publication, CNDP shall resolve, in all cases with a publication in the Official Gazette, in one of the following alternatives:

- i) If a distortion was established, then CNDP shall recommend of the President the application of a measure and its proportion.
- ii) When evidence is considered not entirely sufficient to prove the existence of price distortion or damage thereof, it shall so decide and send a notification to the other party.
- iii) CNDP at any time before the final determination may request of the President the application of a provisional measure within 60 days.

⁷⁹ Law 18525, article 9; Decree 575, article 15

⁸⁰ Decree 575, 1993 Ministry of Finance article 12

⁸¹ Panel Report on Chile - Price Band System, para. 7.128.

⁸² Session 265 of Chilean Commission

XII.7 Treatment of Confidential Information⁸³: Disclosure of certain information would eventually benefit competitors or generate significant harm to the parties. Therefore, special concern and appropriate protection of certain information (which by nature is deemed confidential or provided by parties on a confidential basis) should be properly treated. Such information may not be released without the express consent of the party submitting party⁸⁴. All such information must be accompanied by summary or a justification of confidentiality. This provokes a problem that the said confidential information is made un-reviewable and unverifiable, and in regard to that, Panel considered that the provision of Article 3.2 (of Safeguard Agreement) allows national authorities wide discretion in regards to determining the disclosure of information that is deemed confidential...[but]...non-disclosure of crucial information for the injury determination may compromise the transparency of the investigation, causing complaints and disputes.⁸⁵

Under the Chilean procedure there have been minor allegations among parties in order to consider that certain information should not be considered as confidential and even brought before the Chilean Court because the party has claimed to be left in a defenceless position.

XII.8 Public Hearing: Interested parties shall be allowed time and opportunity for defence and rebuttal arguments from adverse interest. Authorities whenever deemed practical shall provide opportunities to review all relevant information that is not confidential⁸⁶.

CNDP's President shall determine the duration, structure of the audience and available time for parties. This information shall be provided promptly to all interested parties.

Before application of definitive measure (safeguard measure, antidumping or countervailing duties investigation), CNDP shall inform date and place of the public hearing to all interested parties to present proofs, express their approaches and reply regarding other parties' information. Each party shall present separately; for that purpose parties will be granted equal time according to their position whether for or

⁸³ Antidumping Agreement, Art. 6.5 and SCM Agreement, Art. 12.4

⁸⁴ Supreme Decree 16, Ministry of External Relations

⁸⁵ Yong-Shik Lee, Safeguard Measures: Why are they not Applied Consistently with the Rules?, Journal of World Trade 36(4) 2002, p.659 (Wheat Gluten, WT/DS166/R para 8.11)

⁸⁶ Antidumping Agreement, Art.6.2 and SCM Agreement, Art. 12.3

against the measure. The order of appearance to be followed in the audience shall be the same as established in the previous minute.

Parties shall have the right to reply with the single purpose to clarify matters related to the information and proofs presented by previous participants. Minutes provide limited information such as list of participants and a brief written presentation⁸⁷.

Foreign governments' representatives that wish to participate shall have a similar time for the parties involved for the record for third parties that were not present at the public audience.

Parties may provide either prior to or on the day of the Audience a written presentation containing a summary from the spoken presentation at the audience.

Parties shall provide information regarding their professional activities as well as their interest in the case.

XII.9 Conciliation: Investigation proceedings may be suspended or terminated without the application of provisional or definitive measures upon receipt of voluntary and satisfactory undertaking and subject to the WTO's standards.⁸⁸

No particular provisions exist in CNDP procedure as to whether the competent authority may act as a mediator or offer a particular opportunity for interested parties. It would be advisable to have a previously established opportunity within the procedure for conciliation purpose.

XII.10 Trade Agreements with particular obligations:

Chile has signed several trade agreements that have maintained all WTO commitment in both their structure and obligations, particularly in relation to trade remedies and universal safeguard measures, signatories have maintained their rights and obligations under GATT 94⁸⁹.

There are a few particular obligations agreed to which were adopted by Chile and its counterparts when applying a trade remedy mainly related to its procedure and transparency requirements such as prior written notice⁹⁰ to the agreement's

⁸⁷ Common structure of Minutes is the following: I.General backgrounds; II.Imports analysis; III.Damage, treat and causal link; including domestic prices, employment, productivity, maximum output capacity, domestic sales, total production, purported consumption, imports' participation on purported consumption and international prices.

