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Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. Through Heightened Scrutiny

By
Reid M. Bolton*

INTRODUCTION

In the first week of February, 2010, the world's three largest trading entities¹ all became directly involved in anti-dumping² disputes before the World Trade Organization (W.T.O.). China alleged that the European Union had improperly imposed anti-dumping duties on China's footwear exports,³ while Vietnam alleged that the United States had imposed the same type of protectionist tariffs on its imported shrimp.⁴ This was not an extraordinary event as member-countries are constantly invoking Article VI, the W.T.O.'s anti-dumping provision, as both complainant and respondent. Whether W.T.O. members are initiating anti-dumping investigations on behalf of their domestic producers—there are over 200 investigations a year⁵—or challenging another

* A.B., Harvard University, 2004; J.D., University of Chicago Law School, 2010. I thank Anu Bradford, Joseph Bolton, Lindsay Chenault, Alison Miller, and Kathryn Nielson for their helpful comments. Thanks also to Mark Bass for his research assistance.

1. The United States, China, and the European Union. See, GLOBAL TRADE FLOW INDEX, CAPGEMINI CONSULTING 7 (2010), available at <http://capgemini.com/insights-and-resources/by-publication/global-trade-flow-index/>.

2. Anti-dumping refers to the sanctions that members are allowed to assess against other members if they can prove that the goods were in fact "dumped" into the member's market.

3. Request for the Establishment of a Panel by China, *European Union—Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/2 (Apr. 9, 2010), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds405_e.htm.

4. Request for the Establishment of a Panel by Vietnam, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/5 (Apr. 9, 2010), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds404_e.htm.

5. See Press Release, World Trade Org., WTO Secretariat Reports Increase in New Anti-Dumping Investigations (May 7, 2009), available at http://www.wto.org/english/news_e/pres09_e/pr556_e.htm (showing that 3,427 investigations were initiated between 1995 and 2008).

members' imposition of anti-dumping duties in front of the W.T.O.'s Dispute Settlement Body (D.S.B.),⁶ challenges based on Article VI are practically an everyday occurrence.

These everyday occurrences, however, can often raise eyebrows and create tit for tat responses. For example, when the United States recently announced that it was placing tariffs on Chinese automobile tires under the W.T.O.'s safeguard provision,⁷ China announced only two days later that it would be initiating an anti-dumping investigation into whether exporters in the United States were dumping automobile and chicken products into China.⁸ The timing of the announcement was no accident. The anti-dumping investigation was clearly intended to counter the tariffs placed on Chinese products.⁹ Its initiation indicated the type of retaliatory intent and protectionist sentiment that is precisely what the W.T.O. was formed to prevent.

These types of events highlight the challenges to world trade embodied in Article VI. First, the incidence of dumping investigations and duties is extremely high because the elements of dumping are both easily alleged and quickly proven by domestic agencies. Second, anti-dumping investigations and duties (more than any other aspect of the W.T.O.) can become weapons vis-à-vis other members because there are few checks on their use. Third, anti-dumping duties harm consumers (of footwear, shrimp, chicken products, etc.)—a politically powerless group in the context of anti-dumping decisions—by maintaining higher prices for these goods on behalf of domestic producers.¹⁰

Given the fact that anti-dumping investigations are initiated and duties are assessed so often, the D.S.B. has been called upon to adjudicate numerous anti-dumping disputes. Yet what is telling is that in these disputes, the dispute

6. Between 1999 and 2004, there were 41 anti-dumping disputes before the D.S.B. See Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Challenged?*, 34 J. LEGAL STUD. 515, 517 (2005). From 2004 through March of 2010, there were another twenty-two disputes. See *Chronological List of Disputes Cases*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Oct. 10, 2010).

7. Peter Whoriskey & Anne Kornblut, *U.S. to Impose Tariff on Tires From China*, WASH. POST (Sept. 12, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/11/AR2009091103957.html>.

8. See *China Probes 'Dumping' of U.S. Auto, Chicken Products*, BLOOMBERG (Sept. 13, 2009), <http://www.bloomberg.com/apps/news?pid=20601087&sid=a7nGNZouDOM>.

9. See Gregory Mankiw and Philip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, 84 FOREIGN AFFAIRS 107, 115 (2005) (noting that China's increase in "antidumping allegations is motivated, at least in part, by a desire for retaliation against U.S. antidumping actions, not by a change in the trading practices of U.S. exporters").

10. See ANTIDUMPING ACTION IN THE UNITED STATES AND AROUND THE WORLD: AN UPDATE, CONG. BUDGET OFFICE xi (2001), available at <http://www.cbo.gov/ftpdocs/28xx/doc2895/Antidumping.pdf> (finding that anti-dumping duties impose "net costs on the U.S. economy as a whole"). See also Douglas Nelson, *The Political Economy of Antidumping: A Survey*, 22 EUR. J. POL. ECON. 554, 577 (2006) (noting that without institutional checks, each country attempts to protect its own domestic industries, producing "excessive protection").

settlement mechanism has invariably found the duties inconsistent with W.T.O. obligations.¹¹ Thus, there is tension between the frequent use of anti-dumping measures by most members of the W.T.O. and the fact that the D.S.B. has rarely found the measures as-applied to be acceptable. Instead, anti-dumping investigations (and the imposition of tariffs) continue despite disfavor by the W.T.O. because many duties are never challenged in front of the D.S.B. While Article VI remains the most challenged provision of the W.T.O., litigation such as the cases initiated by Europe and Vietnam represents only the tip of the iceberg of anti-dumping duties that *should* be challenged. Although there are some theoretical justifications for recognizing anti-dumping duties, these rationales are rarely present in situations where dumping is alleged.¹²

Recent scholarship has identified a troubling characteristic of anti-dumping disputes: legal capacity, rather than more relevant criteria such as the merits of the case itself, predicts both the targets of anti-dumping duties and the likelihood of anti-dumping measures being challenged. These studies show that anti-dumping investigations are often directed against countries that do not have the legal capacity to defend themselves, and that countries with low capabilities tend to forego challenges to anti-dumping duties due to the complexity of these disputes.¹³ There is also evidence that anti-dumping provisions can lead to “vigilante justice,”¹⁴ since it is easier and faster to initiate one’s own anti-dumping investigation against another W.T.O. member than to challenge that member’s anti-dumping assessment in front of the D.S.B. These studies suggest that anti-dumping duties have little correlation with the actual merits of prohibiting dumping and more to do with raising protectionist barriers against

11. See DEBASHIS CHAKRABORTY ET AL., *ANTIDUMPING: GLOBAL ABUSE OF A POLICY INSTRUMENT* 155, 162 (Debashis Chakraborty & Bibek Debroy eds. 2007) (noting that of the fifty-six dumping duties challenged before the W.T.O. between 1996 and 2005, only two were upheld). A different study noted that between 1995 and 2002, dispute settlement panels found at least parts of the anti-dumping measures invalid in twelve of the thirteen cases it reviewed. See James P. Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures*, 6 J. INT’L ECON. L. 125 (2003); Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions* 6 (Georgetown Univ. Law Ctr., Working Paper No. 351080, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=351080 (noting that every antidumping measure analyzed between 1998 and 2002 had been at least partially invalidated by the W.T.O.). *But see* Bernard Hoekman, Henrik Horn, and Petros C. Mavroidis, *Winners and Losers in the Panel Stage of the WTO Dispute Settlement System* 11 (Research Inst. of Indus. Econ., Working Paper No. 769, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410618 (finding that challenges to anti-dumping duties only “won” 30% of the time).

12. See Alan O. Sykes, *Antidumping and Antitrust, What Problems Does Each Address?*, BROOKINGS TRADE F., 2 (1988) (noting that the purpose of anti-dumping law is to protect “industries facing weak markets or long-term decline”).

13. See Marc Busch, Eric Reinhardt, & Gregory Shaffer, *Does Legal Capacity Matter? Explaining Patterns of Protectionism in the Shadow of WTO Litigation*, (Feb. 1, 2008) (unpublished working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091435.

14. Vigilante justice is a form of self-help and describes the incentive for W.T.O. members to file their own retaliatory complaints against other members rather than defend themselves in the initial dispute. Bown, *supra* note 6, at 524.

fellow W.T.O. members who are unable to participate in the highly legalistic D.S.B. institution.

With all of the problems embodied by Article VI, the obvious question is how to reduce the burden on world trade imposed by this protectionist mechanism. Although the ideal remedy would likely be a wholesale reform of the Article or outright appeal,¹⁵ those avenues are foreclosed by the complete deadlock of every round of trade negotiations over the last decade and resistance from member governments. The anti-dumping regime was an important factor in establishing the original General Agreement on Tariffs and Trade (G.A.T.T.) framework and most (if not all) governments would reject a proposal that completely excised the anti-dumping “safety-valve” from the W.T.O.¹⁶

Since complete repeal is impractical and likely impossible, this article instead proposes a significant change that is both in the best interest of every single member of the W.T.O. and also possible to implement. This article argues that the W.T.O. should adopt a theory of “heightened scrutiny” for all anti-dumping cases. This “heightened scrutiny” standard would be similar to the “strict scrutiny” standard used by United States judiciary when dealing with powerless minorities, presumed breakdowns in the political process, and certain fundamental rights. This article argues that such a procedural proposal is not outside the realm of possibility for the D.S.B. and W.T.O. to adopt. It would have an immediate positive impact on world trade through a decrease in the number of anti-dumping investigations initiated as well as a larger number of duties found inconsistent by the D.S.B. This reform would work by decreasing the importance of legal capacity in bringing suits and thereby increasing the number of petitions raised in front of the W.T.O. Since most petitions against anti-dumping duties that make it to the D.S.B. already end favorably, this reform could also ultimately decrease the overall number of anti-dumping duties assessed.

