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

Reid Bolton
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By Reid M. Bolton†

Abstract:
The W.T.O.’s anti-dumping provisions are widely recognized as a barrier to free trade that caters to members’ protectionist impulses. Even as the W.T.O. has made significant progress in removing most other barriers to trade, the number of anti-dumping duties has continued to climb. This paper proposes a new method for reducing the impact of antidumping duties based on recent scholarship that suggests that legal capacity is the single most important factor preventing countries from challenging duties assessed against them in front of the W.T.O.’s dispute resolution body. This proposal, grounded in the “strict scrutiny” standard developed in U.S. law, suggests that dispute settlement panels utilize a heightened scrutiny standard for anti-dumping challenges that would decrease the required capacity for challenging duties and thereby increase the likelihood that these anti-dumping duties would be challenged in the first place. Furthermore, we would expect fewer anti-dumping duties to be assessed over the longer term as the heightened scrutiny standard decreased the usefulness of these duties. This solution is more viable than other proposed solutions for reducing anti-dumping duties due to the difficulties in amending the W.T.O. charter and the resistance to providing low-capacity members with more legal resources.

In the first week of February, 2010, the world's three largest trading entities¹ all became directly involved in anti-dumping 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,² while Vietnam alleged that the United States had imposed the same type of protectionist tariffs on its imported shrimp.³ 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

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² E.C. Antidumping Measures on Certain Types of Footwear, WT/DS405/1 (2010) online at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds405_e.htm
initiating anti-dumping investigations on behalf of their domestic producers—there are over 200 investigations a year\(^4\)—or challenging another members' imposition of anti-dumping duties in front of the W.T.O.'s Dispute Settlement Body (D.S.B.),\(^5\) challenges based on Article VI are practically an everyday occurrence.

These everyday occurrences, however, can often raise eyebrows as well as 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,\(^6\) 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.\(^7\) The timing of the announcement was no accident. The anti-dumping investigation was clearly intended to counter the tariffs placed on Chinese products\(^8\) and 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-a-vis other members because there are few checks on their use.

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4 See W.T.O, Press Release 556, "WTO Secretariat Reports Increase in New Anti-Dumping Investigations" (May 7, 2009) (showing that 3,427 investigations were initiated between 1995 and 2008) online at http://www.wto.org/english/news_e/pres09_e/pr556_e.htm.
5 Between 1999 and 2004, there were 41 anti-dumping disputes before the D.S.B. See Chad P. Brown, Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Challenged?, 34 J. L. Studies 515, 517 (2005). From 2004 through March of 2010, there were another 22 disputes. See WTO.org "Chronological List of Disputed Cases," online at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm
8 See Gregory Mankiw and Philip L. Swagel, Antitrust: 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").
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.9

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 settlement mechanism has invariably found the duties inconsistent with W.T.O. obligations.10 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 the 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.11

Recent scholarship has identified a troubling characteristic of anti-dumping disputes:

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11 See Alan O. Sykes, Antidumping and Antitrust, What Problems Does Each Address?, 1998 Brookings Institute Trade Forum 1, 2 (noting that the purpose of anti-dumping law is to protect "industries facing weak markets or long-term decline").
legal capacity, rather than more relevant criteria, predicts both the targets of anti-dumping duties and the likelihood of anti-dumping measures being challenged. These studies have shown 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.\footnote{See Marc Busch, Eric Reinhardt, and Gregory Shaffer, Does Legal Capacity Matter? Explaining Patterns of Protectionism in the Shadow of WTO Litigation, SSRN (2009), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091435.} There is also evidence that anti-dumping provisions can lead to "vigilante justice,"\footnote{Bown, Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged? 34 J Legal Studies at 524.} 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 fellow W.T.O. members 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,\footnote{J. Michael Finger famously suggested that the best "reform" of the anti-dumping provision in the GATT was complete redaction. See Finger, Antidumping 57 (Michigan 1993) ("The most appealing option is to get rid of antidumping laws and to put nothing in their place.").} those avenues are foreclosed by the complete deadlock of every round of trade negotiations over the last decade as well as resistance from member governments. The antidumping regime was an important factor in establishing the original 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.\footnote{See Nelson, The Political Economy of Antidumping, 14 Eur J Pol Econ at 579-580 (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).}

Since complete repeal is impractical and likely impossible, this paper 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 change would reduce anti-dumping duties by importing a theory of "heightened scrutiny" for all anti-dumping cases 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 paper argues that such a procedural proposal is not outside the realm of possibility for the D.S.B. and W.T.O. to adopt and 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 increase the number of petitions raised in front of the W.T.O. Since most petitions against anti-dumping duties that make it to the DSU already end favorably, this reform could also ultimately decrease the overall number of anti-dumping duties assessed.

The rest of this paper 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 antidumping investigations and disputes. In particular, it highlights the differences in usage and outcomes for high-capacity (e.g. sophisticated) W.T.O. members compared to low-capacity (many 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 paper 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.
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 (NTB) have remained in place or increased in prevalence. The increased utilization of NTBs 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 NTBs to remain in place even if they have a negative effect on trade.  

