

# HARDENED POSITIONS: GUATEMALA CEMENT AND WTO REVIEW OF NATIONAL ANTIDUMPING DETERMINATIONS

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*When the World Trade Organization (WTO) came into being in 1995, it brought promises of international dispute resolution procedures that would supplant those in place from the General Agreement on Tariffs and Trade. A series of decisions by WTO dispute resolution bodies concerning antidumping duties, however, have called into question their ability to provide dispute resolution in accordance with traditional legal norms. In this Note, David Yocis uses two decisions regarding antidumping duties on foreign cement in Guatemala—a Panel decision and a subsequent Appellate Body reversal on a procedural technicality—to illustrate that WTO procedures continue to reflect a preference for diplomatic, rather than legal, means of dispute resolution. He concludes that, while the WTO dispute settlement system is an important step forward in the process of building a law-based system of international trade, it remains, in significant ways, more constrained by diplomacy than a truly independent judiciary.*

## INTRODUCTION

When the World Trade Organization (WTO) came into being in 1995,<sup>1</sup> its binding dispute settlement mechanism was touted as one of the most important advances on the previous regime of the General Agreement on Tariffs and Trade (GATT), and a significant step toward strengthening the rule of law in the global economy.<sup>2</sup> However,

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<sup>1</sup> See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 [hereinafter WTO Agreement], in *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 3 (1994) [hereinafter *Legal Texts*], 33 I.L.M. 1143 (1994).

<sup>2</sup> See, e.g., John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects*, in *The WTO as an International Organization* 161, 175-76 (Anne O. Krueger ed., 1998) (stating that World Trade Organization (WTO) dispute settlement system is “likely to be seen in the future as one of the most important, and perhaps even watershed, developments of international economic relations in the twentieth century”). But see Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 *Minn. J. Global Trade* 1, 4 (1999) (asserting that commentators have overstated difference between new WTO dispute resolution system and previous system in General Agreement on Tariffs and Trade (GATT)).

after a honeymoon period that one scholar has characterized as marked by “near irrational exuberance,”<sup>3</sup> a series of controversial decisions had raised doubts about WTO dispute settlement in many quarters<sup>4</sup> even before the well-publicized failure of the 1999 WTO Ministerial Conference in Seattle.<sup>5</sup> The reach of the WTO into traditional spheres of national regulation, such as food safety provisions in Europe,<sup>6</sup> cultural protections for the media in Canada,<sup>7</sup> and environmental regulations in the United States,<sup>8</sup> has led to a political backlash. Critics have accused the WTO of promoting free trade at any

<sup>3</sup> Raj Bhala, *The Myth About Stare Decisis and International Trade Law*, 14 *Am. U. Int'l L. Rev.* 845, 856 (1999).

<sup>4</sup> See Marcus Noland, *Learning to Love the WTO*, *Foreign Aff.*, Sept./Oct. 1999, at 78, 78 (describing American and European misgivings about WTO).

<sup>5</sup> See *After Seattle: A Global Disaster*, *Economist*, Dec. 11, 1999, at 19 (noting that Seattle “fiasco” dealt “huge blow” to WTO); David E. Sanger, *The Shipwreck in Seattle*, *N.Y. Times*, Dec. 5, 1999, at A26 (describing how “negotiations to rewrite the rules of world trade for a new millennium collapsed in bitterness and discord”). The failure of the Seattle Ministerial Conference to agree on an agenda for a new round of trade negotiations resulted not from the public protests but rather from substantive international disagreement as to the agenda for talks. See Jeffrey J. Schott, *The WTO After Seattle*, in *The WTO After Seattle* 3, 5-8 (Jeffrey J. Schott ed., 2000).

<sup>6</sup> See Report of the Appellate Body, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) (finding that European Community ban on hormone-treated beef from United States was not based on reliable scientific data and thus violated WTO commitments). Sanctions following the refusal of the Europeans to comply with the WTO decision have fueled popular discontent, especially in France, with the perceived loss of national and cultural sovereignty over food to the WTO and American-led globalization. See Roger Cohen, *Fearful over the Future, Europe Seizes on Food*, *N.Y. Times*, Aug. 29, 1999, § 4, at 1; see also Sophie Meunier, *The French Exception*, *Foreign Aff.*, July/Aug. 2000, at 104, 104 (describing how “France is now taking the international lead in the outcry against globalization”).

<sup>7</sup> See Report of the Appellate Body, *Canada—Certain Measures Concerning Periodicals*, WTO Doc. WT/DS31/AB/R (June 30, 1997) (adopted July 30, 1997) (rejecting Canadian claim that regulations discouraging “split-run” American periodicals with minimal Canadian content are permitted under WTO rules); Richard L. Matheny III, *Comment, In the Wake of the Flood: “Like Products” and Cultural Products After the World Trade Organization’s Decision in Canada—Certain Measures Concerning Periodicals*, 147 *U. Pa. L. Rev.* 245, 247 (1998) (“By all accounts, the Canadian government in *Periodicals* has suffered a great blow to its authority to legislate safeguards for its cultural industries.”).

