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Why the WTO Should Require the Application of the Evidentiary Threshold Requirement in Antidumping Investigations Tara Gingerich

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Why the WTO Should Require the Application of the Evidentiary Threshold Requirement in Antidumping Investigations Tara Gingerich

Keywords

WTO, GATT, Dumping, Antidumping, Antidumping Regulation, Evidence Requirements

COMMENTS

WHY THE WTO SHOULD REQUIRE THE APPLICATION OF THE EVIDENTIARY THRESHOLD REQUIREMENT IN ANTIDUMPING INVESTIGATIONS

TARA GINGERICH*

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INTRODUCTION

Antidumping is one of the most controversial issues in the field of international trade.¹ It divides the main exporting countries from the main importing countries. Companies and industries that find themselves slipping in the international market often abuse antidumping measures for protectionist purposes.²

Antidumping investigations exact a tremendous cost on the company being investigated and deter other foreign companies from entering the market, often allowing the domestic competitor to gain the upper hand.³ The difficulty involved in enforcing antidumping regulation is compounded by the fact that both private companies and government actors are involved. Thus far, negotiations on antidumping laws at the international level have been filled with

1. The controversy surrounding antidumping is demonstrated by the strong views it engenders. See Christopher F. Corr, *Trade Protection in the New Millenium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L L. & BUS. 49, 53 (1997) ("There is . . . one significant threat to the sanguine prospects for freer international trade—antidumping action."); see also Dale E. McNiel, *United States' Agricultural Protectionism After the Uruguay Round*, 23 N.C. J. INT'L L. & COM. REG. 281, 298 (1998) (characterizing antidumping duty law as perhaps the "most controversial" in trade law).

2. See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 81 (1995) (describing antidumping action as "an unfair means of preventing fair competition"); see also *infra* notes 218-26 and accompanying text.

3. See GREG MASTEL, *AMERICAN TRADE LAWS AFTER THE URUGUAY ROUND* 88 (1996) ("Even if unsuccessful, anti-dumping cases all too often involve[] trade disruption and heavy legal costs."); THOMAS J. SCHOENBAUM, *ANTIDUMPING AND COUNTERVAILING DUTIES AND THE GATT: AN EVALUATION AND A PROPOSAL FOR A UNIFIED REMEDY FOR UNFAIR INTERNATIONAL TRADE* 2 (1987) (criticizing the use of antidumping measures by domestic industries to create an unfair bargaining situation); Corr, *supra* note 1, at 54-55 (describing antidumping measures in the United States as "a profoundly effective weapon" because U.S. success in pursuing antidumping cases discourages foreign competitors from entering the U.S. market when there is even a remote possibility of an antidumping complaint against them).

tension⁴ and have produced standards that are often vague and ineffective.⁵

Dumping is the practice of selling a good in a foreign country for less than “normal” or “fair” value, which is usually defined as the price at which the product is sold in the domestic market.⁶ Dumping is considered an act of unfair trade because it puts the players in the domestic market at a disadvantage.⁷ Governments counter such action through antidumping laws, which allow them to pursue a petition made by a domestic company (the petitioner), launch an investigation, and levy antidumping duties upon the foreign company (the respondent) if they find that dumping has caused or threatened material injury to the domestic industry.⁸ However, the investigations that may or may not result in a finding of dumping are often themselves protectionist acts of unfair trade.⁹ The investigations have a detrimental impact on the targeted companies¹⁰ and also deter other companies from trading in that market.¹¹ Both of these effects

4. See *infra* Part I.C (demonstrating the contention surrounding the development of antidumping regulations in the GATT/WTO).

5. See SCHOENBAUM, *supra* note 3, at 2 (stating that international antidumping and countervailing duty laws have been flawed for the following reasons: lack of discretion in price discrimination disputes, abuse and misuse of the laws, lengthy time commitments affecting a small amount of trade, procedurally and substantively complicated provisions and international inconsistencies); *infra* Part I.C (describing how some of the standards that the international community has reached have been vague and ineffective).

6. See PETER B. KENEN, *THE INTERNATIONAL ECONOMY* 247 (3d ed. 1994). For a discussion of “domestic price,” see Patrick A. Messerlin, *The Uruguay Negotiations on Antidumping Enforcement: Some Basic Issues*, in *POLICY IMPLICATIONS OF ANTIDUMPING MEASURES* 45, 46-50 (P.K.M. Tharakan ed., Advanced Series in Management No. 14, 1991) [hereinafter *POLICY IMPLICATIONS*].

7. Governments and industries in importing countries fear that the inundation of cheaper imports will harm and possibly wipe out their domestic industries. See Keith Steele, *An Introductory Overview*, in *ANTI-DUMPING UNDER THE WTO: A COMPARATIVE REVIEW* 1, 2 (Keith Steele ed., 1996) [hereinafter *ANTI-DUMPING UNDER THE WTO*].

8. See *Corr*, *supra* note 1, at 77-78 (outlining the initiation and investigation process).

9. See J. Michael Finger, *Antidumping Is Where the Action Is*, in *ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT* 3, 3 (J. Michael Finger ed., 1993) [hereinafter *ANTIDUMPING: HOW IT WORKS*] (arguing that petitioners will file numerous unjustified petitions in the hope that their governments will levy a duty upon a foreign competitor, thus giving the petitioner an unfair advantage in the market). But see Terence P. Stewart, *Administration of the Antidumping Law: A Different Perspective*, in *DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS* 288, 293 (Richard Boltuck & Robert E. Litan eds., 1991) [hereinafter *DOWN IN THE DUMPS*] (describing the harm that dumping can cause to companies and claiming that U.S. antidumping law attempts to encourage “the workings of comparative advantage”).

10. See *Corr*, *supra* note 1, at 53 (describing antidumping petitions as an “effective weapon” that places a heavy burden on competitors). This is true in terms of the money a company must spend to comply with the lengthy and detailed questionnaires of the investigating government, the potential productivity lost during an investigation and the possible exposure of confidential information regarding price and cost. See MASTEL, *supra* note 3, at 88 (arguing that the filing of antidumping investigations can be used to harass a foreign competitor because of the expense involved in defending an allegation and complying with an investigation).

11. See MASTEL, *supra* note 3, at 88 (claiming that a dumping allegation is expensive to both prove and defend against). The same logic that explains how the filing of an investigation

thus reduce the competition faced by the domestic industry.

The potential for governments to invoke antidumping laws abusively has created controversy over the level of evidence required to initiate an investigation.¹² Opinions on this issue vary drastically among nations, based in large part upon whether the country is a main exporting or importing country. Many exporting companies argue that the level of evidence required should be high to guard against the use of investigations as a weapon to restrict exports.¹³ In contrast, many of the importing countries argue that investigations prevent unfair competition and advocate a more flexible evidentiary requirement.¹⁴

Another factor in this debate is the World Trade Organization (“WTO”), which is the foremost entity in international trade.¹⁵ The WTO structure builds upon that of the General Agreement on Tariffs and Trade (“GATT”) and includes guidelines for the initiation and execution of antidumping investigations, as well as the imposition of sanctions upon positive findings.¹⁶ One complication that has arisen

may be used to harass a competitor can be applied to show how the potential threat of having to defend against such costs may dissuade a foreign company from entering the market in the first place. *See infra* notes 223-26 and accompanying text.

12. There are two related issues that are part of the threshold for initiation: standing and the evidentiary burden. While many authorities use the terms interchangeably, they have different foci. In this context, “standing” refers to the “right of a party or parties in the importing country to petition for relief under national antidumping laws.” 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 1575 (Terence P. Stewart ed., 1993) [hereinafter NEGOTIATING HISTORY]; *see also* Ronald A. Cass & Stephen J. Narkin, *Antidumping Duty and Countervailing Duty Law: The United States and the GATT*, in DOWN IN THE DUMPS, *supra* note 9, at 200, 229 (defining “standing” in this context as “the standards that the government uses in determining who is entitled to initiate and prosecute an antidumping investigation”).

The evidentiary burden issue, on the other hand, focuses on the amount and type of evidence that must be set out in a petition. This Comment examines the evidentiary burden that is required and the one that should be required. It also discusses the issue of standing, as a related issue that has been very controversial.

13. *See* 2 NEGOTIATING HISTORY, *supra* note 12, at 1581 (explaining the exporter countries’ recommendations on this issue). This camp includes Japan, Hong Kong, the Nordic countries (Sweden, Norway and Finland) and the members of the Association of Southeast Asian Nations (“ASEAN”). *See id.*

14. Australia, the United States, Canada and the European Union (“EU”) are among the countries in this category. *See* Steele, *supra* note 7, at 2-3. Not coincidentally, these four entities have brought more than 90% of the antidumping and countervailing duty actions within the GATT since 1979. *See id.*

15. *See id.* at 1 (recounting the switch from the GATT to the WTO regime and noting the expansion of trade policies that accompanied this shift). This Comment generally uses the term “GATT” to refer to the pre-1994 laws and system, as well as the GATT 1994 Agreement; it uses the term “WTO” to refer to the post-1994 system.

16. *See* General Agreement on Tariffs and Trade art. VI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS--RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 13 (1994) [hereinafter GATT 1994]; Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS--RESULTS OF THE URUGUAY ROUND [hereinafter WTO Antidumping Code],

is the interplay between these antidumping guidelines and those in place in the individual member nations.¹⁷ This Comment contrasts these procedures, particularly those relating to the initiation of an antidumping investigation under the rules of the WTO and those of the United States. This Comment also analyzes the impact that the initiation threshold has on antidumping investigations.

Determining the appropriate evidentiary threshold is a significant issue. A threshold that is too low will encourage unwarranted complaints and investigations, which will in turn result in protectionism and deter international trade and investment.¹⁸ A threshold that is too high will lead to increased and unchecked dumping and other unfair trade practices.¹⁹ The need to find a balance between these two extremes is the crux of the problem and one of the foci of this Comment.

The threshold issue is important for many reasons. First, it has been a source of contention since the first GATT Antidumping Code.²⁰ Both the major trading countries and the developing countries employ antidumping investigations more frequently today.²¹ As a result, the issue of whether a petitioner has provided sufficient evidence to initiate an investigation is likely to arise more frequently.

reprinted in JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 174 (3d ed. Supp. 1995).

17. See Steele, *supra* note 7, at 2 (suggesting that the WTO Antidumping Code should be “understood as part of the political balancing between the trade liberalization objectives of the GATT, now the WTO, on the one hand, and member countries’ concerns that their domestic industries can compete on ‘a level playing field’ on the other”). Steele portrays the distinction as reflecting different approaches to competition adopted at the supranational WTO level and at the national level. See *id.*

18. See Raj Bhala, *Rethinking Antidumping Law*, *GEO. WASH. J. INT’L L. & ECON.* 1, 56 (1995) (“A protectionist abuser benefits from an overly broad standing requirement.”).

19. See *id.* (“[T]he meritorious petitioner is harmed by a standing requirement that is too strict.”); Linda M. Weinberg, Comment, *On Whose Behalf? Underlying Conflicts of the Antidumping Standing Rules*, 20 *LOY. L.A. L. REV.* 573, 574 (1987) (discussing how stringent standing requirements have a “discouraging” effect on individual firms).

20. Agreement on the Implementation of Article VI, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. 6431, 650 U.N.T.S. 320 [hereinafter GATT 1967 Antidumping Code]. For a discussion of the controversy surrounding this issue leading up to the first GATT antidumping code, see *infra* notes 58-71 and accompanying text (discussing the development of antidumping regulation under the GATT prior to the Uruguay Round).

21. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 672 (3d ed. 1995) (citing GATT statistics indicating that a growing number of countries are using antidumping laws); Finger, *supra* note 9, at 6 (stating that “[t]he emergence of unfair trade rules as a major instrument for regulating imports has not gone unnoticed by the developing countries,” and noting that over 30 developing countries had become signatories to, or observers of, the then-optional GATT antidumping and countervailing duty laws by the end of the 1980s). Countries that have recently enacted antidumping laws and begun to utilize them include New Zealand, Mexico, South Africa, Japan, South Korea and Taiwan. See Steele, *supra* note 7, at 3 (suggesting that the increase in the use of antidumping laws by these countries is, at least in part, a response to the prevalence of such use by the United States, Canada, Australia and the European Union throughout the 1980s).

This issue has already arisen at the GATT/WTO level on two occasions discussed in more detail later in this Comment.²²

Second, governments are under increasing pressure to make their domestic regulations conform with the WTO regulations.²³ This pressure is in large part due to the more serious sanctions available to WTO dispute resolution panels than existed under the GATT.²⁴ As a result, countries have sought to reduce the risk of being found in violation of the WTO regime.²⁵

Third, the debate over the appropriate threshold for initiating an investigation and its resolution will have an impact on the WTO itself. The threshold issue may very well be one of the most divisive and politically-charged issues yet faced by the new organization. Consequently, many supporters and critics are eager to see how the WTO will withstand this challenge.

This Comment begins by providing background information on the components of the issue of an evidentiary threshold; it will describe the GATT and the WTO, antidumping measures, and the threshold required to initiate an antidumping investigation. Part II focuses on antidumping regulation in the United States, both generally and specifically with respect to the initiation of investigations. Part III examines two GATT/WTO cases that have addressed the evidentiary threshold required for the initiation of an antidumping investigation. Part IV analyzes the issue of a threshold evidentiary requirement, evaluating the status quo and the effect of *Portland Cement*, and arguing that the WTO should raise the evidentiary threshold and clearly articulate this standard. The final

22. See Guatemala Anti-Dumping Investigation Regarding Portland Cement From Mexico, WT/DS60/R (June 19, 1998) [hereinafter *Portland Cement* Panel Report]; United States—Measures Affecting Imports of Softwood Lumber from Canada, Oct. 27-28, 1993, GATT B.I.S.D. (40th Supp.), at 358 (1995) [hereinafter *Softwood Lumber* Panel Report]; see also *infra* Part III (discussing the treatment of the evidentiary requirement in relation to two cases before GATT/WTO dispute resolution panels). The Appellate Body has since concluded that the *Portland Cement* matter was not properly before the Panel. See Guatemala Anti-Dumping Investigation Regarding Portland Cement From Mexico, WT/DS69/AB/R (Nov. 2, 1998), para. 88 [hereinafter *Portland Cement* Appellate Body Report]; discussion *infra* Part III.B.

23. Although WTO Members are theoretically required to have their domestic laws comply with the WTO, this has not been the practice. See *infra* notes 139-43 (discussing U.S. noncompliance with a GATT requirement regarding verification of industry support and the subsequent challenge by Sweden).

24. See discussion *infra* Part I.D (reviewing the dispute settlement procedures under the GATT and the WTO).

25. See John H. Jackson, *The Uruguay Round and the Launch of the WTO: Significance & Challenges*, in THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 5, 15 (Terence P. Stewart ed., 1996) [hereinafter MULTILATERAL TRADE FRAMEWORK] (explaining why WTO members are under increasing pressure to conform to WTO rules); see also *infra* notes 94-98 and accompanying text (discussing the implications of stricter sanctions under the WTO).

section concludes that, as an organization, the WTO has a responsibility to take such measures.