This article is divided into four sections. Part I outlines the traditional justifications for allowing anti-dumping duties and the body of economic analysis that has rejected those justifications. It also provides a brief background on the specific structure of anti-dumping requirements and procedures. Part II then introduces the concept of legal capacity, which recent studies have suggested is the single most important factor in understanding anti-dumping investigations and disputes. In particular, it highlights the differences in usage and outcomes for high-capacity (e.g. sophisticated) W.T.O. members compared

15. J. Michael Finger famously suggested that the best “reform” of the anti-dumping provision in the G.A.T.T. is complete redaction. MICHAEL FINGER, ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 57 (1993) (“The most appealing option is to get rid of antidumping laws and to put nothing in their place.”).

16. See Nelson, *supra* note 10, at 579–80 (noting that “negotiators have long known that sustainability of liberal international institutions over the long run rests, at least in part, on provision of sufficient flexibility” to deal with domestic pressures and that antidumping mechanisms are one of the mechanisms that has provided that flexibility).

to low-capacity (e.g. most developing countries) across a number of facets of the dispute settlement process. Part III then outlines previous proposals for reforming the W.T.O.'s anti-dumping provisions. Finally, in Part IV, this article argues that the ideal way of overcoming the legal capacity dilemma is through a concept of "heightened scrutiny" for anti-dumping duties. After making arguments for this reform by the Appellate Body, it then addresses some of the likely counter-arguments.

I.

BACKGROUND: W.T.O. ANTI-DUMPING LAW

The World Trade Organization broadly stands for the proposition that global trade should be free of restrictions. Together with its predecessor, the G.A.T.T., the W.T.O. has been able to reduce overall duties on trade while increasing its membership from an original membership of 24 countries in 1947 to 153 presently. Yet even as tariffs have been reduced, non-tariff-barriers (N.T.B.s) have remained in place or increased in prevalence. The increased utilization of N.T.B.s is due to the difficulty in identifying any particular regulation as a barrier on trade, and the numerous exceptions within the W.T.O. agreement that allow many N.T.B.s to remain in place, even if they have a negative effect on trade.¹⁷ For example, the W.T.O. allows protectionist policies where such trade may harm the health of citizens,¹⁸ impair the member's national defense,¹⁹ or, under certain circumstances, trigger unexpectedly strong negative consequences for domestic manufacturers.²⁰

This article focuses on one N.T.B. in particular—the anti-dumping provisions in the W.T.O. that allow members to impose duties whenever they believe that exports have been "dumped" into their country in violation of Article VI and the Agreement on Implementation of Article VI (known as the Anti-Dumping Agreement, or A.D.A.). These agreements allow protection whenever an export is sold at "less than normal value" as determined by the importer's domestic government.²¹ This part of the article provides the foundations for understanding this provision, including the economic justifications for the policy and the current procedure for assessing anti-dumping duties. In general, the aim of this part of the article is to illustrate the utter lack of justification for such policies and the transparently protectionist decisions that

17. See Daniel Y. Kono, *Optimal Obscuration: Democracy and Trade Transparency*, 100 AM. POL. SCI. REV. 369 (2006).

18. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

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

20. *Id.* at art. XIX.

21. *Id.* at art. VI.1(a)–VI(b).

are possible through most, if not all, of the anti-dumping procedures used by W.T.O. members.

A. The (Shaky) Theoretical Foundations for Anti-Dumping Duties

There are certain circumstances when countries can—and should—enact anti-dumping duties to protect their domestic industries from exporters that are able to produce and sell their goods for less than the “normal” value.²² The original justifications for an anti-dumping policy were closely tied to the justifications for enacting antitrust laws.²³ Fears of predatory pricing from foreign imports justified protections for domestic firms that were already subject to internal anti-monopoly legislation. Jacob Viner provided some of the original theoretical support for anti-dumping provisions and suggested that dumping was “presumptive evidence of abnormal and temporary cheapness”²⁴ that would subsequently lead to monopolistic behavior and higher prices for consumers in the long run. Robert Willig has described predatory-pricing dumping as:

[L]ow-priced exporting that is geared to driving rivals out of business in order to obtain monopoly power in the importing market. The exporter's losses from supplying its goods at the low price are expected to be more than recouped later, under the high prices made possible by the monopoly position resulting from the irreversible exit of the rivals for the importing market.²⁵

Although predatory dumping justifies anti-dumping duties, the mechanisms W.T.O. members use for identifying dumping do not distinguish between this type of dumping and other types of dumping.²⁶ Incidentally, domestic antitrust law has evolved over time to address this shortcoming by increasing its intent requirements in order to account for the fact that predatory intent is a key part of predatory-pricing dumping.²⁷

22. The paradigmatic definition of dumping is “the practice of selling a good for export at a price below that charged for the identical good in the exporting market.” Robert D. Willig, *Economic Effects of Antidumping Policy*, in ROBERT Z. LAWRENCE (ED.), BROOKINGS TRADE F., 2 (1988).

23. In fact, the antidumping law of 1916 was only enacted after the Supreme Court had denied extraterritorial application of the Sherman Act. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (finding that the Sherman Act was “intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power”).

24. JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 147 (1923).

25. Willig, *supra* note 22, at 66.

26. *Id.* at 75 (“General antidumping policy does not necessarily adhere to this philosophy, and the comparison between export prices and ‘normal values’ does not sharply distinguish between behavior consistent and inconsistent with normal (if imperfect) competition.”).

27. See CONG. BUDGET OFFICE, ANTIDUMPING ACTION IN THE UNITED STATES AND AROUND THE WORLD: AN ANALYSIS OF INTERNATIONAL DATA, 15 (1998) (“At least in recent decades, the courts have tightened requirements for proving predatory pricing under the antitrust laws. Their actions reflect economic research indicating that such behavior is infrequent and seldom rational. They have also interpreted the antitrust laws to prohibit mainly the small subset of cases in which price discrimination is predatory. Harm to the economy can be demonstrated reliably mainly for cases in this subset, whereas vigorous prosecution of cases that do not represent predatory price discrimination could diminish the beneficial effects of competition.”).

In contrast, anti-dumping law has not followed the same path. Unlike modern domestic antitrust law, Article VI has no requirement to show predatory intent. Thus, even if there is a justification for anti-dumping law in preventing predatory dumping, anti-dumping law captures far more types of dumping than just predatory dumping. Furthermore, economists have proven that predatory-pricing dumping is irrational and therefore unlikely to occur—in other words, the most important justification for anti-dumping protection has been shown to be highly unlikely to ever take place.²⁸

A second economic justification for anti-dumping duties is the fear of strategic dumping, where exporters are protected from competition at home and thus can sell their exports at a lower price than they sell in their domestic market.²⁹ This dumping can be problematic if the industry has high research and development costs or large economies of scale. Producers in the importing market could be driven out of business due to their inability to generate the same economies of scale by selling across multiple markets (including the exporter's home market). In this case, anti-dumping duties can be an effective remedy if they deter strategic dumping and prevent the exercise of monopoly power. However, if the anti-dumping duties are unable to deter protection in the exporter's home market, then anti-dumping duties do nothing more than help producers to the detriment of consumers in the importing market.³⁰ Furthermore, while instances of strategic dumping could justify anti-dumping duties, the actual practice of this type of dumping (much like actual predatory price discrimination) is exceedingly rare.³¹

Fears of market-expansion dumping,³² cyclical dumping,³³ and state-trading dumping³⁴ have also been advanced as justifications for anti-dumping duties. However, these types of dumping are “entirely consistent with robustly

28. See Gunnar Niels, *What is Antidumping Policy Really All About?*, 14 J. ECON. SURV. 467, 476 (2000) (noting that several prominent scholars have dismissed the threat of predatory pricing in international markets). In fact, according to Edwin Vermulst, “predatory dumping has never been proven to exist.” EDWIN VERMULST, THE WTO ANTI-DUMPING AGREEMENT: A COMMENTARY, at n.7 (2005).

29. See Niels, *supra* note 28, at 475; Willig, *supra* note 22, at 65 (describing the circumstances necessary for strategic dumping to take place).

30. Willig, *supra* note 22, at 71.

31. See Niels, *supra* note 28, at 475 (noting that several scholars have conducted studies of the steel, electronics, and semi-conductor industries and found strategic dumping to be a minor issue).