<sup>8</sup> See Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, ¶¶ 185-186 (Oct. 12, 1998) (adopted Nov. 6, 1998) (holding that United States may not ban shrimp products from nations failing to comply with U.S. domestic shrimp harvesting regulations protecting endangered species of sea turtles); Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) (adopted May 20, 1996) (denying U.S. right in implementing Clean Air Act to impose different methods of determining producer baselines for foreign and domestic gasoline manufacturers); Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 *U. Colo. L. Rev.* 1555, 1560 (1999) (“[A] group of technocrats serving the WTO compelled the people of the United States to tolerate dirtier gasoline and, ultimately, breathe dirtier air.”).

cost, requiring WTO members to restrict their ability to promote other economic and noneconomic values as a condition of their participation in the world economic system.<sup>9</sup> Others have defended the WTO as ensuring the benefits of mutually open markets by enforcing international promises not to engage in covert protectionism disguised as domestic regulation.<sup>10</sup>

While these direct conflicts between national regulations and WTO norms have attracted the bulk of public attention, a growing portion of WTO dispute settlement cases concerns a less-studied type of trade dispute: challenges to the validity of national "trade remedy" determinations,<sup>11</sup> or unilateral actions taken by nations to counteract injury to particular domestic industries caused by increased imports.<sup>12</sup> The most widely implemented of these trade remedies is the imposition of antidumping duties, which are special tariffs designed to offset injury to a domestic industry caused by an exporter's unfair price discrimination, or "dumping."<sup>13</sup> An importing nation may assess an antidumping duty only in accordance with procedures as defined by

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<sup>9</sup> See Lori Wallach & Michelle Sforza, *The WTO: Five Years of Reasons to Resist Corporate Globalization* 13 (1999) ("The World Trade Organization is carrying out a slow-motion coup d'état over democratic governance worldwide."). Even defenders of the WTO have recognized the constraints the trade system places on domestic national regulation. See John H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 *Law & Pol'y Int'l Bus.* 873, 877 (1996) ("[T]rade relations now require consideration of matters formerly thought to be well within national sovereignty and matters that are deeply embedded in societal structures and cultures."); see also Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* 54 (2d ed. 1999) (stating that:

[T]here are elements of the multilateral trading system as it is evolving that are superimposing on a domestic and global welfare-maximizing optimal bargain to constrain protectionism—one that is welfare-maximizing *whatever* the policy choices individual states adopt on non-trade matters—a supranational regulatory regime that embodies certain substantive trade-offs between free trade and other values).

<sup>10</sup> See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 *Harv. L. Rev.* 511, 566 (2000).

<sup>11</sup> "Trade remedies," for the purposes of this Note, consist of antidumping duties, countervailing duties, and safeguard measures. For a discussion of countervailing duties, see *infra* note 73, and for a discussion of safeguard measures, see *infra* note 69 and accompanying text.

<sup>12</sup> In the fourth quarter of 2000, for example, trade remedy cases accounted for twelve of the fourteen requests for consultation (the first step in filing a dispute settlement complaint) brought to the WTO, including seven antidumping cases, three countervailing duty cases, and two safeguard cases. See WTO Secretariat, *Overview of the State-of-Play of WTO Disputes*, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last updated Mar. 23, 2001) (case numbers DS206 to DS209 and DS211 to DS219).

<sup>13</sup> Dumping may be defined as "the sale of products for export at a price less than 'normal value,' where normal value means roughly the price for which those same products are sold on the 'home' or exporting market." John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 251 (2d ed. 1997).

increasingly detailed GATT and WTO agreements.<sup>14</sup> While the WTO has declined to uphold any of the seven antidumping measures examined to date, or, for that matter, any of the seven other trade remedy measures examined,<sup>15</sup> most of its decisions have given considerable deference to the losing parties to fashion appropriate responses.<sup>16</sup> This practice of never upholding a trade remedy measure while hardly ever unambiguously striking one down suggests that the new judicial model of WTO dispute settlement has not fully supplanted the GATT system it was designed to replace; rather, the new model continues to reflect a preference for diplomatic, rather than legal, means of dispute resolution.<sup>17</sup>

This Note will examine the role of WTO dispute settlement in antidumping cases through the lens of the *Guatemala Cement* decisions,<sup>18</sup> the first antidumping case to result in a final decision. In that case, the Appellate Body issued a “stunning”<sup>19</sup> reversal of a panel finding that a Guatemalan antidumping investigation of a Mexican cement producer, and the subsequent antidumping duties, violated