⁸⁸ Antidumping Agreement, art.8; SCM Agreement, art 16 and 18

⁸⁹ China-Chile Free Trade Agreement Article 51 and 52; Chile-USA Free Trade Agreement Article 8.6 and 8.8; Chile-Canada Free Trade Agreement Section F-02.1 (subject to certain exceptions); Chile- Mexico Free Trade Agreement Article 6-03 and 3-09; Chile-Korea Free Trade Agreement Article 6.1 and 7.1; Chile-Central America Free Trade Agreement Article 6-03(subject to some limitations); Chile-EFTA states Free Trade Agreement Article 18, 19 and 20; Chile-Transpacific Strategic Partnership P4, article 6.1(1) and 6.2(1)

⁹⁰ Chile-Canada Free Trade Agreement Section F02.4 and F02.5(a); Chile-Mexico Free Trade Agreement Section 6-02 (2); 6-03 (3, 4 and 5) and Annex 6-04 (4); Chile-UE Association Agreement Section 92.2 and 92.3; Chile-USA

commission and adequate opportunity for consultation⁹¹ in advance with the other Party.

Before the application of a Safeguard measure an opportunity for consultation must be given as well as notification to the Association Committee providing the possibility for mutual understanding⁹².

Notification to the other party on initiating an investigation⁹³ must be made and *provided to the other Party with all pertinent information, such as a precise description of the product involved, the proposed measure, the grounds for introducing such a measure, the proposed date of introduction and its expected duration. The notifying Party shall provide a courtesy non-official English translation of the notification*⁹⁴.

Furthermore, Parties shall ensure a procedure subject to review by judicial or administrative tribunals, to the extent provided by domestic law⁹⁵.

“Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Agreement.

*Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter*⁹⁶.

Some agreements incorporate specific provisions when in a safeguard procedure such as initiation, complaint's formal requirements of the complaint, level of representation, notification, public audience, consultation opportunity, confidential information treatment and proof of damage.⁹⁷

In some agreements there is the possibility of the application of bilateral safeguard measures, containing some particular obligations⁹⁸.

In summary, treaties besides the application of multilateral rules, provide certain judicial standard to be followed and additional obligations for better transparency.

Free Trade Agreement Article 8.4(1.a); Chile-Central America Free Trade Agreement Article 6-03(5), 7-01; Chile-Transpacific Strategic Partnership P4, article 6.1(3)

⁹¹ Chile-Central America Free Trade Agreement Article 6-04(8)

⁹² Chile-UE Association Agreement Section 92.4;

⁹³ China-Chile Free trade agreement Article 48(a)

⁹⁴ China-Chile Free trade agreement Article 48.2

⁹⁵ Chile-Canada Free Trade Agreement Section F03.2; Chile- Mexico Free Trade Agreement Article 6-04 (2 and 3)
“2. These determinations shall be subject to review by judicial or administrative courts according to the domestic legislation. Negative determinations about the existence or damage shall not be modified, unless upon this reviewing procedure. Competent investigating authority empowered by domestic law to take knowledge these procedures shall be empowered by all necessary means to perform this function.”

3. Each Party shall establish and maintain equitable, prompt, transparent and effective procedures for the application of safeguard measures, in conformity with requirements specified in annex 6-04”. (translation)

⁹⁶ Chile-USA Free Trade Agreement Article 20.5

⁹⁷ Chile- Mexico Free Trade Agreement Annex 6-04; Chile-Central America Free Trade Agreement Article 6-04

⁹⁸ Chile- Mexico Free Trade Agreement; Chile- China Free Trade Agreement

XIII. Judicial Review

The application of trade remedy measures shall satisfy both procedural requirements and compliance with the substantive conditions required by WTO. Revision shall take place by panels but at the National level because failures in procedure may conduct in important consequences and shall be provided an opportunity for a prompt judicial review of administrative actions related to final determination as well as reviews from determination itself, through a previously established mechanism and by Tribunals and procedures that grant independence of the responsible authorities for the determination.⁹⁹

XIII.1 The US law¹⁰⁰ establishes administrative law judge that holds hearings and makes initial determinations in investigations. The said investigations are subject to the Administrative Procedure Act, each of the Commission members (acting as administrative law judge) considers evidentiary record of the arguments of the parties and makes an initial determination including findings of facts and conclusion of law. The initial determination, findings and conclusions from the Administrative Law Judge's are subject to an administrative review by the Commission if they believe it to contains clearly erroneous findings of material fact, contains erroneous legal conclusion or affects ITC policy.

Adversely affected persons from USITC Section 337 determinations may appeal to the Court of Appeals for the Federal Circuit.

Furthermore, an appeal to the administering agency related to the proceedings under the trade laws. Determinations of ITC may be appealed to the U.S. Court of International Trade in New York City, or, in cases involving Canada and/or Mexico, to a bi-national panel under the auspices of the North American Free Trade Agreement.

Appeals concerning denial of application for disclosure of certain business proprietary information under administrative protective order as well as appeal from a denial of a complaint petition must be addressed to the Chairman, United States International Trade Commission.