I. HISTORICAL BACKGROUND ON DUMPING AND THE GATT/WTO

A. *A Brief History of the GATT and Its Transformation to the WTO*

The GATT²⁶ was the principal multilateral treaty for international trade from its inception in 1947 until the conclusion of the Uruguay Round in 1994.²⁷ During this period, the participating countries used the GATT framework as a mechanism to negotiate trade concessions.²⁸ Although the GATT in many ways functioned beyond its intended scope and purpose, its creators intended the GATT to serve only as a provisional measure, assuming it would be supplanted by the International Trade Organization (“ITO”).²⁹

The GATT has evolved through eight major multilateral negotiation rounds on trade liberalization,³⁰ many of which also led

26. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

27. See JACKSON ET AL., *supra* note 21, at 289 (emphasizing how influential the GATT was, despite its provisional nature). The treaty comprises over 200 agreements and protocols. See *id.* at 296.

28. See KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 17 (Midway reprint 1977) (describing the GATT’s primary significance as providing the framework for major tariff negotiation conferences). A tariff is a duty imposed by a government on imported goods. See CHARLES K. ROWLEY ET AL., TRADE PROTECTION IN THE UNITED STATES 37 (1995) (defining the term as “a form of excise tax”). In the context of the GATT, a concession is a lowering of an import barrier. See BRUCE E. MOON, DILEMMAS OF INTERNATIONAL TRADE 78 (1996).

29. See DAM, *supra* note 28, at 11 (describing the GATT as “in origin a trade agreement designed to record the results of a tariff conference that was envisioned at the time as being the first of a number of such conferences to be conducted under the auspices of the ITO”). Many critics, however, saw the ITO as a violation of national sovereignty. When the United States failed to approve the charter for the ITO, the GATT became the default international trade entity. See *id.*; cf. MOON, *supra* note 28, at 77 (stating that, while the GATT was forced to assume a larger role than originally intended, its principal activity remained the facilitation of trade negotiation rounds).

The GATT was amended to include most of the commercial policy of the ITO Charter but practically none of its procedural and institutional provisions. See DAM, *supra* note 28, at 21. The non-substantive provisions “are largely limited to [those] that were thought necessary in 1948 for the General Agreement to function as a continuing multilateral agreement, and do not include ones that might have been inserted if it had been contemplated that the General Agreement would become the founding document of an international organization.” *Id.* The GATT also lacked an institutionalized dispute settlement procedure. See Robert E. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in THE URUGUAY ROUND AND BEYOND 101, 102 (Jagdish Bhagwati & Mathias Hirsch eds., 1998) (describing how the GATT was imbued with a modest dispute settlement procedure because the GATT was intended to stand alone only from 1947 until 1948 or 1949, when the ITO was supposed to enter into force); cf. *infra* Part I.D (describing the WTO system).

30. Round one took place in Geneva, Switzerland in 1947; round two took place in Anney, France in 1948; and Torquay, England was the site of round three in 1950. The next three rounds took place in Geneva: round four in 1956, the Dillon Round from 1960 to 1961,

to the creation of side agreements on various issues.³¹ The early rounds were concerned with tariffs, which were the major trade barriers of the time.³² As the rounds succeeded in essentially extinguishing the tariff problem, the focus shifted to non-tariff barriers such as antidumping.³³ Most recently, the Uruguay Round expanded the scope of trade negotiations and the resulting agreements to cover services and intellectual property, as well as goods.³⁴

The Uruguay Round was “the longest and most difficult bargaining in GATT history.”³⁵ Although not the intended purpose of the round,³⁶ the participants in the Uruguay Round, numbering over one

the Kennedy Round from 1964 to 1968, and the Tokyo Round from 1973 to 1979. The Uruguay Round lasted the longest of any round, from 1986 to 1994, and took place in multiple locations including Uruguay and Marrakesh, Morocco. See JACKSON ET AL., *supra* note 21, at 314. The number of GATT signatories has grown steadily, from 23 at the 1947 Geneva Convention to 96 at the conclusion of the Uruguay Round in 1994 (with 28 countries in the process of negotiating accession). See MOON, *supra* note 28, at 77. Currently, there are 134 WTO Members and 30 countries in the process of negotiating accession. See WTO, *About the WTO* (visited Feb. 16, 1999) <<http://www.wto.org/wto/about/accessions.htm>>.

31. Under the provisions of the GATT 1947, a supermajority was required to amend the treaty and, even then, only those parties that agreed to the change would be bound by it. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 51 (4th ed. 1991) (citation omitted). Because of the difficulty in achieving such solidarity, many issues were decided through side agreements, also called “codes” and “understandings.” See *id.* at 52-56. Side agreements bound only their signatories, a process which facilitated the creation of such agreements but simultaneously limited their effect. See *id.* at 56. The Antidumping Code prior to the Uruguay Round is an example of such a side agreement. The 1967 Kennedy Round Antidumping Code had 17 signatories, while the 1979 Tokyo Round Code had 23. See EDWIN A. VERMULST, *ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES* 5 (1987). One of the most remarkable aspects of the WTO Agreement is that it incorporated all of the side agreements into GATT 1994. See JEFFREY J. SCHOTT, *THE URUGUAY ROUND: AN ASSESSMENT* 15 (1994) (labeling this incorporation the “single undertaking”). As a result, all WTO members are bound by the former side agreements. See *id.* (stating that many countries which formerly “enjoyed a free ride” in these areas would now have to undertake the new obligations).

32. See JACKSON, *supra* note 31, at 52.

33. See JACKSON ET AL., *supra* note 21, at 376 (outlining various import restrictions); ROWLEY ET AL., *supra* note 28, at 205 (describing the push at the Kennedy Round for international legislation to minimize the use of non-tariff barriers). A non-tariff barrier is a measure other than a tariff through which countries restrain imports. Other non-tariff barriers include quotas and subsidies. This shift began to occur with the Kennedy Round. See *id.*

34. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 44 (1994) [hereinafter GATS Agreement].

35. MOON, *supra* note 28, at 86. Factors complicating the political situation during the Uruguay Round included: the divergent trade interests of the West and East that were exposed at the end of the Cold War; the shift in power from the developed, western states to the developing countries; and the focus on domestic economic performance resulting from the slowdown in worldwide growth. See *id.*

36. See JACKSON ET AL., *supra* note 21, at 301 (“[T]here was no indication during the 1980s and during the preparations for the Uruguay Round negotiations that there would be a

hundred, succeeded in passing the 22,000-page Marrakesh Agreement that created the WTO.³⁷

The WTO, which entered into force on January 1, 1995, has the authority to enforce the GATT and the other trade agreements that are now part of the WTO Agreement.³⁸ In fact, the GATT continues to serve as the treaty source for most of the WTO's substantive norms.³⁹ The WTO Agreement consists of the WTO Charter and a number of annexes containing GATT 1994, the General Agreement on Trade in Services ("GATS"), the General Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), the Dispute Settlement Understanding ("DSU"), the Trade Policy Review Mechanism ("TPRM"), and four plurilateral agreements that are binding only on those countries who have agreed to them.⁴⁰ GATT 1994 is itself a comprehensive agreement representing GATT 1947 as it has been amended through the trade liberalization rounds and including the previously optional side agreements.⁴¹ As an international organization, the WTO has attributes such as a secretariat, budget, and the ability to conduct relations with other international entities.⁴² The participating states are "Members," rather than "Contracting Parties" as they were in GATT 1947.⁴³

It is universally accepted that the Members of the WTO must still resolve many issues.⁴⁴ It is currently a matter of debate, however, whether a ninth round of trade negotiations, referred to as the

proposal for a new organization during the Round.").

37. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

38. *See id.* art. III.2 ("The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements . . .").

39. *See* JACKSON ET AL., *supra* note 21, at 290 (discussing the GATT as the predecessor to the WTO as well as the existing treaty source for substantive norms).

40. *See* WTO Agreement, *supra* note 37.

41. *See id.*; *see also* M.A.G. VAN MEERHAEGHE, INTERNATIONAL ECONOMIC INSTITUTIONS 102 (7th ed. 1998) ("GATT lives on as GATT 1994, the amended and updated version of GATT 1947, which is an integral part of the WTO Agreement."); *supra* note 31 and accompanying text (explaining the development of side agreements prior to the Uruguay Round).

42. *See* The Official Web page of the World Trade Organization (visited Feb. 4, 1999) <<http://www.wto.org>> (providing a fact file which includes information about the secretariat and budget); *see also* SCHOTT, *supra* note 31, at 137 (evaluating the functions and responsibilities of the WTO Secretariat).

43. *See* WTO Agreement, *supra* note 37; GATT 1947, *supra* note 26; G.J. LANJOUW, INTERNATIONAL TRADE INSTITUTIONS 6 (ACE Translations trans., 1995).

44. The Marrakesh Agreement contains a timetable for future negotiations on unfinished business, the review of current provisions and negotiations on new issues. *See* SCHOTT, *supra* note 31, at 34. Antidumping is one of these areas. *See* JACKSON ET AL., *supra* note 21, at 318. Other areas include financial services, movement of natural persons, research and development subsidies, government procurement of services and agriculture. *See* SCHOTT, *supra* note 31, at 33-36.

“Millennium Round,” should take place in the year 2000.⁴⁵

B. Dumping and Antidumping Measures

1. Dumping and the GATT/WTO

According to conventional thought, dumping constitutes a form of unfair trade and predatory pricing.⁴⁶ Although the GATT does not prohibit dumping,⁴⁷ it does allow countries to impose antidumping

45. European Union members, Australia and Japan are among the states pushing for the Millennium Round. The United States originally resisted the idea, arguing that rounds are no longer necessary; that negotiations have become routine; and that a piecemeal, sector-by-sector approach to resolving the remaining issues is more appropriate. See *Trade Leaders Celebrate 50 Years of Open Market Efforts*, AGENCE FRANCE PRESSE, May 19, 1998, available in LEXIS, NEWS Library, CURNWS File (mentioning that President Clinton’s speech calling for a faster system of international trade negotiations set him at odds with the European Union and Japan); *U.S.’ Barshefsky-3*, AFX NEWS, Oct. 19, 1998, available in LEXIS, NEWS Library, CURNWS File (describing U.S. Trade Representative Charlene Barshefsky’s explanation of U.S. objections to a new round as two-fold: (1) in a trade round, there is no agreement until there is an agreement on every issue, and (2) there is no time limit). During President Clinton’s State of the Union address on Jan. 19, 1999, however, he called for the initiation of a new round. See U.S. Trade Representative Charlene Barshefsky, Remarks on the President’s State of the Union Address Regarding the Upcoming WTO Ministerial (Jan. 20, 1999), available in LEXIS, NEWS Library, CURNWS File.

46. See KENEN, *supra* note 6, at 247 (“A prohibition against dumping . . . was included in the GATT because dumping is often viewed as a predatory practice.”); MASTEL, *supra* note 3, at 76 (explaining that proponents of antidumping laws assert that “dumping is the result of predatory foreign firms’ efforts to drive U.S. competitors out of business in order to gain control of the market and raise prices”). Predatory pricing refers to the intent on the part of a company to sell its product so cheaply that its competitors will be forced out of business. See Brian Hindley, *The Economics of Dumping and Anti-Dumping Action: Is There a Baby in the Bathwater?*, in POLICY IMPLICATIONS, *supra* note 6, at 27.

There is a strong counterargument to this theory on dumping, however. Some commentators argue that smart domestic business practices are unjustly labeled unfair when applied to international markets:

Dumping, when it actually exists, is merely an exercise in price discrimination, selling the same product in different markets at different prices, which is rational economic behavior. It is a policy that, when properly followed, maximizes a company’s profits.

Yet when it is done across national borders, it is considered sinister or evil.

Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT’L L. & BUS. 491, 553 (1993); see also Steele, *supra* note 7, at 2 (presenting the claim of many economists that dumping is in the interest of the consumer in the importing country unless it is both predatory and there is a serious prospect that the dumper will become a monopoly); see also Hindley, *supra*, at 28-30 (pointing out that, although examples of predatory pricing do exist, “the great bulk of actual antidumping cases cannot conceivably be explained in terms of predatory pricing” and arguing that, if predatory pricing is the genuine rationale for antidumping action, such action should only take place in situations where predatory pricing is conceivable); McGee, *supra*, at 540 (“[P]redatory pricing either does not exist because such behavior is irrational or, if it does exist, it has usually . . . failed when tried.” (citations omitted)).

47. See Marie Louise Hurabiell, *Protectionism Versus Free Trade: Implementing the GATT Antidumping Agreement in the United States*, 16 U. PA. J. INT’L BUS. L. 567, 571-72 (1995) (suggesting that negotiators have perhaps feared that a restriction on dumping would harm domestic exporters as well as domestic consumers). Furthermore, such a restriction would have limited effect because it is companies, not governments, that dump. Negotiating parties could not promise that private companies in their countries would not dump.

Some would say that it is only *antidumping* measures that are antithetical to the goals of the

duties on foreign companies that dump.⁴⁸ The GATT states that the purpose of national antidumping laws is to serve as defense mechanisms for countries in which dumping has either caused or threatened injury, or materially “retard[ed] the establishment of a domestic industry.”⁴⁹

2. *National antidumping investigations*

The Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“WTO Antidumping Code” or “Antidumping Agreement”) sets forth the overall protocol for investigations, but Members tailor investigations in their individual countries.⁵⁰ The procedure for antidumping investigations, therefore, varies considerably among different Members.⁵¹ The general process is as described below. Investigations

GATT. See P.K.M. Tharakan, *Some Facets of Antidumping Policy*, in POLICY IMPLICATIONS, *supra* note 6, at 1 (positing that increased recourse to antidumping mechanisms has resulted in a contravention of the fundamental principles of GATT—free trade and multilateralism); Hurabiell, *supra*, at 572-73 (characterizing the antidumping provision as an exception to the GATT that “allow[s] certain measures that would otherwise be a violation of [the] GATT” (citation omitted)).

48. GATT 1994, *supra* note 16, art. VI; WTO Antidumping Code, *supra* note 16.

49. See GATT 1994, *supra* note 16, art. VI.1 (“The contracting parties recognize that dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.”). According to this view, preserving the openness of the market, not restricting foreign access, is the primary purpose of antidumping procedures. See Stewart, *supra* note 9, at 288 (stating that antidumping laws are designed, among other purposes, to “offset any artificial advantage that flows from closed foreign markets, cross-subsidization by multiproduct producers, government largesse or other factors that have nothing to do with comparative advantage”). For other views on the purpose of antidumping measures, see CROOME, *supra* note 2, at 81 (describing the view that antidumping action is the way in which domestic producers discourage imports when they are unable to compete); SCHOTT, *supra* note 31, at 34 (describing the manipulation of antidumping statutes to promote anticompetitive conditions in the domestic market); McGee, *supra* note 46, at 491 (“Antidumping laws were designed to protect domestic industry from foreign competition.”).