For example, protectionist policies are allowed by the W.T.O. where such trade may harm the health of citizens, impair the member's national defense, or, under certain circumstances, trigger unexpectedly strong negative consequences for domestic manufacturers.

This paper focuses on one NTB in particular—the antidumping 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 ADA). These agreements allow protection whenever an export is sold at "less than normal value" as determined by the importer's domestic government. This Part 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 is to illustrate the utter lack of

18 See Article XXI of the GATT Agreement (1947).
19 See Article XIX of the GATT Agreement (1947).
20 Art. VI.1(a)-(b), General Agreement on Tariffs and Trade (1947).
justification for such policies and the transparently protectionist decisions that 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.\textsuperscript{21} The original justifications for antidumping policy were closely tied to the justifications for enacting antitrust laws.\textsuperscript{22} Fears of predatory pricing from foreign imports justified protections for domestic firms that were already subject to identical internal anti-monopoly legislation. Jacob Viner provided some of the original theoretical support for antidumping provisions and suggested that dumping was "presumptive evidence of abnormal and temporary cheapness"\textsuperscript{23} that would subsequently lead to monopolistic behavior and higher prices for consumers in the long run. Robert Willig has described predatory-pricing dumping as:

\begin{quote}
[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.\textsuperscript{24}
\end{quote}

Although predatory dumping \textit{would} justify anti-dumping duties, the mechanisms W.T.O. members use for identifying dumping does not distinguish between this type of dumping and other types of dumping.\textsuperscript{25} Incidentally, domestic antitrust law has in fact evolved over time to


\textsuperscript{22} In fact, the antidumping law of 1916 was only enacted after the Supreme Court had denied extraterritorial application of the Sherman Act. See \textit{American 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").

\textsuperscript{23} Jacob Viner, \textit{Dumping: A Problem in International Trade}, 147 (Chicago 1923).

\textsuperscript{24} Willig, \textit{Economic Effects of Antidumping Policy} at p. 66.

\textsuperscript{25} See Willig, \textit{Economic Effects of Antidumping Policy} at 75 ("General antidumping policy does not necessarily adhere to this philosophy, and the comparison between export prices and "normal values" does
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.\textsuperscript{26}

In contrast, antidumping law has not followed the same path. Instead of requiring a showing of predatory intent as modern antitrust law does, Article VI has no such element. 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 justifications for anti-dumping protection has been shown to be highly unlikely to ever take place.\textsuperscript{27}

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.\textsuperscript{28} This dumping can be problematic if the industry has high R&D 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

\textsuperscript{26} See C.B.O. 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.”).

\textsuperscript{27} See Gunnar Niels, What is Antidumping Policy Really All About?, 14 J Econ Surveys 467, 476 (2000) (noting that several prominent scholars have dismissed the threat of predatory pricing in international markets). In fact, according to Edwin Vernust, “predatory dumping has never been proven to exist.” Edwin Vernust, The WTO Anti-Dumping Agreement: A Commentary, 1 n 7 (Oxford 2005).

than help producers to the detriment of consumers in the importing market.\textsuperscript{29} 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.\textsuperscript{30}

Other purported justifications for anti-dumping duties that have been advanced have included fears about market-expansion dumping,\textsuperscript{31} cyclical dumping,\textsuperscript{32} and state-trading dumping.\textsuperscript{33} However, the negative effects of these categories of dumping have not materialized. For example, Robert Willig has argued that these types of dumping (market-expansion, cyclical, and state-trading) are "entirely consistent with robustly competitive conditions in the importing nation's market."\textsuperscript{34} Indeed, "the benefits to buyers outweigh, in terms of consumer surplus, any rent or producer surplus that is lost as a result of the sales of imports at the low dumping price."\textsuperscript{35}

However, even conceding that there are some valid reasons for creating anti-dumping provisions in the W.T.O., these mechanisms in fact allow for a "disguised form of protectionism."\textsuperscript{36} While antidumping theory was based on fears of certain predatory pricing (and strategic dumping) schemes—which are economically detrimental but comparatively rare—in practice these policies have been applied to non-predatory price discrimination and sales below cost that are "generally beneficial and common."\textsuperscript{37} These forms of dumping are

\begin{itemize}
\item \textsuperscript{29} Willig, \textit{Economic Effects of Antidumping}, at 71.
\item \textsuperscript{30} Niels, \textit{What is Antidumping Policy Really All About?}, 14 J. Econ. Surveys 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).
\item \textsuperscript{31} 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, \textit{Economic Effects of Antidumping Policy}, at 61.
\item \textsuperscript{32} 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 Willig, \textit{Economic Effects of Antidumping Policy}, at 62.
\item \textsuperscript{33} 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 purposes of gaining hard currency. See Willig, \textit{Economic Effects of Antidumping Policy} at 63.
\item \textsuperscript{34} Id at 66.
\item \textsuperscript{35} Id at 67.
\item \textsuperscript{36} Jackson et al, \textit{International Economic Relations} at 757.
\end{itemize}
beneficial because consumers receive the gains from lower prices and this type of competition either forces domestic producers to achieve their own cost reductions or close shop. Therefore, when anti-dumping duties prevent these types of dumping, the importing country is actually made worse off.