32. Market expansion dumping is defined as “exporting at a lower net price than is charged at home for the purpose of the expanded export sales that this form of price discrimination makes possible.” See Willig, *supra* note 22, at 61.

33. Cyclical dumping is defined as “export at unusually low prices of goods for which there is substantial excess production capacity owing to a downturn in demand.” See *id.* at 62.

34. State-trading dumping is defined as “the export of state-owned enterprises in economies whose currencies are not freely convertible to those generally employed in international trade” for the purpose of gaining “hard currency.” See Willig, *supra* note 22, at 63.

competitive conditions in the importing nation's market.”³⁵ Indeed, “the benefit to buyers outweighs, in terms of consumers' surplus, any rent or producers' surplus that is lost as a result of the sales of imports at the low dumping price.”³⁶

Even if there are valid reasons for anti-dumping provisions in the W.T.O., these mechanisms in fact allow for a “disguised form of protectionism.”³⁷ While anti-dumping theory is based on fears of predatory pricing (and strategic dumping) schemes—which “are economically detrimental but comparatively rare”³⁸—in practice, these policies have been applied to non-predatory price discrimination and sales that are “generally beneficial and common.”³⁹ These forms of dumping are beneficial because the competition forces domestic producers to either achieve their own cost reductions or close shop and consumers receive the gains from lower prices. Therefore, the importing country is actually made worse off when anti-dumping duties prevent these types of dumping.

The idea that anti-dumping provisions could be used for nefarious motives is not new. There are many examples of domestic producers making meritless allegations that exporters are dumping products into the market.⁴⁰ Indeed, there are few doubts that anti-dumping measures hurt the overall economy of the United States far more than they benefit domestic producers.⁴¹ Furthermore, the presence of anti-dumping provisions alone can depress real income globally through higher prices since the “mutual threat of anti-dumping enforcement could stifle international competition, to the detriment of consumers and efficient suppliers in all countries involved.”⁴² Companies threatened with anti-dumping investigations sometimes choose to raise their prices or restrict their exports voluntarily. Such a chilling effect is likely when a country is known for utilizing the anti-dumping machinery.⁴³ In other words, even though the overall

35. *Id.* at 66.

36. *Id.* at 67.

37. JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, JR., INTERNATIONAL ECONOMIC RELATIONS 757 (Thompson 5th ed. 2008).

38. CONG. BUDGET OFFICE, ANTIDUMPING ACTION IN THE UNITED STATES AND AROUND THE WORLD: AN ANALYSIS OF INTERNATIONAL DATA 2 (1998), available at <http://www.cbo.gov/ftpdocs/4xx/doc439/antidump.pdf>.

39. *Id.*

40. See, e.g., Richard J. Pierce Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 ANTITRUST L.J. 725, 726–28 (2000).

41. See C.E.J. Bronckers, *Rehabilitating Antidumping and Other Trade Remedies Through Cost-Benefit Analysis*, 30 J. WORLD TRADE 5, 18 (1996); Mankiw & Swagel, *supra* note 9, at 107.

42. Willig, *supra* note 22, at 68; see also Douglas Nelson, *Political Economy of Antidumping: a Survey*, 22 EUR. J. POL. ECON. 555, 564 (2006) (reviewing scholarly papers that found that anti-dumping duties had “a statistically significant trade suppressing effect”).

43. See K.D. Raju, *India's Involvement in Antidumping Cases in the First Decade of WTO*, in ANTI-DUMPING: GLOBAL ABUSE OF A TRADE POLICY INSTRUMENT 37 (Bibek Debroy & Debasish Chakraborty eds., 2007) (noting that “[a]n investigation is more effective than actual antidumping

welfare of the importing country typically increases if dumping is allowed,⁴⁴ the small risk of injurious dumping provides cover for the many domestic actors that prefer protectionist policies. Indeed, anti-dumping protection is really just “ordinary protection, albeit with a good public relations program”⁴⁵ that allows domestic interest groups to appeal to the superficial righteousness of protecting domestic producers from unfair competition.⁴⁶

Thus, the inclusion of Article VI is arguably the most important mistake in the G.A.T.T.’s founding documents and anti-dumping duties currently occupy the same position that tariffs did sixty years ago: a barrier to trade that potentially benefits an individual country acting alone (or certain interest groups within that country) but ultimately hurts all nations when applied universally. There is a collective action problem that can only be solved through the same types of mutually agreed-upon reductions that successfully reduced tariff rates. However, reducing the number of anti-dumping disputes is far more difficult than reducing tariffs because, unlike tariffs, anti-dumping claims can sometimes (however infrequently) be meritorious. In other words, the W.T.O. needs a system that creates disincentives for frivolous anti-dumping disputes but keeps the forum open for true dumping accusations. The following subsections explain in more detail the elements and procedures that illustrate the problem with the current anti-dumping system and why a procedural solution at the D.S.B. level is appropriate.

B. Elements Required in Anti-Dumping Claims

Under the original G.A.T.T. bylaws, anti-dumping duties are only permissible when a member country proves that the product was introduced into the country for less than “normal value” and that “the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”⁴⁷ However, in many cases there is no easy way to determine what a normal price is for the purposes of anti-dumping investigations. For example, in the U.S., the Department of Commerce (D.O.C.) first looks to the price charged for the product in the exporter’s domestic market. If the product is not sold there, or the sales of the product in the home market is less than 5% of the volume sold in the United States, then the D.O.C. looks to other third-party markets. If there are no comparable markets, then the D.O.C. constructs its own estimate of what the product’s price *should* be by making

duties in many cases. This is mainly due to the ‘chilling effect’ and harassment of the importers in the course of the investigation”).

44. See Niels, *supra* note 28, at 467, 475 (“Importing country’s welfare increases with dumping because of the inflow of cheap imports.”).

45. Finger, *supra* note 15, at 13.

46. See Niels, *supra* note 28, at 485.

47. See G.A.T.T., *supra* note 19, at art. 2.1.

assumptions about what the costs would be to sell the product in the home country.⁴⁸ This sequence of events raises questions about the validity of any assessment that rests on such assumptions.

Anti-dumping duties are also possible if the product is sold at a price below full cost. Of course, this simple statement also introduces a host of questions, including what constitutes the normal value and export price, whether the products are “like” and how to determine what constitutes the ordinary course of trade.⁴⁹ Thus, given all these questions, a D.S.B. panel could be right to assume that the evaluating agencies within the government manipulated these terms to reach a predetermined result.

In addition to requiring that they prove that the product was dumped, Article VI requires that the importing country prove that the dumping “causes or threatens material injury to an established industry” and provide evidence of a causal link between the dumping and the injury itself.⁵⁰ This additional requirement can constrain the ability of countries to impose duties against the exporter. However, the failure of Article VI or the A.D.A. to provide a definition of what constitutes material injury limits the usefulness of that provision as a shield. While the Appellate Body has held that injury determinations can only be based on “an ‘objective examination’ of ‘positive evidence’”⁵¹ and verifiable evidence,⁵² these terms still give much leeway to the examining agencies for determining how to interpret evidence and do not even require the importing country to disclose all of the factors it considered in reaching its conclusion.⁵³

C. Procedures for Enacting Anti-Dumping Duties

Even with this very generous scheme, the mere fact that a domestic producer alleges that the elements of dumping have been satisfied by a competing foreign firm does not automatically lead to anti-dumping duties. Instead, the producer’s accusations must overcome several procedural and administrative hurdles within the importing country’s government before any anti-dumping duties are assessed. While each country can develop its own procedures, the A.D.A. establishes a floor for these investigations and most procedures have tended to mirror the U.S. and Canadian anti-dumping laws

48. See Brink Lindsey and Daniel Ikenson, *The Rhetoric and Reality of US Anti-Dumping Law*, in ANTI-DUMPING: GLOBAL ABUSE OF A TRADE POLICY INSTRUMENT 106–08 (Bibek Debroy & Debasish Chakraborty eds., 2007).

49. See Vermulst, *supra* note 28, at 9.

50. See G.A.T.T., *supra* note 19, at art. VI. Note that dumping itself is not per se incompatible with the W.T.O. The causal link is critical.

51. Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 192, WT/DS184/AB/R (July 24, 2001).

52. Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶ 4, WT/DS122/AB/R (Sept. 28, 2000).

53. See Appellate Body Report, *supra* note 51, at ¶ 107.

since those members were the original active users.

A typical anti-dumping dispute begins when a domestic producer or industry group gathers enough support to request a dumping investigation by the relevant government body.⁵⁴ That agency then investigates the claim by inquiring with a foreign producer about its practices and costs in order to determine whether the domestic producer's claim has merit. This inquiry typically takes the form of questionnaires and requires the exporter to provide a substantial amount of information to the government agency.⁵⁵ The procedure can be quite onerous for the exporter accused of dumping on the domestic market—and in the U.S., failure to provide the requested information in a timely manner can lead to an adverse inference justifying anti-dumping tariffs.⁵⁶ Thus, even from the inception of the investigation, there is a large burden (both in time and expense) on the accused exporter. It should be no surprise that the announcement of an investigation can sometimes be enough to intimidate an exporter into limiting its shipments to that country, or worse, encourage an exporter to raise its prices in order to avoid the time and expense of dealing with the investigation.