50. See Steele, *supra* note 7, at 6 (asserting that countries procedurally and substantively alter the application of the Code so that genuine compliance with the Code is sometimes questionable); S. Linn Williams, *Introduction: Anti-Dumping Laws, Remedies, Procedural Safeguards, Subsidies and Countervailing Duties in the United States*, in INSTITUTE OF INT’L BUS. LAW AND PRACTICE, DUMPING: A COMPARATIVE APPROACH 9, 17 (1995) [hereinafter DUMPING: A COMPARATIVE APPROACH] (claiming that, although the GATT establishes basic standards of transparency and fairness, the national rules establish virtually all the substance and the process of antidumping law).

The sufficiency of evidence needed to initiate investigations is one of the most important differences among national laws. See Williams, *supra*, at 19; *infra* Part II.B (describing U.S. threshold requirements). Standing is another area in which standards vary dramatically among nations. The EU requires that the petition represent 40% of the domestic industry; Canada requires close to that level; and Mexico and the United States require 25%. See 19 U.S.C. § 1671a(c)(4)(A)(1) (setting forth the U.S. requirement); Williams, *supra*, at 30 (discussing European Union, Canadian, Mexican and United States requirements). Also, the governments in both the EU and Canada verify the claimed industry support. See *id.*

51. For a description of the process in the United States, see *infra* Part II.A. For a discussion of processes in other countries, see generally DUMPING: A COMPARATIVE APPROACH,

are initiated by national governments at the request of one or more companies in the domestic industry that believe they have been injured by the dumping actions of a foreign competitor;⁵² less frequently, a national agency will initiate an investigation itself although no petition has been filed.⁵³ The investigating body will evaluate the evidence presented in the petition and make a preliminary determination as to whether there is dumping, whether the domestic industry has been injured, and whether the dumping was a material cause of the injury.⁵⁴ Thereafter, it will send questionnaires to other companies in the domestic industry regarding injury and to the foreign company accused of dumping regarding costs and pricing.⁵⁵ The questionnaire directed at the foreign company is extremely burdensome, requiring the alleged dumper to respond within a specified amount of time and submit large quantities of documents to verify its figures.⁵⁶ If the investigating body reaches a final determination that the foreign company has engaged in dumping, that the domestic industry has been materially injured, and that the dumping caused the injury, the body will impose a duty on the offending company.⁵⁷

C. *The Origins and Development of Antidumping Regulation*

Dumping was already considered a problematic trade practice in the second half of the nineteenth century.⁵⁸ In 1902, the anger of ten

supra note 50; CLIVE STANBROOK & PHILIP BENTLEY, *DUMPING AND SUBSIDIES: THE LAW AND PROCEDURES GOVERNING THE IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES IN THE EUROPEAN COMMUNITY* (1996) (describing the process in the EU); VERMULST, *supra* note 31 (describing the process in the EU); Craig R. Giesze, *Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, As Well As Practical Business Risks and Realities, for United States Exporters to Mexico in the Area of the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 885 (1994) (describing the process in Mexico); Steele, *supra* note 7 (describing the process in Australia, Canada, the EU, Japan, Korea, Mexico, New Zealand, South Africa and Taiwan).

52. See Corr, *supra* note 1, at 77 (noting that an antidumping action begins when a national authority accepts a petition submitted by the domestic industry alleging harm from dumped goods).

53. See, e.g., 19 U.S.C. § 1673a(a) (1994) (allowing the United States to initiate an antidumping investigation without receipt of a petition from a domestic industry); see also Bhala, *supra* note 18, at 26 (stating that the U.S. Department of Commerce can initiate an antidumping action, although companies generally do).

54. See Corr, *supra* note 1, at 77 (outlining the initiation and investigation procedure).

55. See *id.* at 78 (adding that the national authority may use auditors as another means of gathering information after it receives the questionnaire responses).

56. See David Rushford, *Antitrust Versus Antidumping: Revisiting the Antidumping Act of 1916*, 3 U.C. DAVIS J. INT'L L. & POL'Y 85, 96-98 (1997) (recounting the burden questionnaires impose upon respondents and criticizing the questionnaire process for its rigid procedural rules and time constraints).

57. See Corr, *supra* note 1, at 78 (comparing the U.S. retroactive method of assessing antidumping duties with the more common prospective system).

58. See JACKSON ET AL., *supra* note 21, at 684 (noting that several European countries

European countries over the dumping of sugar led them to sign an antidumping agreement that would remain in place for eighteen years.⁵⁹ Countries unilaterally began to legislate against dumping at this time.⁶⁰

When the GATT negotiations began in 1947, the United States offered its national antidumping law⁶¹ as a model, and the negotiating parties drafted Article VI of the GATT the following year.⁶² Article VI defined dumping⁶³ and also established that, upon a finding of both dumping and injury, a country could impose a duty on the company or industry in violation in an amount not greater than the dumping margin.⁶⁴ The lack of specificity in the agreement quickly became apparent, however, and led eighteen GATT contracting parties to supplement the GATT in 1967 with the Agreement on the Implementation of Article VI.⁶⁵ Participating countries eventually incorporated this agreement into the GATT through the Tokyo Round Code.⁶⁶ The Tokyo Round Code provided further detail on

including Great Britain and the Netherlands expressed early concern over dumping).

59. *See id.*

60. *See id.* (stating that nations, by enacting such legislation, were responding to the perceived threat of predatory behavior from their trading partners). Canada was the first country to enact an antidumping law, which it did in 1904. *See* J. Michael Finger, *The Origins and Evolution of Antidumping Regulation*, in *ANTIDUMPING: HOW IT WORKS*, *supra* note 9, at 13, 14-15. The United States followed suit in 1921, patterning the Antidumping Act of 1921, ch. 14, 42 Stat. 11 (codified as amended at 19 U.S.C. § 1671 (1994)), after the Canadian provision. *See* U.S. INT'L TRADE COMM'N, *THE ECONOMIC EFFECTS OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS AND SUSPENSION AGREEMENTS 2-1* (1995) [hereinafter U.S. INT'L TRADE COMM'N]. Interestingly, fears that the laws would be misused for protectionist purposes existed from the beginning. *See* JACKSON ET AL., *supra* note 21, at 684 (explaining that, by the 1920s, nations were as concerned about each other's antidumping laws as they were about the actual practice of dumping).

61. Tariff Act of 1930, ch. 497, 46 Stat. 685 (codified as amended at 19 U.S.C. §§ 1671-1677j (1994)).

62. *See* GATT 1947, *supra* note 26, art. VI.

63. *See id.* art. VI.2.

64. *See id.*; *see also* CROOME, *supra* note 2, at 80. A dumping margin is the difference between the price the exporting country charged and the normal value. *See* JACKSON ET AL., *supra* note 21, at 700 (commenting on the complications of finding the export price and the normal value in order to determine the dumping margin).

65. *See* GATT 1967 Antidumping Code, *supra* note 20; *see also* JACKSON ET AL., *supra* note 21, at 684 (noting that Article VI set "minimal procedural standards" for GATT members to follow in antidumping cases). The Agreement, which was created to clarify and supplement Article VI, required that the alleged dumping be the principal cause of the material injury to the domestic industry. *See* GATT 1967 Antidumping Code, *supra* note 20, art. 3 (requiring that the dumped imports be "demonstrably the principal cause of material injury").

66. *See* JACKSON ET AL., *supra* note 21, at 685. The signatories of the 1979 Antidumping Code were limited in large part to the Organization of Economic Cooperation and Development ("OECD") countries. *See* Petros C. Mavroidis, *Preface* to *ANTI-DUMPING UNDER THE WTO*, *supra* note 7, at xxi, xxi.

Following the Tokyo Round, antidumping became the most frequently-used protectionist instrument. *See id.* The principal importers, in particular, used antidumping proceedings far more often than safeguards, countervailing duties, or voluntary export restraints. *See id.* (naming the United States, Australia, Canada and the European Community). This may have

how governments could establish dumping and injury;⁶⁷ set out questions that assisted in dumping and injury determinations;⁶⁸ codified the procedure for initiating and conducting an investigation,⁶⁹ including when and how an investigation should be terminated;⁷⁰ and determined the level and duration of the application of duties.⁷¹

Antidumping was one of the most contentious issues during the Uruguay Round.⁷² Agreement on antidumping was reached only at the very end of the round.⁷³ The United States, the European Union, Canada and Australia were concerned about attempts to circumvent antidumping duties; consequently, they sought the inclusion of certain anti-circumvention procedural devices in the agreement.⁷⁴ The countries also wanted to expand the discretion of nations investigating dumping claims.⁷⁵ Conversely, many of the countries most commonly targeted with antidumping claims wanted to enact substantive changes that would impede the use of antidumping laws

been due, at least in part, to the expansion of the scope of antidumping regulation during this round to cover imports not priced at full cost. *See* Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade art. 2.4, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. 9650, 1186 U.N.T.S. 2 [hereinafter GATT 1979 Antidumping Code] (permitting dumping margins to be calculated by comparing the export price of the product to the cost of its production in the country of origin when there were no sales of the product in the country of origin); *see also* Finger, *supra* note 60, at 27 (suggesting that this expansion was perhaps the most significant in the development of antidumping measures into an anti-import tool).

67. The 1979 Code reduced the causation requirement of the injury test from that in the 1967 Code. *See* GATT 1979 Antidumping Code, *supra* note 66, arts. 3.1, 3.4 (requiring that in order to impose antidumping duties, dumped imports must be found to have caused injury).

68. *See id.* art. 3.2-4 (listing factors to consider in the dumping and injury investigations but emphasizing that no one factor was dispositive).

69. *See id.* art. 5.1-2 (stating that an investigation shall be initiated upon a sufficient showing that dumped imports are causing injury to a domestic industry and requiring determinations of the existence of dumping and the presence of injury to take place simultaneously).

70. *See id.* art. 5.3 (requiring investigations to be "terminated promptly" when the investigating authority determines there is not "sufficient evidence" of dumping or injury).

71. *See id.*; *see also* CROOME, *supra* note 2, at 80-81 (listing the new antidumping agreements reached at the Tokyo Round).

72. *See* 1 NEGOTIATING HISTORY, *supra* note 12, at 95.

73. *See id.* (listing the number of issues relating to antidumping that remained unresolved just weeks before the Draft Final Act was due for release). This was the case despite the fact that revision of the Antidumping Code was not considered a priority when the round was launched. *See* JACKSON ET AL., *supra* note 21, at 685. The Draft Final Act also was known as the "Dunkel Draft." *See* 1 NEGOTIATING HISTORY, *supra* note 12, at 96.

74. *See* 1 NEGOTIATING HISTORY, *supra* note 12, at 97 (stating that these and other major users "expressed the need to clarify the reach of Article VI to deal with efforts by certain producers to circumvent antidumping orders"). Circumvention situations included attempts by dumping companies to "[shift] sources of supply an affiliate in a third country," export dumped parts to a third country for assembly before shipment to the investigating country, and ship parts or components when there was a sudden expansion of output and imports to the investigating country for assembly, even though most parts were really from the home country and only a small value was added through assembly. *See* CROOME, *supra* note 2, at 306.

75. *See* CROOME, *supra* note 2, at 82.

for protectionist purposes.⁷⁶ These targeted countries wanted to reduce the discretion of governments in interpreting the Code by maximizing the transparency of the GATT rules.⁷⁷

Given these two extremes, and the very politicized nature of the issue, there was little room or inclination to compromise. It is no surprise that the gap remained as the round progressed.⁷⁸ The resulting Draft Final Act was, of necessity, as much a product of decree by the Secretariat as a product of negotiation among the parties.⁷⁹ It raised the threshold for dumping and injury findings on the one hand, and included provisions that would allow action against circumvention on the other.⁸⁰

76. See JACKSON ET AL., *supra* note 21, at 685; *supra* note 13 (naming the countries concerned with the protectionist use of antidumping laws).

77. See CROOME, *supra* note 2, at 82 (asserting that these countries argued for “tight and explicit” antidumping rules in order to negate the discretion of governments in the enforcement of the rules); 1 NEGOTIATING HISTORY, *supra* note 12, at 95 (“Some [major targeted countries] wanted to reduce discretion of governments in interpreting the Code and/or wanted to make resort to Article VI more difficult or demanding.”).

78. See CROOME, *supra* note 2, at 208 (“Renewal of discussions on the anti-dumping code showed no narrowing in the gap which remained between the diametrically opposed positions of the main supplying and importing countries.”); 1 NEGOTIATING HISTORY, *supra* note 12, at 95 (“[A]nti-dumping was one of only three negotiating areas unable to forward a negotiating text to Brussels for the December 1990 ministerial meeting.”). Even as the negotiators were preparing the Draft Final Act in 1991, the issue of antidumping remained unresolved. The critical remaining issues included averaging, sales below cost of production, constructed value, factors to be considered in an injury analysis, standing, *de minimis* dumping margins, negligible import volumes, cumulation of imports from multiple countries in an injury analysis, sampling, sunset provisions, anti-circumvention provisions and dispute settlement. See *id.* The debate spilled over into a few pending matters under GATT dispute settlement, which in turn intensified the feeling of doom in Geneva. See CROOME, *supra* note 2, at 304-36 (referring to feelings of mutual distrust, tension and gridlock). A GATT panel ruled that a European Community action against producers of Japanese-owned assembly plants in Britain and France was unjustified. See EEC-Regulation on Imports of Parts and Components, L/6657-37S/132 (May 16, 1990) (unpublished GATT Panel Report), available in 1990 GATTPD LEXIS 3. The European Community, however, refused to comply until anti-circumvention provisions were added to the GATT. See CROOME, *supra* note 2, at 304. Meanwhile, Japan threatened that it would not consider such amendments until the European Community complied with the panel’s finding. See *id.*

79. See 1 NEGOTIATING HISTORY, *supra* note 12, at 95-96 (explaining that the polarization of individual countries over antidumping was so intense that the Secretariat created the text that was included in the Draft Final Act as a compromise).