The idea that anti-dumping provisions could be used for nefarious motives is not new. There are many examples of domestic producers alleging that exporters are dumping products into the market where there was no merit to the allegation. \(^{38}\) Indeed, there are few doubts that antidumping measures hurt the overall economy of the US far more than any benefits provided to the domestic producers. \(^{39}\) Furthermore, the presence of anti-dumping provisions alone can depress real income globally through higher prices since the "mutual threat of antidumping enforcement could stifle international competition, to the detriment of consumers and efficient suppliers in all countries involved." \(^{40}\) 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. \(^{41}\) In other words, even though the overall welfare of the importing country is typically higher by allowing the dumping to take place, \(^{42}\) the small risk of injurious dumping provides cover for the many domestic actors that would prefer protectionist policies. Indeed, anti-dumping provisions are really just "ordinary protection, albeit with a good public relations program" \(^{43}\) that allows domestic interest groups to appeal to the superficial

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40 Willig, Economic Effects of Antidumping Policy, at 68; See also Nelson, Political Economy of Antidumping, 22 Eur. J. Pol. Econ. at 564 (reviewing scholarly papers that found that anti-dumping duties had "a statistically significant trade suppressing effect").
41 See K.D. Raju, India's Involvement in Antidumping Cases in the First Decade of WTO at 37 (noting that "an investigation is more effective than actual antidumping duties in many cases. This is mainly due to the 'chilling effect' and harassment of the importers in the course of the investigation").
42 See Niels, 14 J. Econ. Surveys at 475 ("Importing country's welfare increases with dumping because of the inflow of cheap imports.").
43 J. Michael Finger, Antidumping at 13.
"righteousness" of protecting domestic producers from unfair competition.44

Thus, the inclusion of Article VI could be seen as the most important mistake in the G.A.T.T.'s founding documents and anti-dumping duties currently occupy the same position as 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 in the end hurts everyone when applied universally. There is a collective action problem requiring 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 of disincentivizing frivolous anti-dumping disputes while nevertheless keeping the forum open for true dumping accusations. The next 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

Theoretically, antidumping duties are only possible when a member country can prove that the product has been 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."45 However, in many cases there is no easy way of determining what a normal price is for the purposes of anti-dumping investigations. For example, in the U.S., the Department of Commerce 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 U.S., then the D.O.C. looks to other third-party markets. Furthermore, if there are no comparable markets, then the

44 Niels, 14 J. Econ. Surveys at 485 (cited in 29).
45 Art. 2.1, ADA.
D.O.C. constructs its own estimate of what the product’s price should be by making assumptions about what the costs would be to sell the product in the home country. This sequence of events should raise questions about the validity of any assessment that rests on such assumptions.

Antidumping duties are also possible if the product has been sold at a price below "full cost." Of course, as Edwin Vermulst points out, this simple statement also introduces a host of uncertainties, including what constitutes the normal value and export price, whether the products are “like” and how to determine the ordinary course of trade. Thus, a DSB panel could be right to assume that the evaluating agencies within the government likely manipulated these terms to reach a predetermined result.

In addition to requiring that the product was dumped, Article VI also requires that the importing country prove that the dumping "causes or threatens material injury to an established industry" due to the dumping, and evidence of a causal link between the dumping and the injury itself. This additional requirement can constrain the ability of countries to impose duties against the exporter. However, the failure of Article VI or the ADA 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 "positive evidence," "objective examinations," and verifiable evidence, these terms still give much leeway to the examining agencies for determining how to interpret evidence and do not even require for the importing country to disclose all of the factors it considered in reaching its conclusion.

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47 Vermulst at 9.
48 GATT Art. VI. Note that dumping itself is not per se incompatible with the WTO. The causal link is critical.
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 antidumping duties are assessed. While each country can develop their own procedures, the ADA establishes a "floor" for these investigations and most procedures have tended to mirror the U.S. and Canadian antidumping laws since those 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. That agency then investigates the claim by inquiring with the foreign producer about their 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 for the exporter to provide a substantial amount of information to the government agency. In fact, the procedure can be quite onerous for the exporter being accused of dumping on the domestic market—and in the U.S. at least, failure to provide the requested information in a timely manner can lead to an adverse inference justifying antidumping tariffs. 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—raising its prices in order to avoid the time and expense of dealing with the

54 See 19 U.S.C. 1677e(b) ("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.").
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 US 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 country or an equivalent 3rd 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. Further complication is present if the products are slightly different (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 (which it invariably does), the agency must then identify a "material injury" to the domestic industry. This injury is easily proven due to the plethora of negative 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.