The investigating agency must then take the information received and construct the "normal value" of the product. This is not an easy task, since creating a normal value requires the agency to develop assumptions about what the net prices are in the U.S. and home country by subtracting out freight, brokerage, handling fees, and commissions from the prices disclosed. It is even more complicated if the product is not sold in the exporting country⁵⁷ or an equivalent third country's domestic market. In that case, the agency would have to create a "constructed value" that is equal to the inferred production costs of the product plus a profit margin. The process is further complicated if the products are slightly different (i.e. not "like" products in the narrow sense of W.T.O. interpretation), which then requires further assumptions to create an apples to apples comparison.

Once the agency has created a basis for comparison between prices in the exporter's home market and the domestic market and established that dumping has taken place, the agency must then identify a "material injury" to the domestic industry.⁵⁸ This injury is easily proven due to the plethora of negative

54. JOHN H. JACKSON, WILLIAM J. DAVEY, AND ALAN O. SYKES, JR., INTERNATIONAL ECONOMIC RELATIONS 784 (Thompson 5th ed. 2008); Chakraborty et al., *supra* note 11, at 18.

55. *Id.* at 765.

56. See 19 U.S.C. § 1677e(b) (2007) ("If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority . . . may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.").

57. Even if the product is sold in the exporting country, if such sales volume is less than 5 percent of U.S. sales, then the prices cannot be used in calculations. See *infra* note 62.

58. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and

indicators an industry can point to as evidence of dumping, including price decreases in the market, decreases in sales for domestic producers, lower market share, productivity or even depressed return on capital investments.⁵⁹

Establishing a causal link can sometimes be a more difficult hurdle since it requires evaluating macroeconomic factors and determining whether the dumping was a “principal cause” of the injury to the domestic industry. However, given the fact that anti-dumping duties can be established merely by showing the threat of injury, anti-dumping duties can generally be imposed even where “the link between dumping and injury is missing.”⁶⁰ In other words, dumping is usually punished even though the “shape and structure of the modern world economy make it particularly difficult to determine whether dumping is taking place and what its effects are.”⁶¹

* * *

As the above snapshot of the anti-dumping investigation procedures suggests, there is more art than science to the process of assessing anti-dumping duties. As one commentator evaluating the U.S. procedure noted:

In the typical anti-dumping investigation, the [Department of Commerce] compares home-market and U.S. prices of physically different goods, in different kinds of packaging, sold at different times, in different and fluctuating currencies, to different customers at different levels of trade, in different quantities, with different freight and other movement costs, [and] different credit terms Is it any wonder that the prices are not identical?⁶²

Similarly, the utilization of econometric models for identifying injury and causation as well as reliance on a “totality of the factors”⁶³ standard leads to the inexorable conclusion by most agencies that actionable dumping has taken place.

In summary, the anti-dumping procedures are subject to two main criticisms: (1) overly complex regulations do not provide precision due to the multitudes of scenarios that require assumptions; and (2) complexity camouflages opportunity for abuse.⁶⁴ Each of these problems alone would probably suffice to raise doubts about the reliability of anti-dumping investigations. Combined, the procedures are “prone to finding dumping even

Trade 1994, Jan. 1, 1995, Art. 3.2 [hereinafter A.D.A.].

59. *Id.* at Art. 3.4. The ADA also notes that “the list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.” *But see Fresh Cut Roses from Colombia and Ecuador*, USITC Inv. No. 731-TA-684-85 (1995) (finding no injury despite establishing that exporters were dumping into the U.S. market).

60. Chakraborty et al., *supra* note 11, at 317.

61. Willig, *supra* note 22, at 60.

62. Lindsey and Ikenson, *supra* note 48, at 106.

63. See A.D.A., *supra* note 58, at art. 3.7.

64. Finger, *supra* note 15, at 29.

when there is no price discrimination or selling below cost”⁶⁵ and “fail to distinguish between normal commercial pricing practices and those that reflect market-distorting government policies.”⁶⁶ Even the most procedurally sound anti-dumping investigation can lead to a suspicious result. There are simply too many ways for countries to game the outcome.⁶⁷

Perhaps because of this ease, anti-dumping duty assessments have become a popular exercise in recent years despite the widespread consensus that anti-dumping never had “a scope more particular than protecting home producers from import competition.”⁶⁸ While only four countries were known to be frequent users of anti-dumping measures prior to 1993,⁶⁹ many developing countries have subsequently become adept at implementing anti-dumping duties. Argentina, India, Brazil, South Africa, and Turkey in particular have begun protecting domestic industries through this mechanism.⁷⁰

Once all of the elements are proven by the investigating agency, the national government decides whether to assess the anti-dumping duty. If the government decides to impose the duty (which happens the majority of the time⁷¹), then the exporting firm’s government must decide whether to challenge the protectionist tariff. Many anti-dumping duties are never challenged. For example, one study found that while 1,822 anti-dumping measures were imposed between 1995 and 2005, only 615 challenges were made.⁷²

This gap is strange because challenges to anti-dumping disputes are generally successful. It makes very little sense for countries *not* to challenge anti-dumping duties assessed against them. For example, one study found that between 1996 and 2004, the complainant had a W.T.O. panel find the anti-dumping duty inconsistent in 19 of the 56 disputes and only “lost” its anti-dumping complaint in 2 of 56 cases.⁷³ The majority of the other disputes led to some sort of negotiated settlement.⁷⁴ Another study found at least parts of the

65. Lindsey and Ikenson, *supra* note 48, at 112.

66. *Id.* at 117.

67. NEERAJ VARSHNEY, ANTI-DUMPING MEASURES UNDER THE WTO REGIME: LAW-PRACTICE AND PROCEDURE WITH SPECIAL EMPHASIS ON INDIAN CASE-LAW 391 (Universal Law, 2007) (“Authorities are not always perceived to be acting in an unbiased and neutral manner.”).

68. Finger, *supra* note 15, at 13.

69. Niels, *supra* note 28, at 470.

70. Michael O. Moore & Maurizio Zanardi, *Does Antidumping Use Contribute to Trade Liberalization in Developing Countries?*, 42 CAN. J. ECON. 469, 471 (2009).

71. Hoekman et al., *supra* note 11, at 8.

72. *See id.* at Table 4, 5.

73. Chakraborty, *supra* note 11, at 163 and Table 8.1.

74. There is evidence that negotiated settlements have a high likelihood of leading to partial or full concessions. *See* Busch et al., *supra* note 13, at 163 Table 2 (noting that 78 of 125 settlements that took place prior to a panel being established had concessions benefiting the plaintiff). However, legal capacity does have an effect on the likelihood that settlements will be favorable. This is yet another reason that solutions are needed to level the playing field regarding legal capacity. *See infra*

anti-dumping measures invalid in 12 of the 13 cases it reviewed.⁷⁵ Furthermore, the actual “win” rate for the plaintiff in disputes is relatively equal across all W.T.O. members—whether developed or developing countries—once they convene a D.S.B. panel.⁷⁶ The message from this evidence is that anti-dumping duties should be challenged immediately—yet challenges are not raised on a significant number of the anti-dumping duties that are imposed.

II.

LEGAL CAPACITY AND ANTI-DUMPING DUTIES

As the above section demonstrated, there are a host of problems with the way anti-dumping duties are assessed. What can explain the striking lack of complaints against many anti-dumping duties? One potential explanation is that decisions to impose anti-dumping duties are based on market power—a form of realpolitik where smaller market members fear angering larger market members. Yet this hypothesis has been discredited in favor of the idea of legal capacity.⁷⁷ Legal capacity can not only predict which countries will impose anti-dumping duties, but even more importantly, it can predict which country will be targeted by the duties and whether or not the targeted country will challenge the anti-dumping duties in front of the W.T.O.’s dispute settlement body.

Legal capacity can be defined as the “institutional, financial, and human resources available to pursue a case.”⁷⁸ This characteristic is important for W.T.O. members due to the increasing “judicialization of international trade dispute settlement”⁷⁹ and the large amount of time, energy, and expertise required to initiate a dispute in front of the W.T.O. and see it through to conclusion. The average length of time between identifying the violation, researching the appropriate arguments, filing a complaint, engaging in consultations, arguing in front of a panel and then in front of the appellate body is 15 months.⁸⁰ These cases also require legal fees in the hundreds of thousands,

note 112.

75. See Durling, *supra* note 11.

76. Hoekman et al., *supra* note 11, at 9.

77. See, e.g., Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J.L. STUDIES 557, 591 (2005) (“Surprisingly, limitations on a government’s capacity to litigate seem to be more important than the fear of political or economic retribution.”); Busch et al., *supra* note 13, at 28 (“Legal capacity thus appears to make *at least* as much substantive difference as market power.”) (emphasis in original).