⁹⁹ Antidumping Agreement, article. 13; SCM Agreement, article. 23

¹⁰⁰ USITC Year in Review 2001, page 28

XIII.2 EU Law: Both Commission and Council's¹⁰¹ acts are subject to judicial review by the Court of Justice of the European Commission, either i) **direct actions** (actions of annulments under article 230 EC¹⁰², actions for failure to act against the Council or the Commission under article 232 EC and action for damages under article 288 EC) or ii) **in the context of a preliminary ruling from national court** under article 234 EC (on questions concerning the interpretation or validity of provisions of Community law. In fact, any national court or tribunal may request a preliminary ruling if it considers that a decision on a question of Community law is necessary).

Direct challenges to anti-dumping measures fall within the jurisdiction of the Court of First Instance.

In certain circumstance decisions of the Court of First Instance may be appealed to the Court of Justice regarding legality of the decisions from the Commission or the Council.

The revision functions are exercised in a marginal review only in connection to clear errors and violations of legal investigating procedures. Even though its faculties are limited, the single fact to have the possibility to exercise a revision of administrative decision means a significant improvement for the investigations.

XIII.3 CNDP Review: Chilean legislation related to its CNDP's task does not establish an explicit reviewing mechanism over to CNDP's procedure or even over its final recommendation.

Although judicial decisions have a limited effect exclusively over the case where it was ruled, we may find some historical consistency that might be helpful for our consideration¹⁰³.

Without a particular motion available, parties have chosen to use general existing legal alternatives such a Constitutional petitions: "*Recurso de Protección*" and "*Recurso de Amparo Económico*". Both alternatives are intended to protect affected rights covered under the Chilean Constitution; the former is related to article 19 including most important guarantees and the latter, particularly related to the right to develop economic activities article 19, number 21.

CNDP's President shall resolve any doubt or discrepancy related to admissibility in a single-instance, avoiding the need for judicial revision of this critical decision¹⁰⁴.

¹⁰¹ Van Bael & Bellis; op.cit. p.462- 469

¹⁰² "[a]ny natural or legal person may..... institute proceedings against a decision address to that person or against a decision which, although in the form of a regulation or a decision addresses to another person, is of direct and individual concerto the former'. Van Bael & Bellis; op. cit. p.467

¹⁰³ article 3 of Chilean Civil Code

¹⁰⁴ Decree 5751993 Ministry of Finance, article 11 paragraph 3

We have reviewed existing jurisprudence, although not extensively, and found that it is consistent in some aspects:

I) International treaties are incorporated to domestic law according to articles 32 No17 and article 50 N°1 from the Chilean Constitution and after promulgation and publication in the Official Gazette. Furthermore, treaties shall be interpreted under a *bona fide*.

Allegations such as purported supremacy from the domestic legislation (law 18525) over international treaties (Law decree N°16 and Agreement related to the application of GATT article VI), has been rejected¹⁰⁵.

ii) The fact that the CNDP has sometimes has rejected parties' allegation, when CNDP after the consideration of available data, backgrounds and deliberation either does not approve the initiation of an investigating process or upon the conclusion of the process, CNDP does not recommend the application of any measures thereof. Under these circumstances, parties have submitted a *Recurso de Protección* (economic habeas corpus) before the Santiago Court of Appeal, asking for the protection of constitutional guarantees such as article 19 Numbers 2, 3, 21 and 22.¹⁰⁶

The affected party has to petition the Court to order to CNDP to initiate a new process because they have considered that it was an “arbitrary and illegal resolution and in violation of the Constitutional guarantees established in Numbers 2, 3 paragraph 4 and number 22 from article 19.”¹⁰⁷

In the Court's decision, it was considered that CNDP, pursuant to law No575 shall within five business days provide a decision to initiate the investigation. The meaning of this expression is that the said entity is not obligated to formally initiate all complaints submitted that may comply with formalities. On the contrary, it may under consideration of the backgrounds preemptively determine if sufficient justification exists to initiate the respective procedure.¹⁰⁸

Only once in the last six years was there a *motion to set aside* to the CNDP in order to reconsider its decision not to recommend the application of safeguard measures¹⁰⁹. The applicant brought the right to address petition to State Bodies and invoked *Ley de*

¹⁰⁵ “Agromaule S.A. con Comisión Nacional de Distorsiones de Precios” Rol 3210-97, considerando 2 (translation)

¹⁰⁶ (Equal treatment by law, non discrimination from government activities)

¹⁰⁷ “Agromaule S.A. con Comisión Nacional de Distorsiones de Precios” Rol 3210-97, considerando 1. (translation)

¹⁰⁸ “Compañía Chilena de Fósforos S.A. con Comisión Nacional de Distorsiones de Precios” Rol 3396-94, considerando 1. (translation)

¹⁰⁹ Session 198, February 15, 2000

Bases de Administración del Estado, entirely from an administrative nature.¹¹⁰

CNDP did not refuse the use of this means; however, by unanimous vote the Commission members rejected the backgrounds and the petition to change its previous decision.

iii) Recourse when CNDP did apply a measure: It has been brought for judicial review cases with application of measures, again through *Recurso de Amparo Económico*, according to the petitioner, the fact that CNDP recommended a safeguard measures *affected entrepreneurial freedom*, and furthermore it considered *CNDP recommendation as illegal and in a clear violation with legality principle and also arbitrary because CNDP acted beyond its faculties granted in the legislation, it did not provide a detailed and reasonable assessment of parties` backgrounds*. Petitioner asks the Court to *declare the Supreme Decree as against the Constitution or to withdraw the measure for Argentinean oil imports*.¹¹¹

Additionally it was requested to the Court *to declare that the period designated had expired, because the 90 days time limit had already elapsed*.