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 despite those other macroeconomic factors. However, given the fact that antidumping duties can be established merely by showing the

55 Even if the product is sold in the exporting country, if such sales volume is less than 5% of US sales, then the prices cannot be used in calculations. See note 60 and accompanying text.
56 See ADA Art. 3.2.
57 See ADA 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." Id. 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 US market).
threat of injury, antidumping duties can generally be imposed even where "the link between dumping and injury is missing." 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."  

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As the above snapshot of the antidumping investigation procedures suggest, there is more art than science to the process of assessing antidumping 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, different credit terms . . . Is it any wonder that the prices are not identical? 

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

In summary, the antidumping procedures are subject to three main criticisms: (1) inferences, as opposed to data, make up the majority of the outcome in any particular analysis; (2) overly complex regulations do not provide precision due to the multitudes of scenarios that require assumptions; and (3) "complexity camouflages opportunity for abuse." Each of these three problems alone would probably suffice to raise doubts about the reliability of antidumping investigations. Combined, the procedures are "prone to finding

58 Debasish Chakraborty, KD Raju, and Julien Chaisse at p. 317.  
60 Lindsey and Ikenson, at 106.  
61 ADA Art. 3.7.  
62 Finger, Antidumping at 29.
dumping even when there is no price discrimination or selling below cost” and “fail to
distinguish between normal commercial pricing practices and those that reflect market-
distorting government policies.” Even the most procedurally sound anti-dumping
investigation can lead to a suspicious result. There are simply too many ways to game the
outcome.

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

Once all of the elements have been proven by the investigating agency, the national
government makes a decision about whether to assess the anti-dumping duty. If the
government decides to impose the duty (which happens the majority of the time) then the
exporting firm’s government must decide whether to challenge the protectionist tariff. Yet
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.

This gap is strange because challenges to anti-dumping disputes are generally

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63 Lindsey and Ikensen, p. 112.
64 Lindsey and Ikensen at 117.
65 "Authorities are not always perceived to be acting in an unbiased and neutral manner." Varshney, Anti-
dumping Measures under the WTO Regime at 391 (Universal Law 2007).
67 Between 1969 and 1993, 90% of anti-dumping measures were implemented by the U.S., E.U., Canada,
68 Michael O. Moore and Maurizio Zanardi, Does Antidumping Use Contribute to Trade Liberalization in
Developing Countries?, 42 Canadian J Econ. 469, 471 (2009).
69 See Hoekman, Horn and Mavroidis, at 8 (noting that 62% of investigations lead to duties) (cited in note 9).
70 See Hoekman, Horn, and Mavroidis, at Table 4, 5.
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. The majority of the other disputes led to some sort of negotiated settlement. Another study found at least parts of the anti-dumping measures invalid in 12 of the 13 cases it reviewed. 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. 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. Legal capacity can not only predict which countries will impose anti-

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71 Chakraborty at 163 Table 8.1, in Debroy and Chakraborty (eds.).
72 There is evidence that negotiated settlements have a high likelihood of leading to partial or full concessions. See Marc L. Busch and Eric Reinhardt, 24 Fordham Int'l Law J 158, 163 Table 2 (2000) (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 legal capacity playing field. See note 110 and accompanying text.
73 See James P. Durling, Deference, but Only When Due: WTO Review of Anti-Dumping Measures, 6 J. Int. Econ. Law 125 (2003).
75 See, for example, Andrew T. Guzman and Beth A. Simmons, Power Plays and Capacity Constraints: The
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 dispute settlement body.

Legal capacity can be defined as the "institutional, financial, and human resources available to pursue a case." This characteristic is important for W.T.O. members due to the increasing "judicialization of international trade dispute settlement" 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. These cases also require legal fees in the hundreds of thousands, if not millions, of dollars.

Legal capacity is not political power 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, 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

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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, Reinhardt and Shaffer, Does Legal Capacity Matter? Explaining Patterns of Protectionism in the Shadow of WTO Litigation, at 28 ("Legal capacity thus appears to make at least as much substantive difference as market power.") (emphasis in original).

76 Guzman and Simmons, 34 J. L. Studies at 566.
79 Gregory Shaffer, Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed at 183 (cited in note 93). The author estimated a smaller matter costing $400,000 and a more complicated dispute costing $2 Million. 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.
80 "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." Guzman and Simmons at p. 571.
81 "95 of the WTO's 120 non-OECD members have never filed a WTO complaint." Shaffer, Gregory Shaffer, Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed at 185 (cited in note 93).
GDP per capita.\textsuperscript{82}

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 related to the complexity of the W.T.O. dispute settlement system and the resources required to navigate it.