78. Guzman & Simmons, *supra* note 77, at 566.

79. Gregory Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed* 168 (Legal Studies Research Paper Series Research Paper No. 08-50, 2008) [hereinafter *Developing Country Use*].

80. William J. Davey, *Evaluating WTO Dispute Settlement: What Results Have Been Achieved Through Consultations and Implementation of Panel Reports?* 20 (Ill. Pub. L. & Legal Theory Research Papers Series Research Paper No. 05-19, 2005).

if not millions, of dollars.⁸¹

Legal capacity is not political power⁸² and does not correspond to the cleavage between developing and industrialized countries. While many developing countries do have low legal capacity and tend to avoid the W.T.O.'s dispute settlement system,⁸³ other developing country members of the W.T.O., such as China, India, and Brazil, "nonetheless can defend their interests in W.T.O. litigation" due to the size of their economy notwithstanding their low G.D.P. per capita.⁸⁴

Over the last decade, numerous studies have examined the effect of legal capacity on W.T.O. dispute settlements and found that those countries with the most sophisticated legal capacity have been the ones least targeted by anti-dumping measures as well as the most likely to dispute (and therefore win, since most complaints against anti-dumping duties end favorably) challenges to disputed anti-dumping duties. This evidence suggests that the most important factor in creating a trade-maximizing W.T.O. is not inherently endogenous to the countries themselves, but rather related to the complexity of the W.T.O. dispute settlement system and the resources required to navigate it.

For example, research shows that low capacity countries are the most frequent targets of anti-dumping duties⁸⁵ and are least likely to challenge those duties.⁸⁶ This suggests that countries make decisions about which countries to target their anti-dumping duties against at least in part because of the perceived inability of that country to challenge the anti-dumping duties in front of the W.T.O. In fact, if every country had a similar legal capacity, one study estimated that there would be 10% less anti-dumping measures imposed.⁸⁷

81. *Developing Country Use*, *supra* note 79, at 183. The author estimated a smaller matter costing \$400,000 and a more complicated dispute costing \$2,000,000. These figures estimated the amount for a low capacity country to hire a private law firm for a single challenge. Developing in-house legal capacity would lower the cost per case but would entail a high amount of fixed start-up costs.

82. Guzman & Simmons, *supra* note 77, at 571 ("There is no evidence to support the view that poor or weak countries are especially reluctant to file against rich or powerful countries for fear of the political consequences.").

83. *Developing Country Use*, *supra* note 79, at 185 ("95 of the WTO's 120 non-OECD members have never filed a WTO complaint.").

84. *Id.* at 170.

85. Busch et al., *supra* note 13, at 28 (showing that increased legal capacity for developing countries would have led to 176% more challenges against anti-dumping duties in front of the D.S.B.).

86. *Id.* at 27 ("Controlling for level of development, market size, and bilateral trade share, countries with greater W.T.O.-specific legal capacity are *less* likely to be subjected to duties when anti-dumping investigations are conducted against their firms . . . [and] a country with greater legal capacity is significantly *more* likely to file a W.T.O. complaint against another Member's anti-dumping action.").

87. *Id.* at 28. See also Moonhawk Kim, *Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures*, 52 INT'L STUD. Q. 657, 679 fig. 7 (2008) (noting that the likelihood that a WTO member will request consultations is directly correlated with legal

Public choice also explains the decision to impose these duties against these particular exporters. The interest groups that initially file complaints with domestic agencies will try to identify firms in countries least likely to challenge the duties imposed. As Chad Bown notes, “domestic industry [] recognize[s] that their petition would be more likely to be accepted if it named firms from countries that were relatively weak and did not name firms from countries which were relatively strong.”⁸⁸

Legal capacity is also important in that the required capacity to levy anti-dumping duties themselves is much lower than the expertise required for challenging a duty in front of the W.T.O. Thus, low capacity countries may have a strong preference for “vigilante justice” and bring their own anti-dumping duties instead of challenging anti-dumping duties directed against their own industry.⁸⁹ This behavior has significant negative consequences on all parties, and leads to escalating levels of trade barriers as anti-dumping tariffs go into place rather than falling down through challenges.

It is important to note that studies of legal capacity have not been limited to the anti-dumping context. Indeed, legal capacity explains the behavior of complainants—particularly complainants with low legal capacity—across most aspects of dispute resolution regardless of what claim is being litigated.⁹⁰ Several studies have also described how sufficient legal capacity to bring complaints is directly correlated with other beneficial aspects of the dispute settlement process.⁹¹

Furthermore, countries appear to gain from simply remaining apprised of the latest case law and textual interpretations.⁹² High capacity countries have

capacity); *Developing Country Use*, *supra* note 79, at 181 (using wealth as a proxy for legal capacity and finding that “developing countries are less able to convince a defendant of the eventual success of their case at an early stage and that a defendant may more likely drag out a legal case against a developing country plaintiff in order to impose legal costs that it is better positioned to absorb”).

88. See Chad P. Bown, *Antidumping Against the Backdrop of Disputes in the GATT/WTO System*, Brandeis Working Papers, 30 (2002), available at <http://chongbanphagia.vn/beta/files/2002-anti-dumping-against-the-backdrop-of-Dispute-in-WTO.pdf>.

89. Bown, *supra* note 6, at 524. But see Busch et al., *supra* note 13, at 29-30 (finding no statistical significance for vigilante justice as an explanatory variable).

90. See Guzman and Simmons, *supra* note 77, at 562 (“Poor countries have to pick their fights very carefully, and this is reflected in the types of defendants they pursue.”). Since these countries face high opportunity costs, they are more likely to bring their few (or only) complaints against “the largest targets and those with whom they already have large amounts of trade.” *Id.* at 568.

91. See, e.g., Marc Busch and Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT’L LAW J. at 158 (noting that when a country has sufficient legal capacity to bring complaints to the dispute settlement body, merely raising a complaint in front of the W.T.O. meant that the complainant country achieved a full or partial concession by the defendant through consultation or dispute resolution two-thirds of the time); Hoekman et al., *supra* note 11, at 14 (“the success rate as measured by share of claims ‘won’ is similar” between developing and developed countries whether it is an anti-dumping claim or otherwise.”).

92. Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing*

elected to participate as third parties in virtually every single case before the dispute settlement body, which suggests that the value of participation in all trade contexts exceeds its costs.⁹³ Without legal capacity, countries cannot participate in the continuing discussion and development of W.T.O. law whereas high capacity W.T.O. members can “attempt to defend their systemic interests [by] shaping the interpretation of W.T.O. rules over time.”⁹⁴

In other words, legal capacity matters not only in the anti-dumping context, but in all circumstances. However, this article focuses on anti-dumping both because it is the most common dispute between W.T.O. members and because Article VI is so easily abused.⁹⁵ Other provisions of the W.T.O. are not nearly as likely to be abused or produce global net welfare loss. Thus, while legal capacity matters across all D.S.B. disputes, this article focuses on the highest priority problem. It follows that the solutions proposed in Part IV are equally applicable to other D.S.B. contexts such as safeguards or subsidies. However, the justifications put forward for applying a heightened scrutiny to anti-dumping disputes simply are not as powerful when applied to other disputes.

* * *

Capacity plays a part in whether a country is targeted, whether the country then challenges the anti-dumping duty, and whether it requests consultations. Yet if the country can begin negotiations, then it has a chance of improving its trading terms. If the country can get its complaint in front of a panel, then the mechanisms of the D.S.B. take over and it has an even better chance of having the duties found inconsistent. Thus, if the goal is to reduce the damage of anti-dumping duties on world trade, legal capacity is the lynchpin. By reducing the importance of legal capacity for anti-dumping disputes, we would expect both fewer overall anti-dumping duties and a higher percentage of imposed duties to be challenged in front of the D.S.B.

III. PREVIOUS PROPOSALS FOR REFORM

Of course, this article’s proposal for reducing the importance of legal capacity emerges from a background of numerous reform ideas that have already been suggested. These reforms can be divided into two categories:

Countries: Some Proactive Developing Country Strategies, ICTSD Res. Paper No. 5, 10 (2003) (noting that W.T.O. law follows a common-law approach and that judicial outcomes are far more important in the W.T.O. than in sovereign states due to the inability of the governing body to make statutory changes within the unanimity model).

93. *Developing Country Use*, *supra* note 79, at 176.

94. *Id.*

95. Mankiw & Swagel, *supra* note 9, at 108 ([anti-dumping] is “little more than an opaque way of protecting favored industries that have powerful lobbies”).

incremental procedural or substantive reforms and major structural overhauls. This section evaluates previous reforms and argues that these reforms either make small improvements or are unlikely to ever be adopted.

In the first category are a number of proposals that are already under consideration at the Doha round of negotiations. These incremental reforms cover every single aspect of the initiation, investigation, and imposition of duties as well as how they are reviewed by the D.S.B. For example, several procedural reforms have been aimed at clarifying how domestic agencies notify the affected foreign firms and their affiliates for the purpose of quantifying total sales.⁹⁶ Similarly, several reforms have been suggested for removing discretion from domestic agencies when calculating the dumping margin. These reforms include eliminating the practice of “zeroing” (ignoring sales above the average price when calculating the dumping margin), ending the use of third-country benchmarks to calculate the normal value, and restricting the opportunities for creating “constructed values” that have no benchmark in reality.⁹⁷ Another reform proposal increases the burden of proof that domestic firms must present to the investigating agency in order to open an investigation.⁹⁸ This procedural reform would also reduce the number of anti-dumping investigations and thus the amount of protectionist tariffs.