80. See CROOME, *supra* note 2, at 305-06. More specifically, the Draft Final Act included the following changes that pleased the exporting countries: elimination of the presumption that below-cost sales and lower prices due to delayed adjustments to change in exchange rate constituted dumping; the addition of a requirement that prevented members from comparing isolated export selling prices with average prices in the home market unless there was evidence that the sellers were targeting particular regions, purchasers or periods for dumping; greater emphasis on ascertaining whether dumping was the factor causing the domestic industry injury; the addition of language prohibiting members from initiating investigations in the absence of evidence of industry support or if the dumping margin was less than two percent (i.e., *de minimis*); and the creation of a sunset clause, which provided for the expiration of duties after five years unless proof existed that their continuance was necessary to prevent injury. See *id.*

For the countries most often subjected to antidumping investigations, the Draft Final Act allowed sampling in fragmented industries and allowed action to be taken in response to many

The United States, in particular, was not satisfied with the text and continued to propose new changes.⁸¹ Many participants feared that a holdout on the part of the United States would threaten the success of the entire round.⁸² In the end, the participants made several concessions to the United States.⁸³ The result was the WTO Antidumping Code.⁸⁴ Agreement on antidumping set into motion the resolution of the remaining open issues and successfully encouraged over 100 countries to sign the Uruguay Round Final Act in Marrakesh, Morocco in April, 1994.⁸⁵

D. A Brief Overview of Dispute Settlement in the WTO

The Uruguay Round, through the DSU,⁸⁶ produced the first fully-integrated dispute settlement procedure in the history of the GATT.⁸⁷ In an effort to decrease the occurrences of unilateral action by the Member states, the WTO Agreement requires aggrieved parties to follow certain procedures in a dispute settlement before the WTO.⁸⁸ These procedures are more precise and expeditious than those under the GATT.⁸⁹

circumvention situations. *See id.* at 306.

81. *See id.* at 365 (identifying the U.S.' forward-looking recommendations on the antidumping conflict).

82. *See id.* (chronicling the other participants' general concern over the frail nature of the Draft Final Act).

83. The United States requested 11 changes and received several of them. *See id.* at 374. The parties reached an agreement on the standard of review to be employed in the WTO's dispute resolution proceedings. Panels were given the authority to scrutinize the way the national authority handled the matter but could not examine the facts of the case. *See id.*; *see also* discussion *infra* Part III (giving an example of this constraint in practice in the *Portland Cement* Panel Report). As the United States had requested, labor unions were accorded the right to file petitions for an investigation. *See* CROOME, *supra* note 2, at 374. Another concession to the United States was that the WTO Agreement did not change the sunset and *de minimis* provisions as drastically as the Draft Final Act had. *See id.* Finally, the anti-circumvention provisions were strengthened. *See id.*

84. *See* WTO Antidumping Code, *supra* note 16. The Agreement is contained in Annex 1A of the WTO Agreement.

85. *See* WTO Agreement, *supra* note 37; *see also* Hurabiell, *supra* note 47, at 570.

86. Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 114 (1994) [hereinafter DSU].

87. *See* JACKSON ET AL., *supra* note 21, at 340 (explaining that the DSU regulates the process of dispute settlement under all covered WTO agreements).

88. *See* DSU, *supra* note 86, art. 1.1 (stating that "[t]he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed") (emphasis added).

89. *See* Hudec, *supra* note 29, at 101 (noting that WTO dispute resolution provides Members automatic access to a neutral panel, sets forth a "sophisticated litigation process leading to binding legal rulings by the panel," provides an appellate tribunal to review panel rulings and specifies the procedure under which retaliatory sanctions can be employed in the event that losing parties fail to implement rulings); Steele, *supra* note 7, at 1 (stating that WTO mechanisms for dispute settlement are expected to be more effective than those of the GATT because of an increased emphasis on rights, obligations and the monitoring for compliance).

After finding a violation, a panel will first issue a recommendation to the respondent that it cease the offending action. The panel will make its recommendation in a report that is to be adopted by the Dispute Settlement Body (“DSB”) unless the WTO Members unanimously decide against adoption.⁹⁰ The Dispute Settlement Body monitors implementation of the report’s recommendations.⁹¹ The respondent must bring the violative measure(s) into conformity with WTO obligations within a reasonable amount of time.⁹² If the respondent fails to comply with the remedial measures, the parties may negotiate a form of compensation, which usually involves a grant of further concessions by the offending party to the prevailing one.⁹³ If the parties cannot agree upon mutually acceptable compensation within twenty days, the injured party may seek authority from the DSB to suspend some of the concessions it has made to the respondent.⁹⁴ An objection to the level or scope of any such retaliatory measures will prompt the involvement of an arbitrator.⁹⁵

This ability to engage in retaliation existed under the GATT.⁹⁶ The DSU, however, changed the procedure by which the DSB authorizes retaliation. In the past, there had to be a consensus in the DSB to

90. See DSU, *supra* note 86, art. 16.4 (“[T]he report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.”); see also WTO Agreement, *supra* note 37, art. IX.1 n.1 (“The body concerned shall be deemed to have decided by consensus . . . if no member . . . formally objects to the proposed decision.”). The Dispute Settlement Body is a special assembly of the WTO General Council, and includes all WTO members. See DSU, *supra* note 86, art. 2.

91. See DSU, *supra* note 86, art. 21.6 (“The DSB shall keep under surveillance the implementation of adopted recommendations or rulings.”).

92. See *id.* art. 21.3 (discussing the reasonable period of time within which the DSB must be informed regarding implementation of the recommendations).

93. See *id.* art. 22.2 (providing the procedure and timeframe for consultations and the negotiation of compensation).

94. See *id.* (“If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period . . . any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the concessions or other obligations.”). This form of sanction is called “retaliation.” See LANJOUW, *supra* note 43, at 20-21. For guidelines regarding retaliation, see DSU, *supra* note 86, art. 22.3.

95. See DSU, *supra* note 86, art. 22.6 (outlining Members’ recourse upon the suspension of concessions and the manner in which arbitration proceeds).

96. Under the GATT regime, the suspension of concessions was one allowable sanction in the dispute resolution mechanism. Article XXIII of the agreement provided that, if a party felt that another party was “nullifying” or “impairing” a benefit afforded to the party under the GATT and the two parties could not reach a solution, the aggrieved party could refer the matter to a panel for dispute settlement. See GATT 1947, *supra* note 26, art. XXIII.2 (“If the [panel] consider[s] that the circumstances are serious enough to justify such action, [it] may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions . . . as [it] determine[s] to be appropriate in the circumstances.”); see also JACKSON ET AL., *supra* note 21, at 327 (explaining that this sanction was allowed if a violation was not remedied and noting that it was utilized only one time under the GATT, in 1955).

grant the petitioner the right to withdraw concessions.⁹⁷ This need for unanimous agreement effectively gave target countries veto power.⁹⁸ Under the current WTO regime, the consensus requirement is now reversed, such that the grant is automatic unless all members of the DSB, including the prevailing party, decide to the contrary.⁹⁹ Also, because the standard of review that panels apply to decisions by national administrative authorities is now more transparent, results under the new procedure should be more uniform and predictable.¹⁰⁰

E. The Debate Over a Higher Threshold for Initiation of Investigations: The Issues of Standing and an Evidentiary Burden

The threshold for initiating an antidumping investigation has a considerable effect on the number of investigations that a nation conducts, as well as the number of complaints that parties file. Clearly, if there were no minimum filing requirements, the number of investigations would surge because domestic producers would be able to use investigations as a tool to stifle foreign competition. Conversely, if the threshold were extremely high, few complaints would result in an investigation and dumping would effectively go unchecked. A high threshold requirement for the petitioner that would effectively require conclusive proof of dumping and injury—the purpose of the investigation itself—makes little sense. There is a fine line between these two extremes, one that the main exporting and importing countries believe should be drawn in very different places.¹⁰¹

As mentioned above, the issues of standing and an evidentiary

97. See MOON, *supra* note 28, at 90 (explaining the consensus requirement for dispute rulings under the GATT).

98. See *id.*; see also ROWLEY ET AL., *supra* note 28, at 314 (suggesting that, in practice, the small countries abided by dispute settlement procedures under the GATT and the large countries routinely ignored them).

99. See DSU, *supra* note 86, art. 22.6.

100. See MOON, *supra* note 28, at 90. The panel can only overturn the national authority's finding if it determines that the authority's factual or legal evaluation was erroneous. The standard is that the authority's evaluation of the facts must be unbiased and objective. The panel cannot overturn a finding at the national level merely because it would have decided the matter differently. See Steele, *supra* note 7, at 5.

Jackson points out that the dispute resolution system and, in particular, the suspension of concessions, is an area in which the disparity between developing and developed countries is especially acute. The suspension of concessions by a large trading country to a developing country could be devastating. The reverse scenario, however, might have little, if any, effect on the powerful country and might actually hurt the interests of the developing country. See JACKSON ET AL., *supra* note 21, at 346-47.

101. Companies, industries and interest groups all seek to affect the position of individual countries. This pressure creates a politically dangerous issue that politicians are loathe to address. See generally Finger, *supra* note 60, at 26-28 (discussing the role that politics and industry have played in antidumping law).

burden comprise the threshold requirement of initiation. To date, the standing issue has been the more contentious of the two. The breakdown of positions among the WTO Members with respect to the appropriate threshold tends to depend on whether the Member is primarily an exporting or importing country.¹⁰² During the Uruguay Round, the countries that are most often investigated cited an excessive number of frivolous cases and argued that the standing requirement should be clarified and made a mandatory prerequisite to any investigation.¹⁰³ The countries most often initiating investigations pushed for more discretion, looser standards, and a presumption of industry support in the standing determination.¹⁰⁴

Although the Tokyo Round Antidumping Code of 1979 included two provisions to clarify the standing issue, the provisions lacked definition.¹⁰⁵ Coupled with the Members' polarized views, this ambiguity made standing a controversial, and therefore critical, issue in the Uruguay Round.¹⁰⁶

During the Uruguay Round deliberations on antidumping, many aspects of the standing issue were contentious. Such issues included whether countries should have an affirmative obligation to confirm the standing information asserted by a petitioner before commencing an investigation,¹⁰⁷ what percentage of an industry must be

102. See 2 NEGOTIATING HISTORY, *supra* note 12, at 1575, 1578 (outlining the variations in importing and exporting countries' interpretations of standing in particular).

103. See 1 NEGOTIATING HISTORY, *supra* note 12, at 97 (pointing out that some countries promoted strict threshold levels to reduce the possibility of frivolous cases); see also 2 NEGOTIATING HISTORY, *supra* note 12, at 1578 (comparing the divergent interpretations of the standing requirement).

104. See 2 NEGOTIATING HISTORY, *supra* note 12, at 1578 (discussing the conflicting standing recommendations proffered by countries in support of their views on antidumping investigations).

105. See *id.* The provisions were Articles 4.1 and 5 of the 1979 Code. Article 4.1 provided: "In determining injury the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products . . ." GATT 1979 Antidumping Code, *supra* note 66, art. 4.1. Article 5 stated: "An investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry affected." *Id.* art. 5.1. Neither "major proportion" nor "by or on behalf of" was defined. See 2 NEGOTIATING HISTORY, *supra* note 12, at 1579.

106. See 2 NEGOTIATING HISTORY, *supra* note 12, at 1579. Despite this ambiguity, the occurrence of antidumping investigations increased following the Tokyo Round. See Steele, *supra* note 7, at 2-3; *supra* note 71 and accompanying text (discussing the increase in use of antidumping laws following the Tokyo Round). This development had many consequences, including a highly visible divergence of views and interpretations of the rules among member countries, "a growth industry for those adroit at exploiting the potential of anti-dumping action as part of the weaponry of industries facing import competition," and heightened tension among members. Steele, *supra* note 7, at 3. These factors were also decisive in placing reform of the antidumping code high on the Uruguay Round agenda. See *id.*

107. See 2 NEGOTIATING HISTORY, *supra* note 12, at 1579.

represented when the entire industry is not the petitioner,¹⁰⁸ whether workers or their representatives should have the ability to bring a petition,¹⁰⁹ how producers who are related to foreign producers under investigation or who are themselves importers should be treated,¹¹⁰ how fragmented industries should be treated,¹¹¹ and how silence on the part of particular industry members should be interpreted.¹¹²

The Draft Final Act settled many of the previously unresolved threshold issues,¹¹³ and the draft provisions were then carried over into the Final Act (i.e., the WTO Agreement). With regard to the evidentiary burden, a request for an investigation must include sufficient evidence of dumping, a cognizable injury under Article VI, and a causal link between the dumping and injury.¹¹⁴ The Code also delineated specific standing requirements including the following: (1) prior to an investigation, the authorities must determine that the petition has been filed by or on behalf of the industry;¹¹⁵ (2) the petition must be supported by domestic producers who account for at least twenty-five percent of the domestic production; (3) authorities may use sampling to determine industry positions in the case of fragmented industries;¹¹⁶ (4) producers who are related to foreign producers subject to investigation, and producers who are themselves importers, may be excluded from the standing determination;¹¹⁷ (5) workers are interested parties;¹¹⁸ and (6) silence on the part of particular industry members does not expressly count for or against initiation.¹¹⁹

108. *See id.* at 1584 (noting that there was disagreement over the percentage that would yield adequate representation).

109. *See* 1 NEGOTIATING HISTORY, *supra* note 12, at 97.

110. *See id.*

111. *See id.*

112. *See id.* Stewart charted the views of the various negotiating parties on this issue. They ranged from wanting silence to be interpreted as a lack of support to neutral to “at least neutral, if not affirmative.” *See id.* at 98.

113. *See* 2 NEGOTIATING HISTORY, *supra* note 12, at 1584 (summarizing the evolving compromises).

114. *See* WTO Antidumping Code, *supra* note 16, arts. 5.2, 5.4.

115. *See id.* art. 5.4.

116. *See id.* art. 5.4 n.13 (“In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.”).

117. *See id.* art. 4.1(i) (“[W]hen producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term ‘domestic industry’ may be interpreted as referring to the rest of the producers . . .”).

118. *See id.* art. 5.4 n.14 (“Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.”).

119. *See id.* art. 5.4. Stewart points out that the language of Article 5.4 suggests that “substantial silence could count against a petitioner.” 1 NEGOTIATING HISTORY, *supra* note 12, at

As a result of the Uruguay Round, then, the issue of standing was largely settled, while the issue of an evidentiary burden remained vague and untested.

II. ANTIDUMPING IN THE UNITED STATES

A. *Antidumping Measures and Investigations*

A majority of all the trade actions initiated in the United States against unfairly traded imports are brought under the antidumping law.¹²⁰ The cornerstone of U.S. antidumping law is Title VII of the Tariff Act of 1930.¹²¹ In the last two decades, changing circumstances in the world economy, as well as changes in the GATT, have forced five major revisions of the law.¹²²

The Treasury Department and the International Trade Commission (“ITC”) enforced antidumping law in the United States until the Tokyo Round of the GATT, which required a restructuring of U.S. law.¹²³ Since 1980, the International Trade Administration of the Commerce Department (“ITA”) and the ITC have shared responsibility for administering the law.¹²⁴ To initiate an injury

96-97 (emphasis added).

120. See Catherine Curtiss & Kathryn Cameron Atkinson, *United States—Latin American Trade Laws*, 21 N.C. J. INT’L L. & COM. REG. 111, 151 n.401 (1995) (citing the statistic that antidumping investigations represented 67% of all U.S. trade actions between 1990 and 1994). Some critics claim that the laws have been ineffective in preventing dumping and that, given this fact, the Commerce Department should desist from levying duties. See Hurabiell, *supra* note 47, at 575-76 (mentioning particularly the criticism of economists “who claim that [antidumping] is inefficient and robs consumers of lower prices” (citations omitted)).