For example, studies show that that low capacity countries are the most frequent targets of anti-dumping duties\textsuperscript{83} and are least likely to challenge those duties.\textsuperscript{84} This suggests that countries make decisions about which countries to target their anti-dumping duties against at least in part because of the perceived (in)ability 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, this study estimated that there would be 10% less anti-dumping measures imposed.\textsuperscript{85}

Public choice also explains the decision to impose these duties against these particular

\begin{footnotesize}
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\item \textsuperscript{82} Gregory Shaffer, Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed at 170 (cited in note 93).
\item \textsuperscript{83} Busch, Reinhardt, and Shaffer, Does Legal Capacity Matter? 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.).
\item \textsuperscript{84} See Busch, Reinhardt, and Shaffer Does Legal Capacity Matter? at 25 ("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.").
\item \textsuperscript{85} Busch, Reinhardt, and Shaffer Does Legal Capacity Matter? at 28. See also Moonhawk Kim, Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures, 52 Int. Studies Q 657, 679 fig. 7 (2008) (noting that the likelihood that a WTO member will request consultations is directly correlated with legal capacity); Gregory Shaffer, Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed 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”).
\end{enumerate}
\end{footnotesize}
exporters. The interest groups that initially file complaints with domestic agencies will try and identify firms in countries least likely to challenge the duties imposed. As Chad Bown notes, "domestic industry [...] recognize 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." 86

Legal capacity is also important in that the required capacity to levy anti-dumping duties themselves is much lower than the expertise required to challenge a duty in front of the W.T.O. Thus, low capacity countries may have a strong preference for "vigilante justice" and bring anti-dumping their own duties instead of challenging other anti-dumping duties where it was an option. 87 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 antidumping context. Indeed, legal capacity explains the behavior of complainants across most aspects of dispute resolution regardless of what claim is being litigated. 88 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." 89 Several studies have also described how sufficient legal capacity to bring complaints is directly correlated with other beneficial aspects of the dispute settlement process. 90

87 See Bown, Trade Remedies and World Trade Organization Dispute Settlement, 34 J. L. Studies at 524. But see Busch, Reinhardt and Shaffer, Does Legal Capacity Matter? Explaining Patterns of Protectionism in the Shadow of WTO Litigation at 29-30 (finding no statistical significance for vigilante justice as an explanatory variable).
88 See Guzman and Simmons, 34 J. L. Studies at 562 (“Poor countries have to pick their fights very carefully, and this is reflected in the types of defendants they pursue.”).
89 Id.
90 See, for example, Marc Busch and Eric Reinhardt, Bargaining in the Shadow of the Law: Early Settlement in
Furthermore, countries appear to gain from simply remaining apprised of the latest caselaw and textual interpretations.\(^{91}\) High capacity countries have 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.\(^{92}\) 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 WTO rules over time."\(^{93}\)

In other words, legal capacity matters not only in the antidumping context but in all circumstances. However, this paper focuses on antidumping both because (1) it is the most common dispute between W.T.O. members; and (2) Article VI is so easily abused and is "little more than an opaque way of protecting favored industries that have powerful lobbies."\(^{94}\) 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 paper focuses on the highest priority problem. It follows that the solutions proposed in the next section 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 (i.e. those provisions are not as universally criticized by economists and abused by domestic interest groups).

\(^{91}\) Shaffer, How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, ICTSD Resource Paper No. 5, 10 (2003) (noting that WTO law follows a common-law approach and that judicial outcomes are far more important in the WTO than in sovereign states due to the inability of the governing body to make statutory changes within the unanimity model).

\(^{92}\) Id.

\(^{93}\) Mankiw and Swagel, Antidumping: The Third Rail of Trade Policy, 84 Foreign Affairs at 108.
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 they have a chance of improving their trading terms. If they can get their complaint in front of a panel, then the mechanisms of the D.S.B. take over and they have an even better chance of having the duties found inconsistent. Thus, if the goal is to reduce the damage of antidumping duties on world trade, then legal capacity is the linchpin. 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 DSB.

III Previous Proposals for Reform

Of course, this paper'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: incremental procedural or substantive reforms and major structural overhauls. This Part 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.\(^95\) 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.\textsuperscript{96} Another reform proposal increases the burden of proof that domestic firms must
present to the investigating agency in order to open an investigation.\textsuperscript{97} 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."\textsuperscript{98} Currently, members have the
option of assessing a duty equal to the dumping margin or assessing the lesser duty. 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.\textsuperscript{99} 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.\textsuperscript{100} Other ideas include requiring a simple
arbitration ruling for straightforward cases and establishing a standing advisory panel that can

\textsuperscript{96} Brink Lindsey and Dan Ikenson, Reforming the Antidumping Agreement: A Roadmap for WTO
Negotiations, at 19.
\textsuperscript{97} Id at 30.
\textsuperscript{98} ADA Article 9.1; See Varshney, at 446–472.
\textsuperscript{99} See Varshney, at 446–472; Lindsey and Ikenson, Reforming the Antidumping Agreement: A Roadmap for
WTO Negotiations, at 35.
\textsuperscript{100} 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 (March
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 antidumping duties as advocated by Finger as well as Mankiw and Swagel. 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 (i.e.
predatory behavior or strategic dumping). 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. Alternatively, an expanded safeguard provision under Article XIX would
allow the same amount of protection but under a more intellectually honest framework that
admitted protection for what it really was.

Other proposed reforms have included giving standing to other parties in the anti-
dumping investigation itself or implementing a requirement that domestic agencies assessing
whether to impose a duty must take a totality-of-the-circumstances approach when
determining whether the duty is appropriate. Each of these reforms would have the effect
of reducing the likelihood that the dumping duty would be assessed in the first place by
adding more counter-pressure to the domestic producers lobbying for the duty.