To this particular claim the Court considered that administrative periods, due to its nature, may be fulfilled beyond the 90 days, and the decree is not subject to objection regarding the formalities in compliance established by law, technically based, according to a procedure previously established by law which cannot be considered illegality, arbitrarily or behave irrational or abusive.¹¹²

Courts' decisions has recognized that CNDP through a report of legal admissibility from the Technical Secretariat, previously to the initiation of the investigating process and after duly consideration of data, documents and technical backgrounds cannot be considered as arbitrary or illegal, due to the fact that the CNDP has not moved aside from the valid existing regulations.¹¹³

With regard to the *Recurso de Amparo Económico*, specially intended to protect infringement to article 19, number 21 from Constitution. The right to develop, any economic activity that is not contrary to moral, public order or national security, following the legal rules that may be applicable. Furthermore, government and its institutions may only develop an entrepreneurial activity or participate when a law with

¹¹⁰ Law 18575,1993 Ministry of Finance, articles 8 and 9

¹¹¹ *Compañía Empresas Carozzi S.A. con Comisión Nacional de Distorsiones de Precios*” Rol 1598-00, considerando 3. (translation)

¹¹² *Compañía Empresas Carozzi S.A. con Comisión Nacional de Distorsiones de Precios*” Rol 1598-00, considerando 5.5. (translation)

¹¹³ “*Agromaule S.A. con Comisión Nacional de Distorsiones de Precios*” Rol 3210-97, considerando 4 y 7 (translation)

a particular qualified majority does authorize so, and under similar legislation to the privates.

The petitioner has considered the decision from the CNDP that had rejected the allegation from dumping over certain steel products, was *“illegal and arbitrary with damage for the parties because it affected the sales condition on a free and competitive market”*.¹¹⁴ They determined in particular that by considering confidential certain data, the information provided by importers left the domestic producers under a severe defenseless position.

The CNDP has argued that the fact that they have rejected the recommendation to the President for the application of a dumping measure is not binding for the President and therefore, does not imply a behavior that may affect or deprive from a Constitutional right.

The Chilean Supreme Court has agreed and considered that the mere recommendation to the President the application of measures recognized by law¹¹⁵ as harmless decision and as merely preliminary act of a technical nature and constitutes an expert opinion for a different and autonomous authority from the one that will make the final decision. Therefore, there is no causal link between the CNDP behavior and the purported damaging result.¹¹⁶

iv) Courts’ decision has consistently rejected petitions. Because they have considered that it has not been demonstrated to be a violation of Constitutional rights, besides it has not been affected equal treatment under law by the negative decision from the CNDP and it neither considered as a privilege granted to the importing party nor does it lack an equal protection to the affected parties. Furthermore, Court of Appeals considered that the affected party has not been banned from its rights to develop an economic activity.¹¹⁷

The courts have acknowledged that the purpose of existing recourses is not ensured to obtain a revenue or profit but rather to correct or amend existing violations of law arbitrary behavior or abusive conduct.¹¹⁸

By reading Chilean judicial decisions, we may conclude that the nature of the existing

¹¹⁴ “Gerdau Aza y Compañía Siderúrgica Huachipato con Comisión Nacional de Distorsiones de Precios” Rol 2420-01, considerando 2 (translation)

¹¹⁵ Law 18525, article 10

¹¹⁶ “Gerdau Aza y Compañía Siderúrgica Huachipato con Comisión Nacional de Distorsiones de Precios” Rol 2420-01, considerando 5 y 6. (translation)

¹¹⁷ “Compañía Chilena de Fósforos S.A. con Comisión Nacional de Distorsiones de Precios” Rol 3396-94, considerando 6. (translation)

¹¹⁸ Compañía Empresas Carozzi S.A. con Comisión Nacional de Distorsiones de Precios” Rol 1598-00, considerando 5.6 y 6 (translation)

alternatives is not entirely appropriate for the type of CNDP's procedure and its potential determinations.

If notwithstanding the result of CNDP's procedure, either reject the petition for investigation or make a decision in order to deny the recommendation of measures, the Court considers as "harmless", without an efficient alternative for impugnation or modification.