Another proposal that would restrict domestic agencies and improve Article VI is a “lesser duty” rule that would require domestic agencies to assess the lowest anti-dumping duty “adequate to remove the injury to the domestic industry.”⁹⁹ This reform would remove the discretion and though it would not limit the application of duties, it would significantly decrease the protection possible under the anti-dumping framework. Similarly, there are proposed mandatory “sunset provisions” on existing anti-dumping duties as well as restrictions on back-to-back investigations.¹⁰⁰ These rules would effectively limit the amount of time that duties can be in place and prevent revolving duties against the same products.

Finally, there are reform proposals to reduce the cost of challenges to anti-dumping duties. One suggestion by the E.C. delegation is to create a “fast track” procedure for challenging certain aspects of anti-dumping duties.¹⁰¹ Other ideas

96. Brink Lindsey & Dan Ikenson, *Reforming the Antidumping Agreement: A Roadmap for WTO Negotiations*, CATO Inst. Trade Pol'y Analysis No. 21, at 19 (2002), available at http://www.cato.org/pub_display.php?pub_id=3636.

97. *Id.*

98. *Id.* at 30.

99. A.D.A., *supra* note 58, at 157; See Varshney, *supra* note 67, at 446–72. Currently, members have the option of assessing a duty equal to the dumping margin or assessing the lesser duty.

100. See Varshney, *supra* note 67, at 446–72; Lindsey & Ikenson, *supra* note 96, at 35.

101. See Negotiating Group on Rules, *Negotiations on Anti-Dumping and Subsidies - Reflection Paper of the European Communities on a Swift Control Mechanism for Initiations*, TN/RL/W/67 03-1312 (Mar. 5 2003), available at

include requiring a simple arbitration ruling for straightforward cases and establishing a standing advisory panel that can comment on whether anti-dumping investigations have abided by the most basic requirements for proper initiation. All of these proposals would reduce the complexity of the anti-dumping system and thereby make it easier for W.T.O. members to challenge duties assessed against their domestic industries. Yet these ideas, even in the aggregate, do not suggest a significant change from the status quo.

More interesting are the reforms that have been proposed by various academics. At the most extreme end, there are suggestions that the only reform should be wholesale elimination of anti-dumping duties as advocated by Finger,¹⁰² as well as Mankiw and Swagel.¹⁰³ In its place, some scholars suggest implementing a modified version of antitrust law that more accurately prohibits only those behaviors shown in theory to be welfare destroying (e.g. predatory behavior or strategic dumping).¹⁰⁴ This could take place through a multilateral agreement between the largest trading partners or through a new competition code within the W.T.O. itself.¹⁰⁵ Alternatively, an expanded safeguard provision under Article XIX would allow the same amount of protection but under a more intellectually honest framework that acknowledged the undesirable consequences of protectionism.¹⁰⁶

Other proposed reforms include giving standing to other parties in the anti-dumping investigation itself and requiring that domestic agencies take a totality-of-the-circumstances approach when determining whether a duty is appropriate.¹⁰⁷ Each of these reforms would add more counter-pressure to the domestic producers lobbying for the duty, and reduce the likelihood that the dumping duty would be assessed in the first place.

Gregory Shaffer has also proposed several significant reforms to help less developed countries (typically low-capacity countries) navigate through the D.S.B. For example, he advocates imposing monetary penalties on infringing members and allowing for retroactive remedies or allowing developing countries to recoup attorney's fees on successful actions directly from the losing country.¹⁰⁸ This reform, if enacted, would certainly reduce the negative effects of anti-dumping duties by increasing the incentives for low-capacity countries to

http://trade.ec.europa.eu/doclib/docs/2003/september/tradoc_113008.pdf.

102. See Finger, *supra* note 15.

103. Mankiw & Swagel, *supra* note 9, at 107.

104. See Robert A. Lipstein, *Using Antitrust Principles to Reform Antidumping Law*, in GLOBAL COMPETITION POLICY (E.M. Graham & J.D. Richardson eds., Institute for International Economics, 1997).

105. See Niels, *supra* note 28, at 484.

106. See Michael O. Moore, *Antidumping Reform in the Doha Round 8: A Pessimistic Appraisal*, presented at the University of Hong Kong, The Economics of the Doha Round and the WTO" (Dec. 16, 2005), available at http://home.gwu.edu/~mom/ad_reform_doha.pdf.

107. See *id.* at 9; Lindsey & Ikenson, *supra* note 96, at 34.

108. Shaffer, *supra* note 92, at 40.

develop legal capacity.

Another proposed reform is a small-claims court for countries bringing claims under a certain fixed amount.¹⁰⁹ Bringing a claim in small-claims court would entail fewer procedural requirements and would therefore require less legal capacity. Since many low-capacity countries have less trade and thus less at stake in trade disputes, they would be more likely to use this procedure and benefit from the reform.

All of these reforms would indeed reduce the burden of anti-dumping duties on world trade and increase the legal capacity of countries to challenge these duties. Yet each of these reforms would likely require the unanimous approval of W.T.O. members in order to modify the basic structure of Article XXIII or change Article VI requirements and would therefore be practically impossible to implement.¹¹⁰

Finally, a number of reforms aimed at legal capacity have already been implemented. For example, the Advisory Centre on W.T.O. Law (A.C.W.L.) has been operating as a legal fund and source of expertise for developing countries since 2001 and provides legal resources to developing countries as needed.¹¹¹ While this reform was not aimed at anti-dumping in particular, its effect was to make all low-capacity countries more likely to bring challenges on a variety of matters, including anti-dumping claims. The problem with the A.C.W.L., however, is that “its institutional design does not allow it to take care of all the problems associated with providing necessary W.T.O. enforcement assistance to poor countries.”¹¹² As a general legal assistance organization with less than ten full-time attorneys,¹¹³ its purpose is not to address the problem of anti-dumping duties directly. This article, in contrast, proposes a targeted approach addressing anti-dumping duties in particular because “modern anti-dumping practice actually facilitates the kind of unfair and anticompetitive behavior it was intended to prevent,”¹¹⁴ and thus requires more urgent attention. Addressing anti-dumping duties and the costs of challenging those duties in particular will likely bring the largest return on investment of any reform.

109. See Hakan Nordstrom & Gregory Shaffer, *Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?*, 7 WORLD TRADE REV. 587 (2008).

110. See G.A.T.T., *supra* note 19, at 50; Hunter Nottage & Thomas Sebastian, *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods for Changing WTO Law*, 9 J. INT. ECON. L. 989 (2006) (noting that unanimity is the rule for all significant modifications to the W.T.O. institution).

111. See ADVISORY CENTRE ON WTO LAW, <http://www.acwl.ch/e/index.html> (last visited Oct. 10, 2010); Shaffer, *supra* note 92, at 29 (suggesting that the A.C.W.L. is helpful in litigating challenges but not in identifying claims or collecting crucial data for those claims).

112. See CHAD P. BOWN, SELF ENFORCING TRADE: DEVELOPING COUNTRIES AND WTO DISPUTE SETTLEMENT, 138 (2009).

113. Bown states that the A.C.W.L. has “less than ten” attorneys on staff. *Id.* at 138. The current website lists only eight attorneys. See ACWL STAFF, <http://www.acwl.ch/e/about/staff.html> (last visited Oct. 10, 2010). Regardless, it is clear that the A.C.W.L. is a very small organization.

114. Mankiw & Swagel, *supra* note 9, at 111.

Some W.T.O. members have also signed side deals agreeing not to assess any anti-dumping duties on each others' exports.¹¹⁵ This too is an ideal solution that would be far more effective than most procedural reforms, because it would cut off the problem at its source. By agreeing to bind themselves through regional or bilateral deals, much of the waste associated with anti-dumping duties disappears. Yet the rarity of these types of deals suggests that policies favoring anti-dumping duties remain well entrenched within member governments. It is indicative that the U.S. insisted that N.A.F.T.A. allow anti-dumping duties between its members because it wanted to preserve its autonomy in applying its anti-dumping procedures against regional trade agreement (R.T.A.) partners.¹¹⁶ Of the 74 R.T.A.s examined in one 2005 study, only nine explicitly prohibited anti-dumping duties between its members.¹¹⁷

In contrast to the reforms detailed above, the reform suggested in this article is neither incremental nor structural (and thus practically impossible to implement). Instead, it directly addresses the issue of legal capacity in a way that is easily implemented and avoids many of the political economy problems associated with major changes to the status quo.

IV.