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<sup>14</sup> The original General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VI, 61 Stat. A-11, A-23 to A-25, 55 U.N.T.S. 194, 212-16 [hereinafter GATT 1947], provided only a skeletal definition of dumping and the appropriate circumstances in which antidumping duties might be imposed. A group of nations negotiated an Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, GATT B.I.S.D. (15th Supp.) at 24 (1968) [hereinafter Antidumping Agreement (1967)], which established more precise definitions of the procedures, rules of evidence, and elements to be established in an antidumping determination. This agreement was modified slightly as part of a series of reforms of nontariff trade barriers in the GATT Tokyo Round negotiations. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 171 (1980) [hereinafter Antidumping Agreement (1979)]. A further amended version of the agreement became an integral part of the 1994 agreement establishing the WTO, and for the first time the antidumping agreement became binding on all WTO Members. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement, *supra* note 1, Annex 1A, in Legal Texts, *supra* note 1, at 147 [hereinafter Antidumping Agreement (1994)].

<sup>15</sup> For a brief discussion of the six cases besides *Guatemala Cement*, see *infra* notes 238-41.

<sup>16</sup> See *infra* note 241.

<sup>17</sup> See Kenneth W. Dam, *The GATT: Law and International Economic Organization* 3-4 (1970) (describing tension between legalism and pragmatism in GATT).

<sup>18</sup> Report of the Appellate Body, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS60/AB/R (Nov. 2, 1998) (adopted Nov. 25, 1998) [hereinafter Report of the Appellate Body, *Guatemala Cement I*], reversing Report of the Panel, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS60/R (June 19, 1998) [hereinafter Report of the Panel, *Guatemala Cement I*]; see also Report of the Panel, *Guatemala—Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WTO Doc. WT/DS156/R (Oct. 24, 2000) (adopted Nov. 17, 2000) [hereinafter Report of the Panel, *Guatemala Cement II*].

<sup>19</sup> C. Michael Hathaway et al., *International Trade*, 33 *Int'l Law* 321, 337 (1999).

WTO norms. This Note will argue that the initial panel decision<sup>20</sup> and the Appellate Body's reversal on procedural grounds<sup>21</sup> do not rest so much on WTO law or policy as on the political and diplomatic context which continues to surround more generally the use of antidumping duties.<sup>22</sup> Indeed, the remarkable similarity of the outcomes in subsequent antidumping cases is itself a reflection of the sharp constraints that context provides.<sup>23</sup>

Part I of this Note describes the background of antidumping cases, examining both the development of the WTO binding dispute settlement system and the use of antidumping duties in order to illustrate the problem that antidumping poses for the trade adjudicatory structure. Part II looks more closely at the decisions in the *Guatemala Cement* case, criticizing the text of the original panel and Appellate Body reports while placing them in a context that illuminates their reasoning and conclusions. This Note concludes that, while the WTO dispute settlement system is an important step forward in the process of building a law-based system of international trade, it remains, in significant ways, more constrained diplomatically than a truly independent judiciary would be.

## I

### ANTIDUMPING: A PROBLEM IN WTO DISPUTE SETTLEMENT

That dumping, or export sales below a "fair" price, is a "problem in international trade," has been recognized for decades.<sup>24</sup> Only recently, however, has antidumping come to the fore as a major stumbling block in relations among the major trading nations.<sup>25</sup> While low-tariff importing nations tend to believe that antidumping duties

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<sup>20</sup> See *infra* Part II.B.

<sup>21</sup> See *infra* Part II.C.

<sup>22</sup> See *infra* notes 236-43 and accompanying text.

<sup>23</sup> See *infra* note 241 and accompanying text.

<sup>24</sup> The definitive early study is Jacob Viner, *Dumping: A Problem in International Trade* (1923).

<sup>25</sup> Until quite recently, antidumping duties were imposed mainly by four jurisdictions: Australia, Canada, the European Community, and the United States. See J. Michael Finger, *Antidumping Is Where the Action Is*, in *Antidumping: How It Works and Who Gets Hurt* 3, 10 (J. Michael Finger ed., 1993) (noting that these four jurisdictions imposed 1489 of 1558 antidumping measures reported to GATT in 1980s). In the most recent semi-annual WTO reporting period, by contrast, twenty-nine countries reported imposing or enforcing antidumping duties in the first half of 2000. See WTO Committee on Antidumping Practices, *Semi-Annual Reports Under Article 16.4 of the Agreement*, WTO Doc. G/ADP/N/65/Add.1 (Oct. 19, 2000); see also Patrick A. Messerlin, *Antidumping and Safeguards*, in *The WTO After Seattle*, *supra* note 5, at 159, 159, 160 fig.11.1 (describing growth in number of countries using antidumping duties and number of antidumping measures taken).

are an essential protection against unfair trade and an important pillar of domestic political support for free trade,<sup>26</sup> exporting nations, as well as most free-market economists, consider antidumping little more than simple protectionism.<sup>27</sup>

This Part examines the role the WTO plays in managing the tensions between importing and exporting countries stemming from the use of antidumping duties. Part I.A describes the role of the WTO and its binding dispute settlement system in trade dispute resolution generally, while Part I.B provides additional background on the practice and theory of antidumping. Part I.C summarizes the status of antidumping in the WTO prior to the *Guatemala Cement* case.