Therefore, a significant improvement of the system would be the regulation of a formal motion to set aside, before the same CNDP when important omission or errors in the process and additionally a formal appeal to a Judicial Court.

XIV. Statistics: We would like to observe the historical activity of the Chilean Commission and when possible, compare with other similar entities in South America. We have reviewed all available data from CNDP and additionally six years of existing minutes, from 2000 to 2005.

i) Investigating Process' origin (1999-2005)

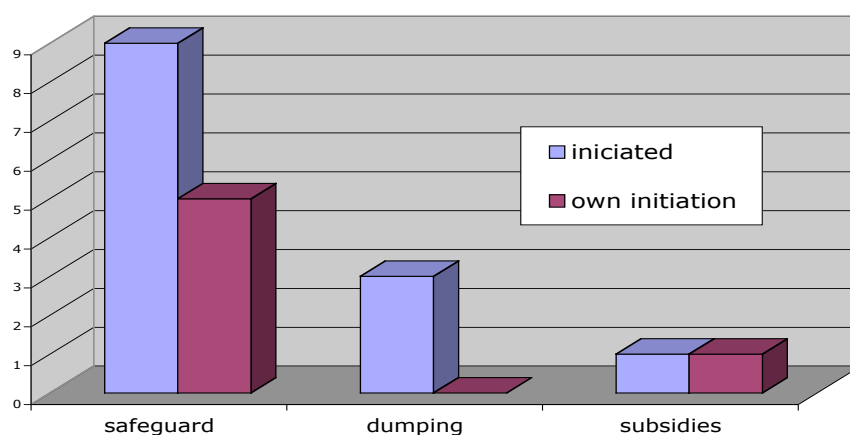


Fig 1.Source: based on CNDP data

Beginning of an investigation: In the period of time covered between 1999 and 2005, more than half of investigations related to safeguard measures have had their origins in the CNDP's own initiation. From this period, 68.4% of all investigations begun by a petitioner's request and 31.6% started by its own activity.

Subsidies' investigations were initiated only in one case by the CNDP and in one case from a third party. Initiations shall count with an important number of affected industries to be truly representatives.

From 1990¹¹⁹ to 2002 only 22.7% of total investigations filed and 20.5% of total investigations have had its origin in CNDP own initiation. This shows an increasing percentage in relative weight in the trend if we consider the last six years.

Either initiated or own initiation procedures shall be justified by backgrounds.

Antidumping, was never started by the CNDP's own initiation. Where antidumping and subsidies are cases from unfair competition, safeguard has nothing to do with unfair trade, but to the fact that the domestic industry affected by increasing imports (recent, sudden, sharp, and significant enough to cause serious injury) is not capable to resist critical circumstances and requires authorities protection to make use of measure to be ready for existing market competitive condition.

ii) Investigation by type of Measure applied (1981-2005)

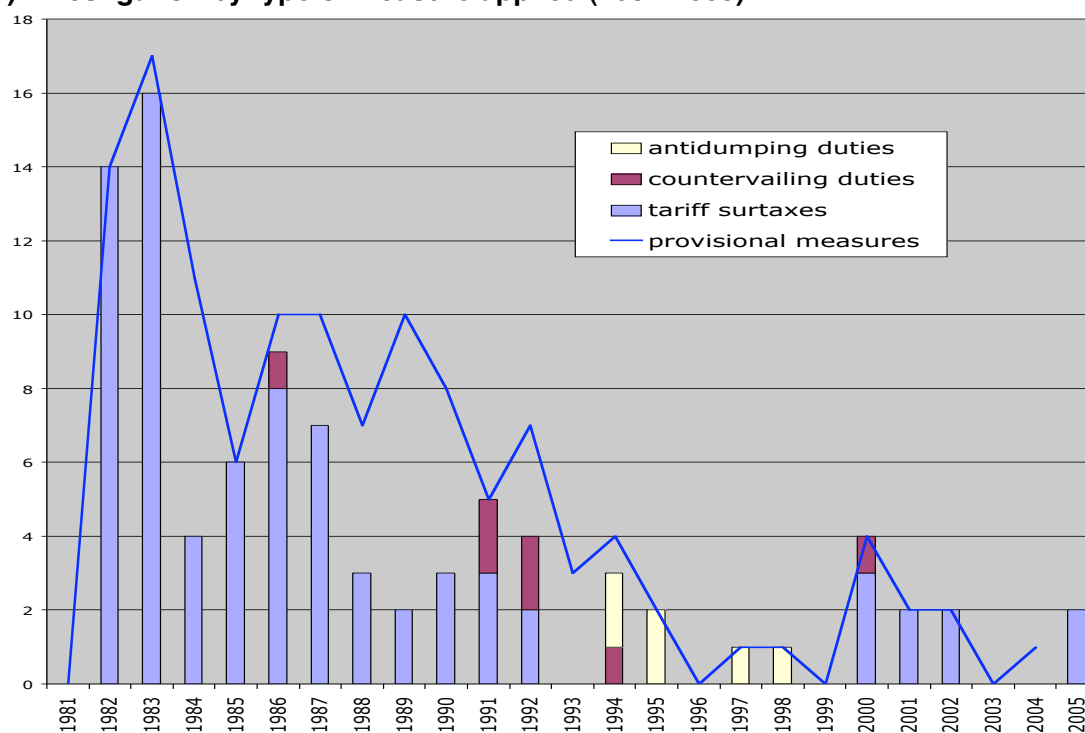


Fig 2. Source: based on CNDP data

All type of trade remedy measures either provisional or definitive, according to available data, were applied in a decreasing trend, comparing with the pick in 1983.