121. Tariff Act of 1930, ch. 497, 46 Stat. 685 (1930) (codified as amended at 19 U.S.C. §§ 1671-1677) (1994). The Uruguay Round Agreements Act (“URAA”) made changes to Title VII of the Act. See URAA, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. § 3511 (1994)); see also U.S. INT’L TRADE COMM’N, *supra* note 60, at 2-1.

122. See Hilary K. Josephs, *The Multinational Corporation, Integrated International Production, and the United States Antidumping Laws*, 5 TUL. J. INT’L & COMP. L. 51, 55-56 (1997) (suggesting that the language of the statute has become more precise and specific, and the discretion of the administering agencies has decreased, with each revision).

There is debate over the obligations of the United States with regard to the antidumping laws of the GATT/WTO and, more specifically, whether the GATT/WTO Agreement “trumps” U.S. law. See JACKSON ET AL., *supra* note 21, at 318-26; see also JACKSON, *supra* note 31, at 75-77 (discussing whether the GATT itself has direct application in U.S. courts).

123. See JACKSON ET AL., *supra* note 21, at 691. The pre-Tokyo Round U.S. law required a demonstration, not of material injury, but merely of injury; it also granted considerable discretion to the national authorities, which resulted in the levying of few antidumping duties. See 19 U.S.C. § 160(c)(1) (1976) (repealed 1979). Jackson maintains that while the restructuring produced significant procedural changes relating to the shift in administrative control, the substantive changes were not as significant. See JACKSON ET AL., *supra* note 21, at 691.

124. For further discussion of the co-administration of U.S. antidumping law, see Tracy Murray, *The Administration of the Antidumping Duty Law by the Department of Commerce*, in DOWN IN THE DUMPS, *supra* note 9, at 23, 25.

investigation, a petitioner first files a complaint with both agencies.¹²⁵ The ITA then decides whether to initiate an investigation.¹²⁶ The ITC, in turn, makes the preliminary determination of injury.¹²⁷ The ITA then makes its preliminary and final determinations of the existence of dumping.¹²⁸ Finally, the ITC makes its final injury

125. See 19 U.S.C. § 1673a(b)(2) (1994).

126. See *id.* § 1673(c)(2).

127. See *id.* § 1673a(c)(1)(A)(i); see also JACKSON ET AL., *supra* note 21, at 718. In the preliminary injury determination, the ITC must find a “reasonable indication” that the injury test *could* be satisfied. See 19 U.S.C. § 1673b(a)(1).

128. See 19 U.S.C. § 1673d(a)(1). In the course of its investigation, the ITA distributes questionnaires to the respondents. See Stewart, *supra* note 9, at 300-02 (discussing the burden of questionnaires used by the ITA in its determinations). The questionnaires the ITA sends to foreign respondents are daunting, to say the least. The ITA’s questionnaires request far more detailed information of the foreign respondent than the ITC requires of the petitioner regarding injury. See Murray, *supra* note 124, at 34-35. Murray provides some insight into the tribulation facing the foreign respondent:

It arrives in the form of a questionnaire, some 100 pages long, in English, requesting specific accounting data on individual sales in the home market (and possibly to third countries), data on sales to the United States, data needed to adjust arm’s-length market prices to net ex-factory prices (that is, packing costs, shipping costs, selling costs, distributor and other middleman costs, adjustments for taxes and duties on imported inputs, and adjustments for exporter’s sales prices, international shipping costs, tariffs in the United States, distribution costs in the United States, and any costs of adding value in the United States), and a host of other details There must be enough information for the [ITA] to investigate nearly every U.S. sale . . . for a period of six months. All this information must be identified, retrieved, recorded, and then transmitted to the [ITA] in English on hard copy and in a computer-readable format within the short deadline stipulated under the U.S. antidumping statutes.

Id. at 34. The respondent usually has 30 days to return the ITA’s questionnaire. See N. David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in DOWN IN THE DUMPS, *supra* note 9, at 64, 67.

Until the Uruguay Round, the ITA and ITC based their determinations on the “best information available.” See 19 U.S.C. § 1677e (1984) (amended 1994); see also Murray, *supra* note 124, at 33-34 (citing ITA regulations). In practice, the ITA refused to consider responses that were incomplete or in the wrong computer format, even when the respondent had substantially complied but was honestly unable to comply fully with the detailed request. See *id.* When the ITA considered a response inadequate, it could consider, and even base its determination upon, unverified information submitted by the petitioner. See 19 C.F.R. § 353.37(b) (1993) (“The best information available may include factual information submitted in support of the petition or subsequently submitted by interested parties.”); *cf.* Murray, *supra* note 124, at 34 (questioning whether such conduct actually produces the “best information available”).

This practice had to be revised as a result of the Uruguay Round. The WTO Antidumping Code sets forth guidelines for the use of information presented in a submission. First, the authorities may use “the facts available” to make determinations only if the respondent does not provide necessary information within a reasonable time. See WTO Antidumping Code, *supra* note 16, art. 6.8. Second, the authorities cannot reject an entire submission as long as some of the information is usable. See *id.*, annex II, art. 3. Third, the authorities should consider the media or computer languages at the disposal of the respondent. See *id.*, annex II, art. 2. Finally, the authorities should attempt to verify information contained in any secondary source to which they must resort. See *id.*, annex II, art. 7. The URAA implemented parallel changes in U.S. law. See 19 U.S.C. § 1677e(c) (“When the administering authority . . . relies on secondary information rather than on information obtained in the course of an investigation . . . the administering authority . . . shall corroborate that information from independent sources that are reasonably at their disposal . . .”).

determination.¹²⁹ For antidumping duties to be imposed, both agencies must make affirmative determinations.¹³⁰

B. Standing and Evidentiary Burden in the Initiation of Investigations

In its initial determination, the ITA considers the threshold issues of standing and the evidentiary burden. With regard to the evidentiary burden, it examines whether the petition properly alleges a basis for an action and whether it contains the information reasonably available to the petitioner.¹³¹ In determining whether the petition reasonably supports allegations of dumping, the ITA will not hear arguments from the respondent as to why an investigation is unwarranted.¹³² Finally, the ITA, unlike the governing authorities in many other countries, does not consider the public interest in antidumping proceedings.¹³³

As for standing, the ITA ascertains whether the petition was filed by an appropriate party. An “interested party”¹³⁴ must file a petition “on

129. See 19 U.S.C. § 1673d(b)(1); see also JACKSON ET AL., *supra* note 21, at 718 (“If dumping or subsidization is ultimately determined to exist, the parties return to the ITC for the ‘final’ injury investigation.”).

There are three components to the final injury test in the United States: (1) defining the related industry, (2) examining the domestic industry for signs or threats of material injury, and (3) if injury or threat of injury is found, analyzing whether dumping was the cause of such injury. See 19 U.S.C. § 1673d(b)(1); see also JACKSON ET AL., *supra* note 21, at 718. If the ITC concludes that there is no injury or threat of injury, it terminates the investigation. See 19 U.S.C. § 1673d(c)(2); see also JACKSON ET AL., *supra* note 21, at 718.

130. See 19 U.S.C. § 1673d(c)(2); see also J. Michael Finger & Tracy Murray, *Antidumping and Countervailing Duty Enforcement in the United States*, in ANTIDUMPING: HOW IT WORKS, *supra* note 9, at 241, 243 (describing the investigation process in the United States). Between 1980 and 1992, the ITA reached an affirmative determination in 93% of the cases, while the ITC reached such a determination in only 66% of the cases. See Palmeter, *supra* note 128, at 278 (citing CONGRESSIONAL BUDGET OFFICE, HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING DUTY POLICY 50 (1994)). The statistics indicate that the injury test, not the dumping test, has been determinative in a final, positive finding. See Finger & Murray, *supra*, at 247 (claiming that in the pre-WTO system, 45% of petitions were rendered moot by Voluntary Export Restraints or “cease and desist” agreements, 13% were rejected based on the preliminary injury determination, 5% were rejected on the basis of the dumping determination and 14% were found to contain no injury in the final injury determination).

131. See 19 U.S.C. § 1673a(c)(1)(A) (detailing the initial requirements that a petition must meet in the determination by the administering authority).

132. See *id.* § 1673a(b)(3)(B) (prohibiting communication from any person other than an interested domestic party before the administering authority decides whether to initiate an investigation); see also JACKSON ET AL., *supra* note 21, at 693 (stating that the ITA does not permit respondents to make arguments against the initiation of an investigation).

133. See Palmeter, *supra* note 128, at 279 (explaining that neither injury to consumers nor a cost-benefit analysis is considered in making a determination); see also Josephs, *supra* note 122, at 70 (“On balance, the benefits of imports to society may far outweigh the harm to the ‘affected industry’ through the creation of new businesses, the availability of superior inputs to downstream producers of other products, and the increased availability of superior products at lower prices to consumers.” (citations omitted)).

134. See 19 U.S.C. § 1673a(b)(1). An “interested party” includes the following: manufacturers, producers or wholesalers in the United States of a like product; certified or recognized unions or groups of workers representing an affected U.S. industry; trade or

behalf of an industry.”¹³⁵ In the petition, the party must identify the industry on whose behalf it is filed, as well as the identity of other companies in the industry.¹³⁶ The complaint must include all of the information regarding dumping that is “reasonably available to petitioner.”¹³⁷

Until implementation of the Uruguay Round Agreements Act (“URAA”), the ITA did not conduct an independent investigation of the degree of support for a particular petition, but instead assumed that a facially sufficient petition was representative of the domestic industry.¹³⁸ Sweden challenged this formulation of standing in 1988, however, as inconsistent with the GATT Antidumping Code.¹³⁹ The GATT panel agreed and recommended the revocation of the antidumping order.¹⁴⁰ Under the dispute resolution mechanisms in place at the time, the United States was able to block the report from

business associations in which manufacturers, producers or wholesalers of a like product in the U.S. comprise a majority of the membership; governments of countries in which the goods under investigation are produced or manufactured; and foreign manufacturers, producers or exporters of the subject merchandise. *See id.* § 1677(9).

This determination can become complicated in situations where, for instance, the petitioning firm uses imported materials to produce its product, the firm is a subsidiary of a foreign company or owns the foreign source company, or the firm operates at multiple stages of the production process. *See Murray, supra* note 124, at 27-28 (further suggesting that these complications can lead to conflicting interests).

135. *See* 19 U.S.C. § 1673a(b)(1). The U.S. definition of “industry” is the same as that under the GATT. *See id.* § 1677(4)(A). Domestic producers opposed to the petitions and related to the foreign producer shall be disregarded as part of the domestic industry, unless such domestic producers demonstrate that their interests as domestic producers would be adversely affected by the imposition of a dumping order. *See id.* § 1673a(c)(4)(B)(i). Additionally, the ITA and ITC may also disregard domestic producers who are also importers of the foreign product in their determinations of the size of the domestic industry. *See id.* § 1673a(c)(4)(B)(ii). In order for a petition to be filed “by or on behalf of the industry,” “(i) the domestic producers or workers who support the petition [must] account for at least 25 percent of the total production of the domestic like product, and (ii) the domestic producers or workers who support the petition [must] account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.” *Id.* § 1673a(c)(4)(A).

136. *See* 19 C.F.R. § 351.202(b)(1)-(2) (1998).

137. *See* 19 U.S.C. § 1673a(b)(1).

138. *See Josephs, supra* note 122, at 74-75 (noting the presumption that a facially sufficient petition was filed by an industry unless contested by the respondent); *see also Murray, supra* note 124, at 28 (noting an instance in which the Court of International Trade allowed a single firm to file a petition without further industry support). Instead, the respondent had the burden of proving that the petitioner was not filing “on behalf of the industry.” *See* 19 U.S.C. § 1673a(c) (1988) (amended 1994) (imposing no explicit requirement that the administering authority confirm that the petition was filed “on behalf of the industry” prior to initiation).

139. Sweden challenged a U.S. decision to impose antidumping duties on seamless stainless steel hollow products from Sweden, claiming that U.S. standing requirements were lax and that the U.S. had violated Article 5.1 of the GATT 1979 Antidumping Code, *supra* note 66, when the ITA failed to verify whether the petition had been filed *on behalf of* the domestic industry. *See U.S.—Imposition of Antidumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, ADP/47* (Aug. 20, 1990) (unadopted), *available in* 1990 GATTPD LEXIS 1.

140. *See id.* para. 5.10 (basing its holding upon statutory interpretation of Article 5.1).

being adopted.¹⁴¹ Nonetheless, the panel's conclusion that industry support must be substantiated was implemented in the Antidumping Agreement of the Final Act of the Uruguay Round.¹⁴² This decision forced the United States to rewrite its antidumping law, which it did through the URAA.¹⁴³

III. GATT/WTO CASELAW CONSIDERING SUFFICIENCY OF EVIDENCE REQUIREMENTS IN ANTIDUMPING CASES

Cases before GATT or WTO dispute resolution panels on the issue of an evidentiary threshold are rare. There are two cases in particular, however, in which this issue was determinative: United States—Measures Affecting Softwood Lumber from Canada (“*Softwood Lumber*”),¹⁴⁴ and Guatemala—Antidumping Investigation Regarding Portland Cement from Mexico (“*Portland Cement*”).¹⁴⁵ These cases are indicative of the confusion that exists over the threshold evidentiary requirement in antidumping law and also of how the threshold that nations apply can influence the outcome of a case. Although there is no *stare decisis* principle in effect in

141. See GATT 1994, *supra* note 16, art. XXIII.2 (“The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate.”); James R. Cannon, Jr., *Dispute Settlement in Antidumping and Countervailing Duty Cases*, in MULTILATERAL TRADE FRAMEWORK, *supra* note 25, at 359, 360 (“Because Article XXIII requires a ‘ruling’ by the ‘Contracting Parties,’ panel decisions were recommendations to the Contracting Parties, rather than rulings. To become enforceable, panel reports had to be adopted by consensus of the Contracting Parties.”). For the U.S. action, see Gunnar Fors, *Stainless Steel in Sweden: Antidumping Attacks Responsible International Citizenship*, in ANTIDUMPING: HOW IT WORKS, *supra* note 9, at 137, 157 (stating that the U.S. blocked approval of the report from the GATT Antidumping Committee’s agenda).

142. See WTO Antidumping Code, *supra* note 16, art. 5.4. The provision reads:
An investigation shall not be initiated . . . unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.

Id.

143. See 19 U.S.C. § 1673a(c)(4) (1994) (delineating the rules the administering authority now applies in determining industry support). The ITA must now affirmatively determine the degree of support within the domestic industry before opening an investigation. In other words, “[The ITA] must establish that the petitioner has standing as a threshold matter.” Josephs, *supra* note 122, at 81 n.210 (referring to 19 U.S.C. § 1673a(c)(4)).