HEIGHTENED SCRUTINY OF ANTI-DUMPING DUTIES

Virtually all anti-dumping duties are meritless and negatively affect the country imposing the anti-dumping measures, the exporting producers, as well as world trade more generally. Furthermore, recent scholarship has noted that the presence (or absence) of legal capacity for W.T.O. members is the fundamental factor affecting anti-dumping decisions. Thus, this article proposes that D.S.B. panels articulate a new standard for anti-dumping disputes that simultaneously decreases the amount of legal capacity necessary for challenging an anti-dumping duty and reflects W.T.O. suspicion toward all anti-dumping duties. This standard would be a form of heightened scrutiny for anti-dumping cases that reach the panel stage. By explicitly adopting a presumption that anti-dumping duties are inconsistent with the W.T.O.'s core principles, less legal capacity would be required for challenging anti-dumping duties, which in turn would lead to almost all anti-dumping duties being challenged. This standard

^{115.} See, e.g., Chile-Canada Free Trade Agreement, ch. M, July 5, 1997, 36 I.L.M. 1079 ("[N]either party shall initiate any anti-dumping investigations or reviews with respect to goods of the other Party."). But see Bruce A. Blonigen, *The Effects of NAFTA on Antidumping and Countervailing Duty Activity*, 19 WORLD BANK ECON. REV. 407 (2005) (noting that free trade agreements have not been shown to reduce the number of antidumping duties assessed amongst signatories).

^{116.} Blonigen, *supra* note 115, at 21.

^{117.} Robert Teh, Thomas Prusa, & Michele Budetta, *Trade Remedy Provisions in Regional Trade Agreements* 18WTO Econ. Research & Statistics Div., working paper No. 2007-03(2007), available at http://www.wto.org/english/res_e/reser_e/ersd200703_e.pdf.

would be beneficial to all members—not only developing countries—and would also incentivize settlements at the consultation stage since there would be far less incentive for defendants to take an anti-dumping dispute to the D.S.B.

The idea of requiring that anti-dumping duties withstand a more exacting inquiry stems from a line of U.S. case law where courts have interposed themselves between various political actors when the court felt that proper functioning of the political process had broken down.¹¹⁸ Whereas courts typically let coalitions pass legislation in their interests as long as it “rationally relates” to the goals of the majority, there are times when courts reject seemingly rational legislation for discriminating against politically powerless groups or offending some fundamental constitutional law. In those two circumstances, U.S. courts have instead required that the law or government action withstand a higher standard of review.

This higher standard of review is a “more exacting judicial scrutiny”¹¹⁹ that judges use whenever they believe that the state is directly abridging a fundamental part of the Constitution or accomplishing its aims by using a “highly suspect tool,”¹²⁰ such as classifications explicitly based on race, gender, religion or citizenship.¹²¹ Although courts acknowledge that there may be “compelling” justifications for the government using such categorizations, such justifications must be so important—and so narrowly tailored—that in reality the categorizations rarely withstand scrutiny.

Statutes that employ these categories are struck down because their use reflected a failure of the democratic process. Even though the government passed the law or executed the policy based on a duly constituted majority, courts invalidate the actions because they believe that a properly functioning political process would not have allowed that decision to take place. Thus, the U.S. judiciary “ensur[es] that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work.”¹²² In the context of U.S. law, the illegitimate motives are typically directed towards insular minorities, but invidious motives may also be present in other contexts, such as

118. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73 (Harvard Univ. Press 1980) (discussing a theory of heightened scrutiny for representational procedures and fundamental values). For examples of legislation struck down through strict scrutiny review, see *Loving v. Virginia*, 388 U.S. 1 (1967); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

119. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

120. Michael A. Helfland, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same Sex Marriage*, 12 UNIV. PENN. J. CONST. L. 1, 14 (2009).

121. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 797 (2006) (describing the traditional areas where heightened scrutiny has been applied by federal courts).

122. *Id.* at 802 (citing Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 78 (1996)).

gender discrimination.¹²³ Instead, courts are attune to preventing impermissible animus or allowing conduct that contained badges of fraud—circumstances where the court should be a more “vigilant judicial police.”¹²⁴

Similarly, courts use heightened scrutiny where law burdens rights or privileges fundamental to citizenship.¹²⁵ In these instances, when a litigant alleged that government law or action infringes on a fundamental part of our social contract, U.S. courts closely scrutinize the purported restriction on a group or right. Typically, a strict scrutiny analysis finds the restriction inconsistent with the most basic goals of the U.S. Constitution.¹²⁶ Again, the only way for such restrictions to overcome heightened scrutiny is if the restriction is both narrowly tailored and has a compelling justification.¹²⁷

Although this foray into U.S. law appears completely unrelated to the problem of anti-dumping duties, a closer inquiry reveals that the problems associated with anti-dumping measures are similar to the problems that led to the development of heightened scrutiny: protecting politically weak groups and fundamental rights. First of all, the heightened scrutiny standard is appropriate for anti-dumping duties because of the similarities between the justifications for strict scrutiny in U.S. law and the justifications for preventing protectionist tariffs through anti-dumping measures. For example, just as strict scrutiny is justified where there is evidence that the political process has broken down and law is based on impermissible motivations, a “more searching judicial inquiry”¹²⁸ is necessary by the D.S.B. for challenges to anti-dumping duties. This is particularly true given that domestic agency determinations in anti-dumping decisions typically ignore the consumers harmed by the decision and “the protectionist status quo enjoys the support of entrenched bureaucracies and import-competing corporate interests.”¹²⁹

123. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating legislation discriminating against men under a heightened scrutiny standard of review).

124. *Booher v. Worrill*, 57 Ga. 235, 238 (1876).

125. E.g., infringements on fundamental rights have been subject to strict scrutiny—and protected—in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Roe v. Wade*, 410 U.S. 113 (1973). In the free speech context, cases such as *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) have suggested such strict scrutiny as to “accord absolute protection to the speaker so long as he does not use express words of incitement.” GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 1096 (Aspen 5th ed. 2005).

126. For a recent example, see *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008) (finding the right to bear arms was a fundamental right such that any legislation restricting ownership of weapons must be subjected to strict scrutiny and citing *Carolene Products*, 304 U.S. 144 for the proposition that rational basis scrutiny was inappropriate). See also *Winkler, supra* note 118, at 802 (noting that courts can use “an alternative course in core rights and discrimination cases.”).

127. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding a statute that made certain types of speech illegal notwithstanding the First Amendment’s protection of free speech because the statute was narrowly construed to only outlaw “fighting words”).

128. *Id.*

129. *Lindsey & Ikenson, supra* note 48, at 117.

The very problems that make anti-dumping investigations perfunctory and the protectionist tariffs a virtual certainty suggest that the anti-dumping process ignores the interests of many groups who benefit from dumping. In fact, J. Michael Finger acknowledges the potential for discrimination in anti-dumping mechanisms, stating:

It is no surprise that when economic decisions are made through political instruments, which the anti-dumping mechanisms are, it is the economic interests of the least politically powerful group that are put in greatest jeopardy.¹³⁰

The reference to political power and wealth diversion are key. Anti-dumping duties are assessed without taking into account the full national economic interests because of the imbalance in political power within the anti-dumping investigation mechanism. While consumers may not be an insular minority in general, for the purposes of anti-dumping law they have no voice in a broken political process. Judicial intervention can eliminate this welfare loss:

If statutes employing suspect classifications are inordinately likely to be wealth transferring rather than wealth creating, strict judicial scrutiny that discourages such legislation reduces the dead weight losses associated with competing for and enacting it.¹³¹

Since every government authority conducting these anti-dumping investigations arguably under-represents the interests favoring dumping—or more accurately, the interests favoring normal competitive behavior—strict scrutiny could overcome the problems of this institutional breakdown.¹³²

Strict scrutiny is also justified due to the fundamental nature of trade within the W.T.O. system and the inherent tension between that principle and anti-dumping tariffs. Even though Article VI allows anti-dumping duties, this provision should be interpreted in the shadow of the founding document's Preamble, which states that member countries should endeavor to "expand [] the production and exchange of goods" chiefly through "substantial reduction of tariffs *and other barriers to trade*."¹³³ Just as racially-motivated discrimination is against the idea of a "color-blind" Constitution in the United States,¹³⁴ anti-dumping provisions authorizing protectionist tariffs require more scrutiny because of their inherent tension with the very existence of the W.T.O. Thus, D.S.B. panels and the Appellate Body should allow anti-dumping duties, but

130. Finger, *supra* note 15, at 38.

131. Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry Into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1815 (1992), reprinted in Stone, *supra* note 125, at 538.

132. See also, Ely, *supra* note 118, at 102-03 ("Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority . . . obviously our elected officials are the last people we should trust with identification of either of these situations.").

133. G.A.T.T. Preamble, *supra* note 19, at 194-96 (emphasis added).

134. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

only if they can find that the dumping duty is narrowly tailored to actual impermissible dumping and has a compelling justification (e.g. predatory or strategic dumping). This heightened scrutiny would align the understanding of Article VI with the greater framework of the W.T.O.'s constitution and ensure that anti-dumping duties are not used to subvert the very purpose of the institution.