From year 1994 to 1998 several antidumping measures were also applied.

From 1993 a clear trend to a minor application is noted with the exceptional year 2000, related to dairy products such as wheat, wheat flour, sugar, vegetal oils and synthetic fibres socks. During that time Chile was severely affected as a result of Asian Crisis. This perhaps may be in connection with the increasing number of measures.

¹¹⁹ The CNDP has had the power to own initiate investigations since 1990

In the period of six years analysed (1999-2005), the trend seems to be clearly with preferential use of safeguard measures.

The question to be confirmed is whether this trend is consistent with similar international data. We will compare similar data with important trade partners to Chile, in order to confirm if a similar situation may be observed in the last six-year period.

Only in one case there were two separate subsidies investigating cases related to milk powder and other two requested antidumping measures that were finally rejected (refrigerators and washing machines from Korea and Brazil and expandable polystyrene from Korea).

Provisional measures although followed a similar trend of other measures were applied in larger number than definitive measures during the eighties and in the most recent period its application has been minimized.

iii) Measures Applied by Country (1981-2005)

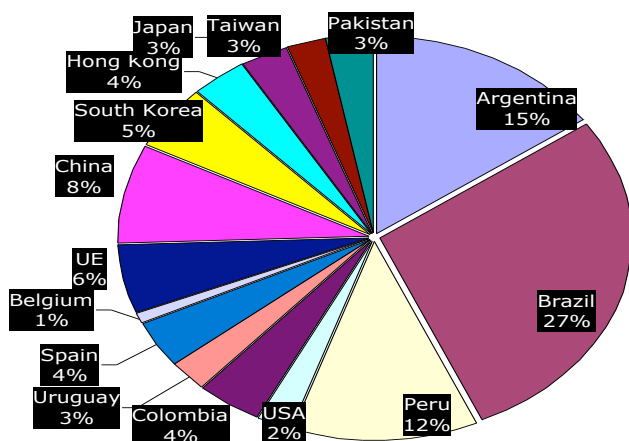


Fig 3. Source: based on CNDP data

Average relative weight by importing countries from the period 1997 to 2005 reveals the following data: Canada 2.31%, USA 16.36%, Argentina 16.05, Brazil 9.4%, Peru 1.86%, EU 19.27%, Korea 3.17%, China 6.51%, Japan 4.21% and Taiwan 1.08%. According to the data, a country such as Brazil shows an exaggerated frequency as a destination market of measures with 27% when as trade importing partner only weighted 9.4% in a similar period and even more significant is the difference that shows Peru as trade partner with 1.86% although as much as 12% of measures were applied against this neighbour country in the same period. On the contrary, USA which

is an important trade partner with 16.36%, however shows as little as 2% of measures as relative historical appearance.

On a different trend, USA products are commonly not affected by CNDP's measures. Furthermore, we may observe that South American commercial partners were affected by a total of 61% of measures, although its relatively minor importance as a trade partner. This may appear somehow surprising because the significant relative weight of the region comparing with some other relative more important trade partners.

And may indicate, according to available data, that Chilean neighbour countries are main target to trade remedies although their relative weight is not that important.

Perhaps by observing our next chart by product category (Fig.4), we may find some guidelines on the purported causes.

By observing the chart (Fig 3), one may assume that percentages should imply a similar situation with the trade partners of Chile, however sometimes reality may show a different conclusion and no direct connection is to be found.

We have chosen information from Argentina and Brazil because those countries are among relevant trade partners to Chile and historically the two most important markets affected by Chilean measures.

In the period 1981-2002 there was 277 filed investigations upon the Chilean Commission, from which 75.5% (212 cases) were terminated, from the said 212 investigations 72.1% (153 cases) were applied either definitive or provisional measures. The latter amount represents 55.2% of the said 277 investigations filed. This would imply quite a similar percentage that may be found within the Brazilian data.

According to DECOM¹²⁰ annual report, the result of Brazilian investigating process from 1988 to 2005 finished with 52% application of measures; 43% without measures applied, 4% with price undertaking and 1% withdrawals by petitioner. From measures applied by Brazil in the same period 90% were dumping; 7% subsidies and only 3% of the measures were safeguards.