Prior to the Uruguay Round, there was a dispute between the two agencies regarding responsibility over standing. The ITC claimed that it lacked the authority to determine whether a particular petitioner had standing. See Murray, *supra* note 124, at 29. Similarly, in a 1989 ruling, the ITA said it “has consistently declined to decide issues of standing.” See Cass & Narkin, *supra* note 12, at 229 n.56 (citing Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan, USITC Pub. 2234, Inv. No. 731-TA-448-50 (Nov. 1989) (Preliminary)). The ITA has rejected a petition for lack of standing in only one case. See *id.* at 229. The ITC has never refused to investigate a petition due to lack of standing.

144. *Softwood Lumber* Panel Report, *supra* note 22.

145. *Portland Cement* Panel Report, *supra* note 22.

GATT/WTO law, precedents can still be influential.¹⁴⁶ The *Portland Cement* panel's reliance upon the *Softwood Lumber* case is illustrative of this tendency.

A. Softwood Lumber

In *Softwood Lumber*, a GATT dispute resolution panel examined the threshold evidentiary requirements of the GATT countervailing duty agreement.¹⁴⁷ The relevant provisions are substantially similar in GATT antidumping and countervailing duty laws. The dispositive provisions in both require that the petition be “on behalf of the industry affected” and include “sufficient evidence” regarding the existence of either a subsidy or dumping, injury, and causation.¹⁴⁸ The panel noted that, as with the GATT Antidumping Code, the countervailing duty agreement contained no interpretative guidance as to the meaning of “sufficient evidence.”¹⁴⁹ The panel read the provision as reflecting a balance between the interest of the domestic industry in securing the initiation of an investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of an investigation initiated on an unmeritorious basis.¹⁵⁰

The panel attempted to pinpoint the amount of evidence that would be sufficient for the purposes of initiating an investigation. It placed the appropriate level somewhere between the amount and type of evidence that “would be required of that authority at the time of making a final determination” and “mere allegation or conjecture.”¹⁵¹ The threshold that the panel finally settled on was

146. See Japan--Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (stating that although adopted panel reports are not binding, they do “create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant”).

147. See *Softwood Lumber* Panel Report, *supra* note 22, paras. 330-36; see also Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. 9619, 1186 U.N.T.S. 204 [hereinafter GATT Subsidies Code].

148. See GATT Subsidies Code, *supra* note 147, art. 2.1 (stating that a countervailing duty investigation should normally be initiated upon a petition “by or on behalf of the industry affected” which provides “sufficient evidence” of the existence of a prohibited subsidy, injury to the domestic industry and a causal link between the two); GATT 1979 Antidumping Code, *supra* note 66, art. 5.1 (stating that an antidumping investigation should normally be initiated upon a petition “by or on behalf of the industry affected” which provides “sufficient evidence” of the existence of dumping, injury to the domestic industry and a causal link between the two).

149. See *Softwood Lumber* Panel Report, *supra* note 22, para. 330 (explaining that elementary rules of legal construction must be used to interpret the intended application of “sufficient evidence”).

150. See *id.* para. 331 (emphasizing the anti-harassment function of the “sufficient evidence” provision).

151. See *id.* para. 332.

“evidence that provides a reason to believe that a subsidy exists and that the domestic industry is injured as a result of subsidized imports.”¹⁵²

B. Portland Cement

Portland Cement is the first antidumping dispute to be considered by either a WTO dispute settlement panel or the WTO Appellate Body.¹⁵³ Despite the ruling of the Appellate Body that the matter was not properly before it, the outcome should provide considerable insight into the way future panels may apply the standing requirements of the WTO Antidumping Code.

On October 15, 1996, Mexico requested consultations with Guatemala regarding the initiation and conduct of Guatemala’s antidumping investigation of grey portland cement from Cruz Azul, a Mexican Producer.¹⁵⁴ In January, 1997, based on a petition from the sole Guatemalan cement producer, Guatemala’s Ministry of Economy levied an antidumping duty of 89.54% on imports of grey portland cement from Cruz Azul.¹⁵⁵ Mexico then requested the establishment of a panel on February 4, 1997.¹⁵⁶ The Dispute Settlement Body established a panel on March 20, 1997.¹⁵⁷ The panel, finding for Mexico, released its final report to the parties on May 18, 1998 and to the public on June 19, 1998.¹⁵⁸

Guatemala appealed the decision on August 4, 1998.¹⁵⁹ On November 2, 1998, the Appellate Body concluded that the dispute had not properly been before the Panel.¹⁶⁰ As a result, it was unable

152. *See id.* para. 333.

153. *See* Third-Party Submission of the United States, June 25, 1997, *Portland Cement* Panel Report, *supra* note 22, para. 1 [hereinafter U.S. Submission] (describing this as the first dispute involving antidumping under the WTO).

154. *See* Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico: Request for Consultations by Mexico, WT/DS60/1 (Oct. 24, 1996). Consultation is required by Article 4 of the DSU as well as Article 17 of the WTO Antidumping Code. *See* DSU, *supra* note 86, art. 4; WTO Antidumping Code, *supra* note 16, art. 17.

155. *See* Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico: Request for the Establishment of a Panel by Mexico, WT/DS60/2 (Feb. 13, 1997) [hereinafter Mexican Complaint] (pointing out that this was “well above” the amount claimed by Cruz Azul).

156. *See id.*

157. *See Portland Cement* Panel Report, *supra* note 22, para. 1.5.

158. *See id.* para. 1.11; *supra* notes 187-217 (discussing the panel’s holding).

159. *See* Notification of an Appeal by Guatemala under Paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), WT/DS60/9 (Aug. 4, 1998).

160. *See Portland Cement* Appellate Body Report, *supra* note 22, para. 88. The Appellate Body concluded that, due to its definition of the term “measure” in Article 17 of the Antidumping Code, Mexico had to identify the antidumping duty, the acceptance of a price undertaking or a provisional measure as part of the matter being referred to the DSB. *See id.* para. 80. Mexico had contested this interpretation and thus did not see a need to identify either the final duty or

to review the substantive findings of the Panel regarding Guatemala's initiation of the antidumping investigation.¹⁶¹ The Appellate Body did, however, leave open the possibility of Mexico "seeking consultations with Guatemala regarding the latter's imposition of definitive anti-dumping duties on imports of portland cement from Mexico and . . . pursuing another dispute settlement complaint under the provisions of Article 17 of the Anti-dumping Agreement and of the DSU."¹⁶² As a result, the Panel Report does not carry the weight of other Panel Reports; it has, in effect, been overturned on procedural grounds. Nevertheless, it is dispositive of how future panels may evaluate the substantive issues relating to standing.¹⁶³

Mexico cited a number of reasons indicating that Guatemala's evaluation of the facts was not objective.¹⁶⁴ First, according to Guatemalan law, the Ministry must accept the validity of any evidence submitted to it by an applicant; the burden is on other interested parties to rebut this presumption.¹⁶⁵ Second, the Ministry endeavored to bolster the application by requesting additional information from the applicant.¹⁶⁶ Third, the application was insufficient.¹⁶⁷ Finally, the investigating authority "assumed the role of applicant" and requested information from the customs agency to supplement the application, and then it initiated its investigation before receiving the information it sought.¹⁶⁸

According to Mexico, the national authority was not justified in launching an investigation merely because the application contained all the information reasonably available to the applicant. Rather, it had an obligation to evaluate the accuracy and adequacy of the

the provisional duty as the specific measure at issue. *See id.* paras. 81-89. According to Mexico, it was disputing Guatemala's initiation of the investigation and several aspects of the investigation itself. *See id.* para. 82. In fact, Mexico explicitly stated that it was not challenging Guatemala's final determination, although it did suggest that the panel revoke the final duty if its claims were established. *See id.* para. 85. As a result, the panel was not entitled to examine Mexico's claims. *See id.* para. 88. Not only did the Appellate Body reverse the panel's contrary interpretation of "measure," *see id.* para. 90, but it also reversed the panel's finding that Article 17 of the Antidumping Code replaced the provisions of the DSU in antidumping cases. *See id.* para. 90; *see also id.* paras. 64-80 (discussing the relationship between the two).

161. *See id.* para. 89.

162. *Id.*

163. In a system with no *stare decisis*, one could argue that the status of a panel report reversed on procedural grounds is not far beneath that of an adopted panel report. Future panels may choose to look to its logic, but are not bound by it. *See supra* note 146 and accompanying text.

164. *See Portland Cement Panel Report, supra* note 22, para. 4.112.

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

evidence submitted in the petition.¹⁶⁹ With regard to Mexico's third claim, Mexico argued that the petitioner did not substantiate its claims of dumping with relevant evidence;¹⁷⁰ that it did not submit any evidence regarding threat of injury to the Guatemalan industry, but instead made allegations and conjectures;¹⁷¹ and that it was able to supply only allegations as to the causal relationship between the alleged dumping and threat of injury.¹⁷²

Guatemala made a number of arguments in response. It asserted that the quantity and quality of evidence necessary to justify the initiation of an investigation was significantly lower than that necessary to make an affirmative preliminary or final finding.¹⁷³ It also argued that a national authority is justified in initiating an investigation based on an application that includes all of the information reasonably available to the applicant regarding each of the categories of information described in Article 5.2(i)-(iv).¹⁷⁴ Guatemala thus suggested that Article 5.3's requirement that the authorities examine the accuracy and adequacy of the evidence to make a determination of its sufficiency is satisfied when the petition includes all the information reasonably available to the petitioner.

The United States filed a third-party submission in the matter.¹⁷⁵ Concerning the issue of sufficiency of evidence, the United States generally discussed the threshold level that a petitioner must meet to invoke an investigation properly.¹⁷⁶ The United States cited Article 5.2 of the Antidumping Code, requiring that a petition contain more than "simple assertions, unsubstantiated by relevant evidence."¹⁷⁷ The United States also affirmed the rule, set out in Article 5.2, requiring that the domestic industry's petition contain information "reasonably

169. *See id.* para. 7.48. According to Mexico, the term "accuracy" implies an obligation on the part of the national authority to establish the truth and relevance of the information. *See id.* para. 4.162.

170. *See id.* para. 4.132 (reiterating Mexico's contention that the only evidence of the normal value (i.e., the Guatemalan market price) was two invoices, each for one sack of cement).

171. *See id.* para. 4.139 (reciting Mexico's claim that Guatemala had substantiated its claim of threatened injury with photocopies of two import certificates—and that Guatemala did not even receive these until after it had made the decision to initiate).

172. *See id.* para. 4.150.

173. *See id.* para. 4.115.

174. *See id.* para. 4.133.

175. *See* U.S. Submission, *supra* note 153.

176. *See Portland Cement* Panel Report, *supra* note 22, para. 5.19. The United States also presented its views on the appropriateness of Mexico's complaint, the level of review that the panel should apply, the timing of Guatemala's notification to Mexico regarding the investigation and the use of specific or retroactive remedies in antidumping and countervailing duty disputes. *See id.* paras. 5.18-70.

177. *Id.* para. 5.34.

available” to it.¹⁷⁸ The United States argued that the national authorities have a responsibility to examine the petition for accuracy and adequacy of evidence.¹⁷⁹ Moreover, it advocated that the antidumping arena adopt the balancing test used for countervailing duties in *Softwood Lumber*.¹⁸⁰

The United States focused its analysis on “[t]he adequacy of the information provided in the application and on which the initiation was based,” which was dependent upon the meaning of the term “reasonably available to the applicant.”¹⁸¹ The United States suggested that the standard was “intended to prevent the imposition of unreasonable information requirements that go beyond not only the normal capacity of a private entity to develop, but also beyond those of a particular applicant in a given case.”¹⁸² As a result, confidential information such as pricing, cost of production, and profitability information would not be required, nor would information whose obtainment would be practically or legally prohibitive.¹⁸³

Although the Antidumping Code contains no such requirement, the United States suggested that a petitioner claiming that critical data is unavailable should provide some explanation for its unavailability.¹⁸⁴ If the authorities would expect the domestic industry to have access to such data, an explanation for its absence would be particularly essential, in the view of the United States.¹⁸⁵ In the case at

178. *See id.* Such information is required regarding the volume and value of the domestic production of the product by the applicant, the identity of the industry on behalf of which the application is made, a description of the allegedly dumped product, the existence of dumping and the impact of the dumped imports on the domestic industry. *See id.* para. 5.34 (citing Article 5.2 (i)-(iv) of the WTO Antidumping Code); *see also infra* note 188 (quoting Article 5.2).

179. *See Portland Cement Panel Report, supra* note 22, para. 5.34 (referring to Article 5.3 of the WTO Antidumping Code).

180. *See id.* (stating that the initiation requirements used in *Softwood Lumber* “reflect a careful balancing of the interest of the domestic industry in the country of importation in securing the initiation of an anti-dumping investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of an anti-dumping investigation initiated on an unmeritorious basis”).

181. *Id.* para. 5.39. The U.S.’ submission addressed the prospective role of the panel in reviewing Guatemala’s acts, rather than the role that the Guatemalan authorities should have played. *See id.* The United States made it clear that, in its view, the panel’s role was only to determine whether the information relied upon by the investigating authorities and reasonably available to the applicant was sufficient to persuade an unprejudiced person that sufficient evidence of dumping, injury and causation existed. *See id.* para. 5.37. The panel’s role was not to conduct a *de novo* review of the evidence that Guatemala had considered. *See id.*

182. *Id.* para. 5.39.

183. *See id.* (defining circumstances when information may not be considered “reasonably available” to an applicant).

184. *See id.* (stating that the “reasonably available” language may not be used as an excuse to avoid providing certain critical information).

185. *See id.* para. 5.37.

hand, the United States advised the panel to pursue the issue of the reasonable availability of data pertaining to the dumping and import volume, as Guatemalan authorities provided no justification for the meager amount of evidence submitted with the petition.¹⁸⁶

The determination of the panel in fact hinged on this issue, namely its interpretation of Article 5.3 of the Antidumping Code. The panel ultimately concluded that, considering the information available to the Guatemalan authorities at the time that they made the determination to initiate an investigation, there was not sufficient information regarding dumping, injury and causation to warrant the initiation of an investigation.¹⁸⁷

The panel first looked at whether Article 5.3 imposes an additional obligation upon the national authority above the requirements set out in Article 5.2.¹⁸⁸ The panel determined that compliance with the

186. *See id.* para. 5.40 (asking whether the applicant provided all of the reasonably available information in accordance with Article 5.2(iii) and (iv) of the WTO Antidumping Code). Nonetheless, the United States concluded that the Guatemalan authority considered the required factors, and that its factual findings were without bias and properly established. *See id.* para. 5.52. Therefore, because of the standard of review, although the United States suggested that the Guatemalan authorities should have reached the opposite conclusion, it was forced to recommend that the original finding be upheld. The United States pointed out that Articles 3.4 and 3.7 of the GATT do not require national authorities to detail all of the listed factors in an injury or threat of injury determination, because “the lists are not exhaustive and no single factor or group of factors is decisive.” *See id.* It stated that the national authorities can “discern the relative importance of each factor in the particular circumstances of each investigation.” *See id.*

187. *See id.* paras. 7.79-80. Specifically, the panel concluded that, based on the information available to the investigating authority at the time of its determination, a reasonable person could not have found that there was sufficient evidence of dumping, injury and causation. *See id.* para. 7.79. For a discussion of the appropriate standard of review determined by the panel, see paras. 7.56-57.