Furthermore, establishing an explicit heightened scrutiny standard under Article VI may not be such an extreme change from the status quo for the Appellate Body. The history of Appellate Body's treatment of anti-dumping challenges suggests that it has quietly—perhaps unintentionally—adopted this heightened standard already. As Daniel Tarullo observed, the W.T.O.'s track record of evaluating anti-dumping cases shows that the standard of review in use is a much higher standard than the one on the books.¹³⁵ Tarullo even states that the Appellate Body has a “practice of applying strict scrutiny of trade restrictions taken by national administrative authorities.”¹³⁶

This article argues that even if such a *de facto* practice exists, it should be converted into an explicit policy statement as a method of increasing the number of challenges to anti-dumping assessments. This policy would make such a standard more likely to be utilized in every dispute settlement panel and would advertise to countries with low legal capacity, who are least likely to be aware of such a *de facto* standard, that the resources necessary to challenge the anti-dumping duty are lower than they would expect from looking at the dispute settlement rules in Article XVII.¹³⁷ A heightened scrutiny standard also addresses the legal capacity issue by decreasing the expected cost of litigation in front of the D.S.B. and increasing the likelihood of winning a challenge to an anti-dumping duty. While a heightened scrutiny standard would initially increase the amount of litigation in front of the W.T.O., as this standard becomes more established, one would expect far more anti-dumping duties to be settled or never assessed. In addition, even if the political economy of anti-dumping assessments continued to produce anti-dumping duties in non-

135. Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions* 59 (Georgetown University Law Center 2002 Working Paper Series in Business, Economics, and Regulatory Policy, Working Paper No. 351080, 2002), available at <http://ssrn.com/abstract=351080> or doi:10.2139/ssrn.351080.

136. *Id.*

137. The standard of review is articulated in A.D.A. article XVII.6(i)-(ii), which states that all administrative reviews such as anti-dumping determinations should be given both factual and legal deference as long as “the evaluation was unbiased and objective” and based on a “permissible interpretation” of the A.D.A. provision. If this occurs, “the evaluation shall not be overturned” “even though the panel might have reached a different conclusion.” Tarullo believes that this practice has negative consequences due to the dynamic effect of unhappy member countries “limiting later opportunities for trade liberalizing negotiations.” Daniel K. Tarullo, *Paved with Good Intentions: The Dynamic Effects of WTO Review of Antidumping Action*, 2 WORLD T. REV. 373, 374 (2003) (arguing that at least in the anti-dumping sphere, such dynamic effects are outweighed by the benefits to all players from decreased anti-dumping challenges to world trade).

predatory pricing situations, the clear standard would decrease the burden on the petitioner for establishing that the duty was inconsistent.

Finally, the Appellate Body has established a higher standard of review in other areas of adjudication. For example, in *EC—Asbestos*,¹³⁸ the Appellate Body interpreted the public health exception in Article XX(b) to require a higher burden of proof by a member challenging the exception as not being the least trade-restrictive regulation reasonably available.¹³⁹ As the W.H.O. noted in its analysis of that decision, the standard of review for health-related trade restrictions changed after the *EC—Asbestos* decision:

The *EC—Asbestos* ruling does not provide WTO members with an argument that automatically trumps any challenge that a measure relating to health is unnecessary, but it establishes that challenges to health-related measures face strict scrutiny as to their effectiveness vis-à-vis the measure adopted.¹⁴⁰

There is nothing to prevent the Appellate Body from making a similar determination for all disputes pertaining to Article VI and putting the higher burden on defendants in those cases.

Under heightened scrutiny, D.S.B. panels or the Appellate Body would explicitly impose a higher threshold for the country imposing the anti-dumping duty in order to sustain a finding that anti-dumping duties are necessary. This burden could be satisfied by showing predatory dumping or strategic dumping, the only types of dumping that justify anti-dumping duties. This would also integrate international trade with domestic antitrust standards, which differentiate between actionable predatory price discrimination and non-actionable competitive behavior,¹⁴¹ while avoiding the political economy problems of requiring that each member government approve a new standard for enacting anti-dumping duties. Duties would subsequently have to be narrowly tailored to only prevent truly deleterious dumping while allowing other types of trade to continue; evidence of run-of-the-mill dumping would no longer justify anti-dumping duties.

138. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, (March 12, 2001), available at <http://www.worldtradelaw.net/reports/wtoab/ec-asbestos%28ab%29.pdf>.

139. Subsequent reports have confirmed this higher standard. See, e.g., Appellate Body Report, *Brazil—Imports of Retreaded Tires*, ¶ 210, WT/DS332/AB/R (Dec. 17, 2007). In this instance, it is interesting to note that the Appellate Body stated that a “fundamental principle” was involved: “the right [] to determine the level of protection that they consider appropriate in a given context.” *Id.* This language mirrors the language that courts use for justifying strict scrutiny in the United States.

140. David P. Fidler et al., World Health Org., GATS Legal Review Team, *Legal Review of the General Agreement on Trade in Services (GATS) from a Health Policy Perspective* ¶ 255 (Globalization, Trade, and Health Working Paper Series, 2005), available at http://whqlibdoc.who.int/gats/GATS_Legal_Review_eng.pdf.

141. There are important differences between the standards of proof in domestic competition laws, for example between the E.C. and U.S., see Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. COMPETITION L. & ECON. 427 (2005). However, for the purposes of this reform, whichever standard the Appellate Body adopted in practice would accomplish the goal of decreasing the legal capacity requirements for anti-dumping challenges.

This heightened scrutiny approach would mitigate the problem of legal capacity for W.T.O. members by making it easier to challenge anti-dumping duties imposed on a member's exporting industries. Furthermore, if member countries knew *ex ante* that their duties would consistently be challenged, they would likely impose fewer unjustified anti-dumping duties in order to avoid ensuing legal costs. This effect is borne out in the theoretical work done by Professors Busch, Reinhardt and Shaffer.¹⁴² One would also expect lower levels of anti-dumping retribution as challenging the laws became easier. Of course, while this proposal would diminish the prevalence of anti-dumping duties, it would not eliminate all unjustified duties; some domestic industries would still insist on protection despite the costs and enjoy the protection for the brief period before the D.S.B. panels found the tariff inconsistent with W.T.O. rules.

Although there are several counter-arguments for why heightened scrutiny jurisprudence is inappropriate to anti-dumping duties, all of them can be refuted or blunted. First, the fact that exporter countries challenging anti-dumping duties would not have any relationship to the importing country's consumers, who are hurt by the anti-dumping duties, does not mean the exporters have no standing or that the D.S.B. or Appellate Panel must ignore the malfunctioning anti-dumping process. While the issue of standing has merit, review panels can take into account the suspicious nature of anti-dumping investigations, including the badges of fraud that would suggest motivations contrary to the W.T.O.'s founding documents, and the way they ignore interests in the importing country itself. Even the fact that panels do not exercise *de novo* review¹⁴³ does not mean that the D.S.B. must accept the procedures themselves as appropriate.

A second argument against this article's proposal is that consumer groups are not the type of political minority that require a heightened scrutiny standard, since they constitute a large interest group in the importing country. This can also be refuted by the near unanimity of criticism of the anti-dumping investigation process for being opaque to most affected parties. Even large interest groups can be shut out where the political process does not take their values into account.¹⁴⁴ In fact, there is little doubt that anti-dumping duties would disappear if the political process were to operate correctly¹⁴⁵—precisely the type of circumstance where strict scrutiny would be appropriate in the United States. Increasing trade is the foremost goal of the W.T.O. and where the agreement's text seems to contradict itself, as it arguably does in Article VI,

142. See Busch et al., *supra* note 13, at 28.

143. See Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 7.6, WT/DS184/R (Aug. 23, 2001).

144. See Neil Vousden, *The Economics of Trade Protection*, at 182 (Cambridge, 1990) (noting that consumers "have been notably unsuccessful in forming a coalition to oppose tariffs and other distortions" even though these groups have more to gain from free trade than the manufacturers do from protection through anti-dumping duties); Mankiw and Swagel, *supra* note 9, at 107-08.

145. See Niels, *supra* note 28, at 484 (noting that if all interests were taken into account within the anti-dumping investigation, "few duties would be applied after such analysis").

D.S.B. panels should refer to the first principles embodied in the Preamble and protect free trade amongst W.T.O. members.

V.
CONCLUSION

This article has focused on the negative consequences of anti-dumping duties, their prevalence in the current trading environment and the legal capacity issues that allow anti-dumping duties to flourish. Although anti-dumping policies no longer have widespread support,¹⁴⁶ this criticism has rarely led to workable solutions for reform. By contrast, the reform proposed by this article goes directly to the problem of legal capacity without requiring major reforms in the way the W.T.O. operates. By increasing the likelihood that such challenges will be successful at a cheaper price, a heightened scrutiny standard should effectively reduce the use of anti-dumping duties. While Article VI is not going anywhere, the utilization of that provision can, and should, be limited by making the procedural changes outlined and reducing the legal capacity constraint in challenging anti-dumping duties.

146. Finger, *supra* note 15, at 7.