From 1999 to 2005 93.7% of measures applied were dumping, 1.56% subsidies and 4.68% safeguards. These data show entirely a different trend compared to Chile, which had applied safeguard as its most recurrent measure.

Pursuant to the 2004 annual report of *Comisión Nacional de Comercio Exterior* of Argentina (CNCE¹²¹) from 1996 to 2004 a total 215 measures were applied among them, 3.75% were safeguard measures, 3.75% subsidies and 92.5% of dumping

¹²⁰ Relatório N°9 DECOM 2005; Brazilian Department of Trade Defense

¹²¹ <http://www.mecon.gov.ar/cnce/pub/ia/a%Fl os/ia2004/index.htm> (last visit August 20, 2006)

measures. In years 2001 and 2002, a total of 84 provisional and definitive antidumping measures were applied with an important increasing number in a similar period of time. During 2004, China's relative weight within total imports in Argentina was 6.2% however its position within the number of investigations was 30.1%, Korea relative weight in imports was 1.4% but among the number of investigations was 10.6%. On the contrary EU was 18.7% as an importing partner but only appears with 4.6% within investigations.

With the available information we may interpret that no direct correlation exists between the relative significance as a trade partner with the percentage of investigations or measures applied.

“Brazilian investigation related to unfair competition by country: 39 US, 32 China, 13 India, 10 Russia, 8 Mexico and several countries 5 (Germany, UK, Korea, Taipei) and South Africa 8. Chile does not even appear”.

According to Brazilian data, Chile is not relevant as investigating market origin, which supports the idea that there is no correlation between countries such as Chile and Brazil, and no apparent counter investigations against Chile from Brazilian authorities as a way of countermeasures or by mean of political pressure is observed.

iv) Final Measures by Product Category (1981-2005)

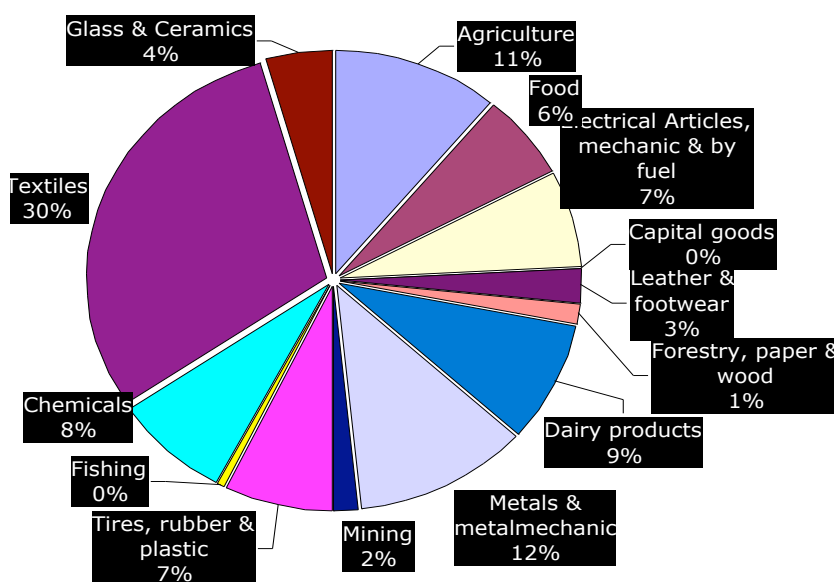


Fig.4 Source: based on CNDP data

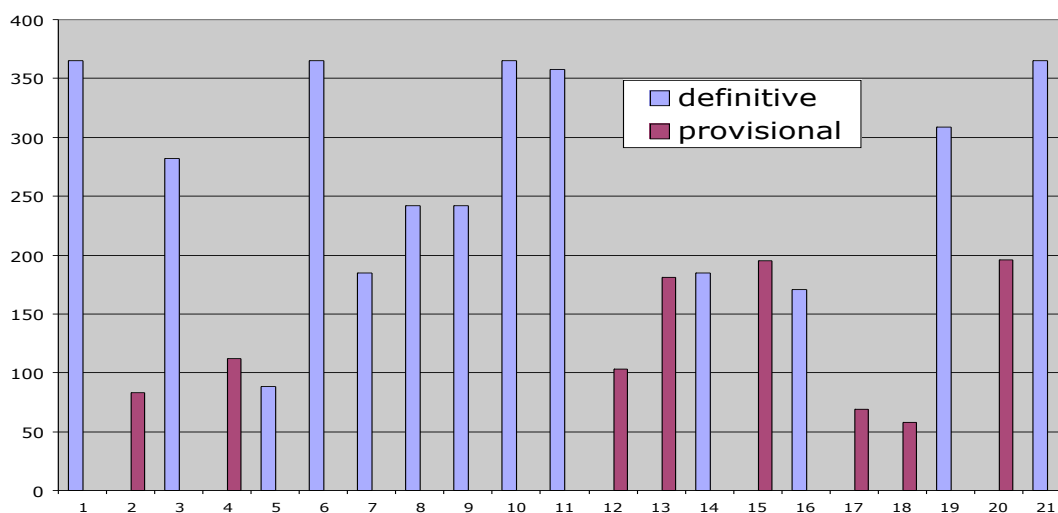
In the case of Chile, Textiles with almost one third of historical measures are revealed as an industry that apparently was considered as threat by Chilean domestic industry.