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101 See note 15.
102 Mankiw and Swagel, Antidumping: The Third Rail of Trade Policy, 84 Foreign Affairs 107.
103 See Robert A. Lipstein Using Antitrust Principles to Reform Antidumping Law, in E.M. Graham and
J.D. Richardson (eds.) in Global Competition Policy. (Institute for International Economics, 1997)
105 See Michael O. Moore, Antidumping Reform in the Doha Round: A Pessimistic Appraisal, 8 presented
at the University of Hong Kong conference “The Economics of the Doha Round and the WTO” (Dec. 16,
106 See Moore, Antidumping Reform in the Doha Round: A Pessimistic Appraisal, at 9 (cited in note 130);
Lindsey and Ikenson, Reforming the Antidumping Agreement: A Road Map for WTO Negotiations at 34.
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 has argued for 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.\textsuperscript{107} This reform, if enacted, would certainly reduce the negative effects of anti-dumping duties by increasing the incentives for low-capacity countries to develop legal capacity.

Another proposed reform is a small-claims court for countries bringing claims under a certain fixed amount.\textsuperscript{108} This procedure would have less procedural requirements and therefore require less legal capacity to utilize. Since many low-capacity countries typically 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 make 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 as it modified the basic structure of Article XXIII or changed Article VI requirements.\textsuperscript{109}

Finally, a number of reforms aimed at legal capacity have already been implemented. For example, the Advisory Centre on W.T.O. Law (ACWL) 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.\textsuperscript{110} While this reform was not aimed at anti-dumping in

\textsuperscript{107}  Gregory Shaffer, \textit{How to Make the WTO Dispute Settlement System Work for Developing Countries}, at 40.


\textsuperscript{110}  See the Advisory Centre on WTO Law, online at http://www.acwl.ch/e/index.html; Gregory Shaffer, \textit{How to Make the WTO Dispute Settlement System Work for Developing Countries} at 29 (suggesting that the AWCL is helpful in litigating challenges but not in identifying claims or collecting crucial data for those claims).
particular, its effect was to make all low-capacity countries more likely to bring challenges on a variety of matters including antidumping claims. The problem with the ACWL, 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."\footnote{See Chad P. Bown, Self Enforcing Trade: Developing Countries and WTO Dispute Settlement, 138 (2009).} As a general legal assistance organization with less than ten full time attorneys,\footnote{Bown states that the ACWL has "less than ten" attorneys on staff. Bown, Self Enforcing Trade, at 138. The current website lists only eight counsel. See ACWL website, online at http://www.acwl.ch/e/about/staff.html. Either way it is a tiny organization.} its purpose is not to address the problem of anti-dumping duties directly. Instead of simply adding more funding for legal assistance, this paper proposes a targeted approach addressing anti-dumping duties in particular because "modern antidumping practice actually facilitates the kind of unfair and anti-competitive behavior it was intended to prevent"\footnote{Mankiw and Swagel, Antidumping: The Third Rail of Trade Law, 84 Foreign Affairs at 111.} 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.

Some W.T.O. members have also signed side-deals agreeing to not assess any antidumping duties on each others' exports.\footnote{See, for example, Chile-Canada Free Trade Agreement, Chapter M ("neither party shall initiate any anti-dumping investigations or reviews with respect to goods of the other Party") online at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/chap-m26.aspx?lang=en. 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).} This too is an ideal solution that would be far better than most procedural reforms by cutting off the problem at its source. By agreeing to bind themselves through regional or bilateral deals, 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 NAFTA allow anti-dumping duties between its members because it "wanted to preserve its autonomy in applying its anti-dumping procedures against RTA partners."\footnote{Id at 21.}

Of the 74 regional trade agreements (RTA) examined in one 2005 study, only seven explicitly
prohibited anti-dumping duties between its members.\textsuperscript{116}

In contrast to the reforms detailed above, the reform suggested in this paper 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 antidumping 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 antidumping decisions. Thus, this paper 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 with all anti-dumping duties. This standard would be a form of heightened scrutiny for antidumping cases that reach the panel stage. By creating a presumption that the anti-dumping duties are inconsistent with the W.T.O.’s core principles, less legal capacity would be required for challenging the anti-dumping duties (leading to almost all anti-dumping duties being challenged). This standard would be beneficial to all members—not only developing countries—and would also incent settlements at the consultation stage since there would be far less incentive for defendants to take an anti-dumping dispute to the DSB.

The idea of requiring that antidumping duties withstand a more exacting inquiry stems from a line of U.S. caselaw where courts have interposed themselves between various political actors when the court felt that proper functioning of the political process had broken

down.\textsuperscript{117} Whereas courts typically let coalitions pass legislation in its interests as long as it "rationally relates" to the goals of the majority, there are times when these 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"\textsuperscript{118} that judges use whenever they believe that the state accomplished its aims by using a "highly suspect tool"\textsuperscript{119} such as classifications explicitly using race, gender, religion, or citizenship or directly abridged a fundamental part of the Constitution.\textsuperscript{120} Although courts acknowledged that there could be "compelling" justifications for using such categorizations, such justifications had to be so important—and so narrowly tailored—that in reality the measures rarely withstood scrutiny.