188. *See id.* para. 7.46.

Article 5.2 stipulates that a petition must include evidence of dumping, injury and a causal link between the dumped imports and the alleged injury. *See* WTO Antidumping Code, *supra* note 16, art. 5.2. It continues, “Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.” *Id.* It then sets out four areas regarding which “[t]he application shall contain such information as is reasonably available to the applicant.” *Id.* They are:

- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers; (ii) a complete description of the allegedly dumped product, the name of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question; (iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices, or where appropriate, on the prices at which the

requirements of Article 5.2 is not determinative of whether there is sufficient evidence to justify initiation.¹⁸⁹ On the contrary, it found that it is the obligation inherent in Article 5.3 that is determinative of the sufficiency of an application.¹⁹⁰ The panel interpreted the requirements in Articles 5.2 and 5.3 as imposing separate obligations on the applicant and the national authority, respectively.¹⁹¹ According to the panel, the investigating authority's obligation is invoked after it has determined that the application contains evidence on dumping, injury, and the causal link between the two, as well as whatever information is reasonably available to the applicant regarding the factors in Article 5.2(i)-(iv).¹⁹² The panel described the further requisite examination of the evidence and information in the application as follows: "If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation."¹⁹³

For further guidance in interpreting Article 5.3, the panel looked to the purpose of the initiation requirements in general, which it determined is to establish a balance "between the competing interests of 'the import competing domestic industry in the importing country in securing the initiation of [an] investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of [an] investigation initiated on an unmeritorious basis.'"¹⁹⁴ The *Portland Cement* panel thus adopted the balancing test set out in the *Softwood Lumber* panel report. Considering the requirements in this context, the panel found that the interpretation of Article 5.3 advocated by Guatemala "would undermine the

product is first resold to an independent buyer in the territory of the importing Member; (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by such relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

Id. Article 5.3 provides, "The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation." *Id.* art. 5.3.

189. *See id.* para. 7.49.

190. *See id.*

191. *See id.* para. 7.5 ("Article 5.2 sets forth what evidence and information must be in the application . . . Article 5.3 on the other hand sets forth what the investigating authority is to do when confronted with an application . . .").

192. *See id.*

193. *Id.*

194. *Id.* para. 7.52 (citing *Softwood Lumber* Panel Report).

balancing of competing interests in initiation and non-initiation established in Article 5.”¹⁹⁵

The panel also considered relevant Article 5.8, which states, “An application under paragraph 1 shall be rejected and an investigation terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.”¹⁹⁶ Guatemala argued that the provision did not apply to the initial determination of whether to initiate an investigation but, rather, applied only after the investigation had begun.¹⁹⁷ The panel, focusing particularly on the “as soon as” language of Article 5.8, decided that the provision implied that an investigation may be initiated only if the application contains sufficient evidence of dumping and injury.¹⁹⁸

While the panel agreed with Mexico’s arguments regarding Article 5.3, it did not accept Mexico’s argument that the Guatemalan authorities had acted inappropriately by independently seeking information to supplement the application.¹⁹⁹ The panel made it clear that the Antidumping Code does not contain a prohibition against the initiation of an investigation in situations in which sufficient evidence is not reasonably available to the applicant.²⁰⁰ It said, “There is nothing in this Agreement to prevent an investigating authority from seeking evidence and information on its own, that would allow any gaps in the evidence set forth in the application to be filled.”²⁰¹

The panel also agreed with Guatemala with regard to the amount of evidence and information required for a determination to investigate allegations raised in an application.²⁰² According to the panel, the quantum and quality of the evidence required for the Guatemalan initiation determination was less than that required for a preliminary or final determination of dumping, injury or the causal link.²⁰³

Nonetheless, contrary to Guatemala’s arguments, the panel made clear that the substantive provisions of Articles 2 and 3 of the Antidumping Code were relevant to the initiation determination

195. *Id.* (offering an extreme example to prove the point).

196. *Id.* para. 7.59.

197. *See id.* para. 4.197.

198. *See id.* para. 7.59.

199. *See id.* para. 7.53.

200. *See id.*

201. *Id.*

202. *See id.* para. 7.57.

203. *See id.* (citing *Softwood Lumber* for the proposition that evidence might be insufficient for a preliminary or final determination but sufficient for an initiation determination).

insofar as they set out the elements of a calculation of dumping and injury respectively.²⁰⁴ For example, with respect to evidence of dumping, the panel was clear that “an investigating authority may not ignore the provisions of Article 2 of the [Antidumping Code].”²⁰⁵

According to the panel:

Article 5.2 of the Agreement requires an application to include evidence of “dumping” and Article 5.3 requires a determination that there is “sufficient” evidence to justify initiation. Article 2 of the [Antidumping Code] sets forth the technical elements of a calculation of dumping In our view, the reference in Article 5.2 to “dumping” must be read as a reference to dumping as it is defined in Article 2.²⁰⁶

With regard to the elements of dumping and injury, the panel made the observation that, while there were higher standards for assessing the evidence in a preliminary or final determination than the determination to initiate an investigation, the subject matter or type of evidence was the same.²⁰⁷

The panel stated that, because Mexico was claiming threat of injury, its application should have included evidence of threat of material injury as set out in Article 3.7.²⁰⁸ To find otherwise would be inconsistent with the text, as well as with the object and purpose of Article 5.2.²⁰⁹ According to the panel:

We cannot see how, in the absence of information pertaining to [the factors set forth in Article 3.7], an unbiased and objective investigating authority could properly determine that there is sufficient evidence of threat of material injury to justify initiation in a case in which threat of material injury is alleged.²¹⁰

As mentioned above, the panel ultimately concluded that there was insufficient evidence in the application regarding dumping, injury and causation to substantiate the initiation of an investigation. Specifically, the Ministry did not meet the obligation inherent in Article 2.4 to make a fair comparison in presenting evidence of

204. *See id.* paras. 7.64 (discussing dumping determination), 7.76 (discussing injury determination).

205. *See id.* para. 7.64.

206. *Id.*

207. *See id.* paras. 7.67 (discussing dumping determination), 7.77 (discussing injury determination).

208. *See id.* para. 7.76.

209. *See id.* para. 7.75.

210. *Id.* para. 7.77. The panel reached this conclusion despite the fact that Article 3.7 is not expressly referenced in Article 5.2. *See id.* para. 7.76. Mexico had argued that Article 3.7 was not applicable to the decision to initiate because Article 5.2 references Articles 3.2 and 3.4 but not Article 3.7. *See id.* para. 7.58.

dumping.²¹¹ The application compared transactions involving significantly different volumes and occurring at different levels of trade,²¹² and it did so without even acknowledging the necessity of making adjustments.²¹³ There was also insufficient evidence of material injury. The panel found that Guatemala had offered unsubstantiated statements, rather than evidence, of the threat of material injury that did not allow for the objective evaluation of accuracy and adequacy required by Article 5.3.²¹⁴ This was particularly disturbing to the panel because much of the relevant evidence was in the possession of the applicant and no one else.²¹⁵ In response to the suggestion that some of the information was withheld because of its sensitivity, the panel pointed out that both the Antidumping Code and Guatemalan law provide for the confidential treatment of such information.²¹⁶ Finally, the Ministry could not possibly have correctly determined that there was sufficient evidence of causation when there was not sufficient evidence of dumping or injury.²¹⁷

IV. ANALYSIS AND RECOMMENDATIONS

A. The Current State of Antidumping Measures and Evaluation of a Threshold Evidentiary Requirement

Currently, many countries use antidumping measures as protectionist weapons.²¹⁸ When country *x*'s domestic market is unable to keep up with foreign competition, companies from that market may petition their government, which is then under considerable political pressure to launch an antidumping investigation.²¹⁹ These

211. *See id.* para. 7.64 & n.7.

212. *See id.* para. 7.62.

213. *See id.* para. 7.64.

214. *See id.* para. 7.71.

215. *See id.* para. 7.70.

216. *See id.* para. 7.71.

217. *See id.* para. 7.78.

218. *See* Bhala, *supra* note 18, at 5 (describing antidumping law as a weapon for “protectionists seeking undeserved protection from competitive imports”); *Corr.*, *supra* note 1, at 53 (predicting that “antidumping law will become the weapon of choice for import protection” as industries become exposed to new levels of international competition and turn to “the most viable basis for imposing or preserving protective duties”); *see also* Finger, *supra* note 60, at 34 (“Antidumping regulation was created by removing from antitrust law the checks and balances that constrain antitrust law policy to disciplining only competitive practices that compromise society’s overall interests.”).

219. *See* Finger, *supra* note 9, at 5 (discussing the industry pressure on governments to launch antidumping investigations). A domestic company will often systematically file petitions that target each of the imported products within a particular industry. *See id.* at 3. If a petitioner does not convince its government to initiate an investigation based on the

investigations are invasive (often as invasive as the investigating country can possibly make them), and their scope and length force the company under investigation to divert its attention from competing in the market, perhaps causing it to lose its competitive edge.²²⁰ Antidumping investigations also cause other competing companies to expect such an experience if investigated, thus diverting their attention from production and marketing.²²¹

Country *x* will usually find the presence of dumping, injury and causation, at which time it will levy a duty that further cripples the targeted company.²²² Once country *x* has brought a sufficient number of investigations, the targeted companies, as well as other foreign companies that have not yet been investigated, may begin to reconsider doing business in country *x*.²²³ Business becomes an economic gamble because of the price an investigation exacts.²²⁴ The alternative for companies is to redirect their export trade to a country whose government is less willing than country *x* to resort to antidumping investigations as a means to protect its domestic market from healthy and fair competition.²²⁵ This is, not coincidentally, the result that the petitioners most often intend to produce by initiating investigations.²²⁶

petitioner's first complaint, a petitioner often will resubmit the complaint, slightly modifying the definition of the threatened or injured industry, until the domestic government is convinced that there has been an injury to the domestic industry. See J. Michael Finger, *Lessons for the Case Studies: Conclusions*, in ANTIDUMPING: HOW IT WORKS, *supra* note 9, at 35, 39-40 [hereinafter Finger, *Conclusions*] (using the Colombian cut flower industry as an example).

220. See *supra* note 10 and accompanying text (discussing the effect of investigations on targeted countries).

221. See Corr, *supra* note 1, at 54 (stating that "the mere filing of an antidumping complaint" often has "a marked chilling effect on competition" and often places exporters and importers at a severe disadvantage).

222. See *id.* (citing a "conviction rate" of over 90% in the U.S. between 1980-1997); Finger, *supra* note 9, at 3, 5 (describing the pressure on the exporter to accept a restraint agreement to avoid "the formal antidumping or countervailing duty order that is just around the administrative corner").

223. See McGee, *supra* note 46, at 500-01 (explaining how the Taiwanese sweater manufacturers are having difficulty competing in the U.S. market due to U.S. antidumping laws); *id.* at 535 (noting that one harmful effect of U.S. antidumping law is that foreign producers choose not to enter the U.S. market because of the high risk of being hit with an investigation); see also *supra* note 11 and accompanying text (discussing the potential effect on other foreign companies).

224. See Finger & Murray, *supra* note 130, at 247 (discussing the uncertainty that responding to a petition generates regarding the profitability of continuing efforts to export in the particular market); McGee, *supra* note 46, at 535 (arguing that both foreign suppliers and domestic importers will have to take the potential costs of an antidumping investigation into consideration, and noting that domestic importers will hesitate to do business with foreign producers because the liabilities of an investigation might transfer to them).

225. See McGee, *supra* note 46, at 535.

226. See Yeomin Yoon, *The Korean Chip Dumping Controversy: Are they Accused of Violating an Unjust Law?*, 19 N.C. J. INT'L L. & COM. REG. 247, 259 (1994) (noting that companies are abusing antidumping laws by filing actions for the purpose of battering the foreign

Antidumping measures stifle competition and deter trade and investment.²²⁷ They harm imports that are both fairly and unfairly priced.²²⁸ They are inconsistent with antitrust laws.²²⁹ Perhaps most importantly, they are bad for the domestic consumer.²³⁰

In the United States, the fact that the ITA launches investigations on nearly all of the petitions that U.S. companies file suggests the low level of scrutiny currently attached to the amount of evidence required to initiate a petition.²³¹ The frequency of both antidumping

competition's ability to compete); *cf.* J. Michael Finger, *Preface* to ANTIDUMPING: HOW IT WORKS, *supra* note 9, at vii, viii ("Dumping is the rhetoric justifying action against imports; it is not the criterion that determines when such action will or will not be taken. When the politics of the matter compel action against imports, the legal definition of dumping can be stretched to accommodate it.").

227. See Christopher M. Barbuto, *Toward Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman*, 62 FORDHAM L. REV. 2047, 2050 (1994) (noting the criticisms that American antidumping laws deny consumers access to competitively-priced goods and are biased against foreign companies in a manner that is counter to free trade principles). According to one commentator, "Complaining about the unfairness of foreigners has become the most popular way for an industry seeking protection from imports to make its case to its government." Finger, *supra* note 9, at 3. Not only does Finger believe antidumping measures are anticompetitive in policy, but he argues that they actually provoke a targeted company to engage in anticompetitive practices, such as formal price coordination, in order to avoid becoming the target of an investigation. See Finger, *Conclusions*, *supra* note 219, at 53 (summarizing industry studies).

228. See Richard Boltuck et al., *The Economic Implications of the Administration of the U.S. Unfair Trade Laws*, in DOWN IN THE DUMPS, *supra* note 9, at 179 (noting that the application of dumping laws in particular are "a modified escape clause that provides potential relief from all imports"); Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 992 n.131 (1996) (describing the U.S. antidumping regulations as "so virulent that they penalize fairly priced imports as well as those at unfair prices").

229. See Ernst-Ulrich Petersmann, *International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO*, 72 CHI.-KENT L. REV. 545, 575 (1996) ("As a means to protect import-competing industries against predatory pricing by foreign exporters, antidumping laws are inconsistent with antitrust laws (e.g., in the EC and United States) and go far beyond what might be necessary."); A. Paul Victor, *Antidumping and Antitrust: Can the Inconsistencies be Resolved?*, 15 N.Y.U. J. INT'L L. & POL. 339, 339 (1983) (asserting that antidumping measures are at odds with antitrust theory).