Metal and metal mechanics with 12%, agriculture 11% and food 6%, two critical Chilean industries and dairy products (produce from milk). Figure 4 may provide help to better understand the relative weight of certain countries in Chart 3 that may appear somehow extremely over represented, considering their relative weight as commercial partners.

Taking into consideration the origin of imported products such as textiles, food, agriculture and metals this presumably is connected with countries affected by measures.

Pursuant to Brazilian Department of Trade Defence's data, measures distributed by category applied against unfair competition from period 1988 to 2005 offers a different approach: Chemical and wires 38.8%, Metal 14.3%, Agriculture 12.2%, other industries 12.3, with as little as 2% in textile, capital goods and other manufactured 20.4%. This may not be connected with the product itself but rather to a number of circumstances such as potential protectionist mechanism such as Technical Barriers to Trade

v) Average number of day's duration of a measure (1999-2005)



Source: based on CNDP data

We may observe that average duration for 13 definitive measures applied from 1999 to 2005 was 282 days and for eight provisional measures was 108 days. Five definitive measures lasted a full year period and only one definitive measure lasted less than 100 days.

On a different trend, five from eight provisional measures lasted around 100 days or less revealing its nature as critical circumstance and intended for emergency situations.

It must be pointed out that Chilean legislation is a WTO plus, therefore its possibility to apply a measure is less than the period allowed by WTO, thus no antidumping, countervailing or safeguard measure may exceed one year period with an extension of only an extra year¹²².

Furthermore, according to the chart above mentioned, it has not been applied a provisional measure and a definitive one in all cases for the same investigating process because enough background for avoidance of a definitive measures exists or the circumstance did not require the application of a provisional measure.

XV. Conclusions

The importance of the competent investigating authorities' work should be properly understood and included as a significant "domestic first filter" within the economic integration process and the rule of law based multilateral system. Hence we should undertake with responsibility the efforts to correct and enhance their faculties and performance in each country.

We have talked about the significance of accurate and consistent work for competent investigating authorities and the importance that at the domestic level, authorities perform their task properly, if additionally exist efficient judicial review mechanisms, then the standard of review¹²³ rendered at the WTO level, the deference to the previous investigating process at domestic level will provide predictability and strengthen the multilateral system.

On the contrary, if the said tasks are performed poorly, then the said deference lacks its justification root and would remain only as a matter of sovereignty.

Deeper analysis and review of existing cases by competent investigating authorities will ensure better justification under critical and unforeseen circumstances, and will help to identify the real causes of damage and how the domestic industry will face threats and assume the challenge of adapting to the existing market situation. Additionally, if we consider the public choice theory approach, we may conclude that the more rigorous the process at domestic level, the better the allocation of economic resources.

In general, the Chilean experience with the competent authority has shown an important commitment with WTO's rules, has demonstrated in its investigating

¹²² Law 18,525 article 10; Decree Law 3567, article 21

¹²³ "Moreover, as national economies become increasingly interdependent, and as the need for national cooperation and coordination accordingly becomes greater, the standard-of-review question will become more and more important." Petersmann Ernst-Ulrich and Otino Federico; op. cit. p.158

procedure accuracy and predictability, and according to the data, the number of investigations and measures have decreased in the last six years. We have reviewed some aspects that should be evaluated for possible improvements.

Furthermore, Chilean legislation should be amended in order to provide a specific procedural recourse for an effective review upon a judicial and independent entity.

Additionally, it would be advisable to follow other countries' experience such as Brazil and Argentina in order to make available yearly, comprehensive reports with relevant statistics as those countries' reports already include.

Some of Chilean commission's minutes are not very comprehensive in their grounds, analysis and debate, providing little information such as list of participants, a brief written presentation, some short information on the investigation and most critical aspects for determinations.

This should be improved for better transparency and for future potential judicial reviews at domestic level as well as panels and Appellate Body. Furthermore, full text of minutes should be published on the CNDP's web.

In terms of Chilean unilateral reduction of custom duties during the last decade, the country could be considered as in a fragile commercial position when facing imports of goods. However, as Chile has reduced its duties, and has signed more free trade agreements, the less is the investigation and the application of measures has decreased. This could be understood, at least in the case of Chile, as an important indication that economic integration does not necessarily implies the rise of commercial disputes.

In the end, only cooperation and trust will enhance prosperity and ensure a better worldwide situation.