Statutes that employed these categories were struck down because their use reflected a failure of the democratic process. Even though the government had passed the law or executed the policy based on a duly constituted majority, courts invalidated the actions because they believed that a properly functioning political process would not have allowed that decision to take place. Thus, the U.S. judiciary adopted a posture of "ensuring that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work."\textsuperscript{121} In the context of U.S. law, the illegitimate motives were typically directed towards insular minorities, but invidious motives could be present in other contexts not involving


\textsuperscript{118} United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).


\textsuperscript{120} 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).

minorities, such as gender. Instead, courts were attuned to preventing impermissible animus or allowing conduct that contained badges of fraud—circumstances where the court should be a more "vigilant judicial police." 

Similarly, heightened scrutiny has been used by courts where law was used to burden rights or privileges fundamental to citizenship. In these instances, when a litigant alleged that government law or action had infringed a fundamental part of our social contract, U.S. courts have closely scrutinized the purported restriction on a group or right. Typically, this strict scrutiny has found the restriction inconsistent with the most basic goals of the U.S. Constitution. Again, the only way for such restrictions to overcome heightened scrutiny is if the restriction is both narrowly tailored and has a compelling justification.

Although this foray into U.S. law appears completely unrelated to the problem of anti-dumping duties, a closer inquiry reveals that the very same problems that led to the development of heightened scrutiny to protect politically weak groups and fundamental rights is well tailored to the problem of antidumping measures. 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 has been based on

122 See, for example, Craig v Boren, 429 U.S. 190 (1976) (invalidating legislation discriminating against men under a heightened scrutiny standard of review).
123 Booher v. Worrill, 57 Ga. 235, 238 (1876).
124 For example, 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, 395 U.S. at 449, 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).
125 For a recent example, see District of Columbia v. Heller, 554 U.S. ___ slip op. 56, n.27 (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 for the proposition that rational basis scrutiny was inappropriate) See also Winker, Strict Scrutiny in the Federal Courts, at 802 (noting that courts can use "an alternative course in core rights and discrimination cases").
126 See, for example, 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").
impermissible motivations, a "more searching judicial inquiry" is arguably necessary by the D.S.B. on challenges to anti-dumping duties due to the fact 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." 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.

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 antidumping 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.

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

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127 Id.
128 Brink Lindsey, in Debroy and Chakraborty, at 117.
129 Finger, Lessons from the Case Studies at 38 in Finger (ed.) Antidumping.
130 Stone et al, Constitutional Law, at 538.
breakdown.¹³¹

Strict scrutiny is also justified due to the fundamental nature of trade within the W.T.O. system and the inconsistency of anti-dumping tariffs with that principle. 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.”¹³² Just as racially-motivated discrimination is against the idea of a “color-blind” Constitution in the U.S.,¹³³ and any restrictions on speech are repugnant to the First Amendment, anti-dumping provisions authorizing 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 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 were not used to subvert the very purpose of the institution.

Furthermore, establishing an explicit heightened scrutiny standard under Article VI would not be an extreme change from the status quo for the Appellate Body. In contrast, the historical data of how the Appellate Body has treated anti-dumping challenges suggests that the Appellate Body has perhaps quietly—or unintentionally—adopted this standard already. As Daniel Tarullo has observed,¹³⁴ the W.T.O.’s track record of evaluating anti-dumping cases

¹³¹ John Hart Ely elaborates this point: “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.” Ely, Democracy and Distrust at 102-103 (1980).
¹³² GATT Preamble (1986).
¹³³ See Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan dissenting).
shows that the standard of review in use is a much higher standard than the one on the books. Tarullo even goes so far as to state that the Appellate Body has a "practice" of applying "strict scrutiny of trade restrictions taken by national administrative authorities." This paper argues that such a de facto practice should be converted into an explicit policy statement as a method of increasing the number of challenges to anti-dumping assessments. Not only would this policy make such a standard more likely to be utilized in each and every dispute settlement panel, but it would also decrease the legal capacity necessary for bringing anti-dumping challenges by advertising to low-capacity countries (who are least likely to be aware of such a de facto standard) that the resources necessary for challenging the anti-dumping duty are lower than would be expected merely from looking at the dispute settlement rules in Article XVII. 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 the a challenge to an anti-dumping duty. While it would initially increase the amount of litigation in front of the W.T.O., we would expect far more anti-dumping duties to be settled (or never assessed) in the long run as this standard became well-established. In addition, even if the political economy of anti-dumping assessments continued to produce anti-dumping duties in inappropriate situations, the clear standard would decrease the burden on both the petitioner and the panel itself for establishing that the duty was inconsistent.