230. Antidumping measures protect "producers at the expense of consumers, which results in higher prices, lower quality products, less consumer choice and a general lowering of the standard of living for the vast majority of people." McGee, *supra* note 46, at 491. Some even argue that antidumping measures destroy jobs by forcing the U.S.-based affiliates of foreign companies to relocate to other countries and by shutting down U.S. companies that rely on foreign components to produce their products. See *id.*

231. See *id.* at 547. According to a Government Accounting Office ("GAO") study of the 1986-1989 period, 96% of the petitions resulted in investigations. See *id.* (citation omitted). According to McGee, "The Commerce Department [ITA] is very sensitive to any allegations made by a domestic company or industry, regardless of the truth or quality of information All it takes is a letter from a company that might stand to be harmed by a foreign competitor." *Id.* at 551; see also Mitsuo Matsushita, *Competition Law and Policy in the Context of the World Trade System*, 44 DEPAUL L. REV. 1097, 1116 (1995) (claiming that there are "inherent biases against importation in the structure of antidumping law as shown in such areas as . . . standing to bring petition"). But see David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7, 11 (1995) ("The U.S. dumping law is detailed and specific, with strict statutory time limits, reducing-but not

investigations and findings of dumping in the United States has caused the antidumping system to be widely criticized “as a club [that domestic companies use] to batter the competition.”²³² Some critics go further and accuse the United States of engaging in behavior that is incompatible with the GATT/WTO.²³³

B. The Threshold for Initiation of an Antidumping Investigation Should Be Higher

The sufficiency of evidence threshold has a direct and powerful effect on the number of investigations that are filed and initiated. A higher threshold would serve as a sieve, allowing through authentic cases of predatory pricing and truly unfair trade while blocking cases in which antidumping is being used for protectionist purposes.²³⁴ As such, any attempt to weed out frivolous, pretextual petitions should focus on the threshold for initiation.²³⁵

Individual members of the WTO currently have substantial flexibility in setting their own standards for initiation requirements.²³⁶

eliminating—the discretion available to the administering authorities.”); Stewart, *supra* note 9, at 289 (“[D]omestic producers find that a few interpretations of U.S. law by the Department of Commerce bias the results in favor of foreign respondents.”).

232. McGee, *supra* note 46, at 546 (accusing the system of having rules that are “so biased that nearly all the foreign companies that were investigated for dumping between 1980 and 1989 were found guilty”); *see also id.* at 547 (noting that the company submitting the petition does not pay for the investigation but “stands to gain if a competitor can either be bloodied by the Commerce Department [ITA] and forced to raise its prices, or exits the U.S. market altogether, thus reducing the competition, and the need to keep prices low”). *But see* Josephs, *supra* note 122, at 73 (defending the U.S. laws as “fair, impartial and transparent” in comparison to the administration of antidumping laws in other countries).

233. *See* Hurabiell, *supra* note 47, at 567-68 (stating that U.S. protectionist trade policies are at odds with a system of free trade and, specifically, the GATT). The objective of the GATT, after all, is to constrain governments from imposing or enforcing measures that restrain or distort international trade. *See* JACKSON ET AL., *supra* note 21, at 290.

234. Repealing the antidumping measures might actually best resolve the problem, but it is a politically impossible solution. *See* Finger, *Conclusions*, *supra* note 219, at 57-58 (suggesting options including the repeal and reform of the existing antidumping laws).

235. Other suggestions for improving the initiation of antidumping investigations, not related to an evidentiary threshold requirement, include adding a public interest clause and replacing the private interest injury test with a national economic interest test. *See id.* at 60-74; *see also* RAINER M. BIERWAGEN, GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTIDUMPING LAWS 169 (Studies in Transatlantic Economic Law No. 7, 1990) (recommending the following three-step approach toward abandoning antidumping: (1) conforming existing trade relief measures with the letter and spirit of the GATT, (2) increasing substantive and procedural obstacles to raise thresholds for trade relief, and (3) gradually replacing antidumping legislation with domestic antitrust and competition law); Matsushita, *supra* note 231, at 1116 (advocating the incorporation of principles of competition law to offset the abuses of antidumping legislation); Messerlin, *supra* note 6, at 57-61 (detailing how a “national domestic interest” clause on material injury would mean that neither a country nor the WTO would take antidumping measures when such measures are not in the best interest of that country or the WTO). *But see* Stewart, *supra* note 9, at 288 (arguing that U.S. antidumping laws are necessary and need strengthening).

236. As discussed above, the WTO Antidumping Code contains explicit requirements with

The GATT traditionally avoided the issue of a threshold requirement, evaluating it in very few instances in relation to the considerable controversy surrounding it. The *Portland Cement* panel report raises the possibility that the WTO will change this policy.²³⁷

C. The Effect of the Portland Cement Panel Report on the Threshold for Initiation of an Investigation

In the *Portland Cement* panel report, the WTO undeniably took the strongest stance that it or the GATT has taken to date with regard to insisting that applications meet a minimum threshold before a national authority can initiate an antidumping investigation. Whereas the antidumping law generally appears to be tipped in favor of the investigating country and applicant company or industry, the panel evened the field to some degree by applying the balancing test proposed for countervailing duty cases in the *Softwood Lumber* panel report; this test balances the interests of the exporting, allegedly dumping country and those of the importing, investigating country.²³⁸

The panel concluded that the Guatemalan authorities wrongly initiated an investigation because the application in question did not provide sufficient evidence of dumping, injury, and causation.²³⁹ As mentioned above, this report is a strong statement for the WTO in this area of trade. In the process of providing interpretations of the elements that a national authority must consider in making its initiation determination, the panel raised the threshold that an application must meet. The report will have perhaps its most significant impact as a result of its interpretation of Article 5.3 of the Antidumping Code; the panel's determination that Article 5.3 contains requirements distinct from those in Article 5.2 clearly increases the burden on both the applicant and the national authority contemplating investigation.²⁴⁰ The fact that the panel granted the national authority the right to act independently to supplement the application does not affect the threshold that an application must meet. The panel also noticeably raised the

regard to standing. Conversely, the requirements regarding the evidentiary threshold are vague and have not been tested except in the *Portland Cement* matter.

237. Finger, however, offers a metaphor that would suggest that the policy of avoidance will continue. He says, "Antidumping is the fox put in charge of the henhouse: trade restrictions certified by GATT. The fox is clever enough not only to eat the hens but also to convince the farmer that that is the way things ought to be." Finger, *supra* note 60, at 34.

238. See *supra* note 150 and accompanying text (discussing *Softwood Lumber's* adoption of the balancing test).

239. See *supra* note 187 and accompanying text (discussing panel's holding).

240. See *supra* notes 188-93 and accompanying text (discussing panel's differentiation between the requirements of Articles 5.2 and 5.3).

requirements by ruling that Articles 2 and 3, which set out the elements of dumping and injury, are relevant to the initial investigation determination as well as the preliminary and final determinations.²⁴¹ Finally, the panel's application of the rules to the case at hand was demonstrative; the panel stood fast in requiring that the national authorities present evidence of dumping in terms that can be compared and in not allowing mere statements to take the place of evidence when assessing a case for the existence of injury.²⁴²

As a result of the Appellate Body report, the impact of the panel report has yet to be determined. Mexico may begin the DSU process again. The panel in that case—or any other case—will have the opportunity to rely on the analysis and conclusions of the *Portland Cement* panel report. This is, in effect, no different from the panel report being approved by the Appellate Body.

The *Portland Cement* panel report was the WTO's first move toward clarifying the threshold for the initiation of antidumping investigations. Through its analysis, the panel sent a message that the threshold requirements are more than a formality. It appeared to establish a framework through which applications, and decisions to initiate investigations, should be examined. For the reasons discussed above, it remains to be seen whether future panels will use that framework.

D. The WTO Should Codify a Threshold Requirement for the Initiation of Antidumping Investigations in Precise Language that Leaves Little Room for Interpretation by Individual Countries

The WTO should decide on a higher initiation requirement and codify it in the Antidumping Code. The evaluation of sufficient evidence should be a required part of the preliminary determination. If investigators conclude that the petitioner does not present sufficient evidence to support a petition, the investigation should terminate prior to the preliminary determination of dumping, injury and causation.²⁴³

The WTO should codify the results of the *Portland Cement* panel

241. See *supra* notes 204-06 (discussing the panel's holding regarding relevance of Arts. 2 and 3 to initiation determination).

242. See *supra* notes 208-17 (discussing panel's application of its ruling to Guatemala's investigation).

243. Within the United States, the evaluation of standing should be the responsibility of both the ITA and the ITC, and should be evaluated by both in a step prior to the ITC's preliminary injury determination. *But see* Cass & Narkin, *supra* note 12, at 229-32 (citing the possibility of conflict, division of authority and sequence of decisions as among the difficulties existing with regard to the issue of which agency has authority to decide standing matters).

report. Until it does so, WTO members will not be able to take full advantage of the clarifications that the panel made to the threshold requirements. In particular, the WTO should codify the balancing test discussed in the countervailing duty context in *Softwood Lumber* and adopted by the panel in *Portland Cement*. The test would require the WTO to weigh the interest of the domestic industry in securing the initiation of an investigation based on a deserving claim against the interest of the exporting country in avoiding the burden of an investigation initiated on a petition that is without merit. The WTO should also require the national authorities to evaluate each petition for accuracy and adequacy of evidence, and it should require the petitioner to base its allegations of dumping and injury on the criteria of Articles 2 and 3 of the Antidumping Code.

The WTO should implement several other changes to the initiation procedures as well. First, the WTO should raise the standard by defining what “reasonably available to [the petitioner]” means with respect to information. Second, the WTO should require that the petitioner provide an explanation for the absence of any missing information.²⁴⁴ Third, the WTO should implement a public/national interest analysis, either at the initial stage of investigation or following the final determinations as to injury and dumping.²⁴⁵

Not only would WTO obligations compel Member states to implement such changes in their national laws, but the WTO’s dispute resolution regime would also incite Member states to apply the standard.²⁴⁶ This system is far stronger than the one that existed under GATT.²⁴⁷ The prospect of facing retaliatory measures will encourage Member countries to comply with their obligations under the WTO.²⁴⁸ Furthermore, countries will continue to see that the effectiveness of the WTO system is contingent upon compliance.²⁴⁹ Countries that frequently resort to the WTO’s dispute settlement

244. This policy was suggested by the United States in its submission in the *Portland Cement* matter. See *supra* notes 184-85 and accompanying text (discussing *Portland Cement*).

245. See *supra* note 133 and accompanying text (stating that the ITA does not currently consider such a standard).

246. See *supra* Part I.D (discussing the more binding nature of the WTO dispute resolution system); see also SCHOTT, *supra* note 31, at 14 (stating that the Uruguay Round “fortified the institutional charter of the GATT by establishing a new [WTO] to consolidate the results of previous trade negotiations under a common framework . . .”).

247. See Steele, *supra* note 7, at 1 (stating that dispute settlement under the WTO could be superior to that under the GATT); see also *supra* Part I.D (discussing strengths of new dispute settlement system).

248. See *supra* notes 90-95 and accompanying text for a discussion of this process.

249. It is clear that “trading rules have little value unless they can be enforced.” JEFFREY J. SCHOTT, *WTO 2000: SETTING THE COURSE FOR WORLD TRADE 6* (1996) (claiming that the effectiveness of the WTO’s dispute settlement mechanism could “make or break” the success of the WTO).

mechanism, such as the United States, will have an even greater incentive to strengthen the WTO system, and thus should be more willing to comply.²⁵⁰

The reality of the situation, however, is that Members are not likely to agree to a higher initiation threshold.²⁵¹ Based on the controversy that has historically surrounded this issue, the great divergence in views, and political factors influencing countries' positions, it is arguable whether the Members are capable of even negotiating a more precise definition of the current standard.²⁵² Great diplomacy on the part of powerful members such as the United States and the European Union certainly would be necessary.²⁵³ The stance that the United States took in the *Portland Cement* case, in which it argued for a more defined standard that would bar unmeritorious petitions, suggests a possible auspicious shift in U.S. policy on the matter.²⁵⁴

In sum, decisions of the WTO dispute settlement panels and the Appellate Body may be the most practical method of effecting change in the threshold for initiation. In the *Portland Cement* dispute, the panel took advantage of the "clean slate" that it faced on the initiation issue, as well as the new and improved dispute settlement mechanism, and squarely took on the issue of an evidentiary burden. The panel ruled strongly in favor of having a meaningful threshold for investigations. Hopefully, future panels will see the wisdom in

250. See *id.* at 7 (stating that because the DSU has assisted the United States to achieve favorable resolutions of harmful foreign trade practices by Korea and Japan, the United States has been careful to comply with DSU rulings).

251. An amendment to the Antidumping Code requires agreement by two-thirds of the WTO's members. See WTO Agreement, *supra* note 37, arts. X.1-X.4.

252. See SCHOTT, *supra* note 31, at 34 ("As a practical matter, attempts to amend the WTO antidumping rules to remedy this important problem are unlikely to bear fruit. Few countries want to reopen the antidumping text after the harsh experience of the Uruguay Round negotiations."); Hindley, *supra* note 46, at 26 (claiming that political considerations at either the national or supranational (WTO) level could block reform); Petersmann, *supra* note 229, at 578-79 (citing political reasons such as the power of the domestic import-competing industries for the unlikelihood of reform); *id.* at 578 ("The experience with the 1979 GATT Antidumping Code and the 1994 WTO Antidumping Code suggest that reforms of international antidumping rules through international negotiations in GATT and the WTO among self-interested antidumping bureaucracies may produce only few procedural improvements.").

253. Petersmann supports this notion, writing:

Reform of antidumping rules will not be politically possible without the strong support from export industries in the EC and the United States. In order to build up such support, other trading countries may have to use "carrots" (e.g., liberalization of governmental market access barriers and enforcement of competition rules against private market access barriers to prevent market segmentation as one precondition for dumping) as well as "sticks" (e.g., reciprocal use of antidumping laws against EC and U.S. exporters).

Petersmann, *supra* note 229, at 579.

254. But see *id.* at 578 (acknowledging that the main importing countries, such as the United States and the EC, will not be persuaded to support reform as long as their exporting competitors continue to be the targets of anticompetitive investigations).

following this tradition, and the WTO dispute resolution system will act as a vehicle for reform.

CONCLUSION

The WTO has obligations to the international community. While it must be flexible out of political necessity, it also must set standards for international trade. It needs to establish a clear requirement of an evidentiary threshold in antidumping investigations. The standard must be one by which all countries can, and will, abide. The organization must realize its limitations and accept that if it pushes its members too far, they will not comply and the organization will lose all credibility. Conversely, it must not shrink from its responsibility to promote fair and free trade, or the WTO will risk becoming meaningless. Antidumping measures may have met this balance in the past, but they no longer do; the initiation threshold must now be set clearly, and at a sufficiently high level, in order to accomplish the same goals.