135 Id.
137 Specifically, the standard of review is articulated in ADA 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 ADA provision, then "the evaluation shall not be overturned" "even though the panel might have reached a different conclusion." While Tarullo believes that this practice has negative consequences due to the dynamic effect of unhappy member countries "limiting later opportunities for trade liberalizing negotiations," see Daniel K. Tarullo, Paved with Good Intentions: The Dynamic Effects of WTO Review of Antidumping Action, 2 World T. Rev. 373, 374 (2003), this paper argues 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. See Part I.
Finally, the Appellate Body has established a higher standard of review in the past in other areas of adjudication. For example, in *EC—Asbestos*, 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. As the WHO 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.

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

Assuming that heightened scrutiny is appropriate for challenges to anti-dumping duties, D.S.B. panels or the Appellate Body would explicitly impose a higher threshold for the country imposing the anti-dumping duty to meet in order to sustain its finding that antidumping duties are necessary. This burden could be satisfied by showing the type of predatory dumping that anti-dumping law was originally created to protect domestic industries from and the only types of dumping that justify anti-dumping duties. This would have the effect of integrating international trade with domestic antitrust standards (which all differentiate between actionable predatory price discrimination and nonactionable...
behavior\textsuperscript{141} while avoiding the political economy problems of requiring each member government (which is beholden to anti-dumping lobby groups) from having to approve a new standard for enacting anti-dumping duties. In other words, the duties would 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.

This heightened scrutiny approach would solve the problem of legal capacity for all members of the W.T.O. by making it much easier to challenge anti-dumping duties imposed on a member's exporting industries and we would expect most anti-dumping duties would be immediately challenged upon imposition. As a second-order effect, we would also expect fewer anti-dumping duties to be imposed in the first place. If member countries knew ex-ante that their duties would consistently be challenged (with the ensuing legal costs in every instance) and found inconsistent with W.T.O. law, they might be less likely to find dumping on questionable grounds. This effect is borne out in the theoretical work done by Busch, Reinhardt and Shaffer.\textsuperscript{142} Of course, it would not eliminate anti-dumping duties entirely. Domestic industries would still insist on protection despite the costs in some instances and enjoy the protection for the brief period before it was found inconsistent.

We would also expect lower levels of vigilante justice as challenging the laws became easier and retaliation through anti-dumping duties less attractive. Since strict scrutiny would raise the likelihood to a near certainty that the challenged anti-dumping law would be found inconsistent and would place the burden on the anti-dumping tariff-imposing country, significantly fewer resources would be required by the challenging country. While this

\textsuperscript{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.

\textsuperscript{142} See Busch, Reinhardt, and Shaffer, Does Legal Capacity Matter?, at 28.
procedure would be particularly beneficial for developing countries with low capacities, all countries would prosper if the cost of challenging anti-dumping duties dropped and thus the incidence of anti-dumping duties dropped dramatically.

Although there are several counter-arguments for why heightened scrutiny jurisprudence is inappropriate to anti-dumping duties, all of them can be refuted (or at least blunted). First, the fact that exporter countries challenging anti-dumping duties would not have any relationship to the importing country's consumers (that are purportedly shut out of the political process and hurt by the anti-dumping duties) does not mean that the DSB or appellate panel must ignore the malfunctioning anti-dumping process. While this issue of "standing" has merit, there is no reason that review panels cannot take into account the suspicious nature of anti-dumping investigations (e.g. the badges of fraud that would suggest motivations contrary to W.T.O.'s founding documents) and the way they ignore important interests in the importing country itself. Even the fact that panels do not exercise de novo review does not mean that the D.S.B. must accept the procedures themselves as appropriate.

A second argument, that consumer groups are not the type of political minority that requires a heightened scrutiny standard, since they constitute a large interest group in the importing country, 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 process does not take their values into account. In fact, there is little doubt that anti-dumping duties would disappear if the political process were to operate correctly—which is precisely the type of circumstance where strict scrutiny would be

144 See Neil Voussen, 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, Antidumping: The Third Rail of Trade Policy, 84 Foreign Affairs at 107-08.
145 See Niels, 14 J Econ Surveys at 484 (cited in note 29) (noting that if all interests were taken into
appropriate in the U.S. Finally, the argument that antidumping duties are not analogous to the fundamental rights that receive strict scrutiny under U.S. law can be refuted by referring to the text. Increasing trade and reducing barriers is the foremost goal of the binding document—larger than any particular provision. Where the W.T.O. text seems to contradict itself as it arguably does in Article VI, DSB panels should refer to the first principles embodied in the Preamble.

Conclusion

This paper has focused on the negative consequences of antidumping duties, their prevalence in the current trading environment and the legal capacity issues that allow antidumping duties to flourish. Although the statement that "antidumping [policies] have too few enemies and too many friends"\(^{146}\) is no longer the case, this criticism has rarely led to workable solutions for reform. By contrast, the reform proposed by this paper 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 antidumping duties. While Article VI is not going anywhere, the utilization of that provision can, and should, drop by making the procedural changes outlined and reducing the legal capacity constraint in challenging antidumping duties.

\(^{146}\) Finger, Antidumping at 7.