### A. *The WTO and Binding Dispute Settlement*

The WTO enforces a detailed set of multilateral trade agreements negotiated over the past half century and now binding on approximately 140 countries.<sup>28</sup> In a series of negotiating rounds that began with the drafting of the GATT in 1947,<sup>29</sup> nations have agreed to the progressive reduction of tariffs and other barriers to international trade and have extended promises of nondiscriminatory treatment for goods imported from one another. In general, each country agrees to impose no tariffs above specified levels and to refrain from offering special protections from foreign competition to its domestic industries. The hope is that the expected domestic economic benefits from other countries' concessions enable the agreements of a negotiating round as a whole to win sufficient domestic political support to outweigh the opposition of its own, often vocal and powerful, domestic interest groups.<sup>30</sup>

To make trade negotiations work, then, a general sense that each party will live up to its commitments is essential to gaining the necessary domestic political support for the resulting agreements.<sup>31</sup> Thus, some mechanism for settling disputes has been a central part of the

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<sup>26</sup> See *infra* notes 82-84 and accompanying text.

<sup>27</sup> See, e.g., Editorial, *Steel's Deal*, Wash. Post, June 19, 2000, at A16 ("Most countries rightly regard anti-dumping law as a cover for protectionism."); see also *infra* notes 78-81 and accompanying text.

<sup>28</sup> Croatia became the 140th member of the WTO on November 30, 2000. See WTO, *The Organization: Members and Observers* (last visited Mar. 28, 2001), at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>29</sup> GATT 1947, *supra* note 14.

<sup>30</sup> For an excellent analysis of the role that GATT commitments play in restraining the protectionist biases of domestic interest groups, see generally Judith Goldstein, *International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade*, in *The WTO as an International Organization*, *supra* note 2, at 133.

<sup>31</sup> Trade negotiations are a classic example of a "Prisoners' Dilemma," in which cooperation provides the best collective outcome yet is difficult to achieve because each partici-

GATT from its inception,<sup>32</sup> though in its early years the primary focus was on finding diplomatic solutions that maintained the general balance of concessions and a shared sense of mutual commitment, rather than on strict adherence to the letter of the GATT.<sup>33</sup> However, in the Uruguay Round (1986-1994), the eighth GATT negotiating round, the WTO was created as an international multilateral institution empowered to administer the Round's increasingly broad and complex agreements through, among other means, binding dispute resolution.<sup>34</sup>

The procedural rules negotiated during the Uruguay Round and adopted by the WTO are known as the Dispute Settlement Understanding (DSU).<sup>35</sup> Like the GATT dispute procedures before it, the DSU prescribes that a WTO Member wishing to complain about another Member's actions<sup>36</sup> make a formal written request for consultations with that Member.<sup>37</sup> After a period of sixty days, if the consultations have not resolved the dispute, the complaining party may seek the establishment of a panel to hear the matter.<sup>38</sup> The panel

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pant has strong incentives to cheat. See Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. Pa. J. Int'l Econ. L. 347, 359-63 (1998); Goldstein, *supra* note 30, at 135-37.

<sup>32</sup> See GATT 1947, *supra* note 14, arts. XXII, XXIII, at A-64 to A-65 (outlining general process for dispute settlement).

<sup>33</sup> See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* 289 (2d ed. 1990) (stating that:

The legal code had an important role to play in meeting the fear of a return to autarky for it was by observing the code that governments could demonstrate to each other that they were committed to cooperation, and thus create the sort of reciprocal confidence that had been so badly lacking in the 1930s);

Robert E. Hudec, *The Expedition to Darkest Geneva*, 20 Mich. J. Int'l L. 121, 124 (1999) (recalling that in 1960s "leading GATT governments—chiefly the United States, the European Community and the United Kingdom—became attached to the view that legal claims were not the way to solve trade conflicts, and that only diplomatic negotiation could reconcile the underlying social and economic interests that gave rise to such conflicts").

<sup>34</sup> See WTO Agreement, *supra* note 1.

<sup>35</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, *supra* note 1, annex 2, in *Legal Texts*, *supra* note 1, at 354 [hereinafter DSU].

<sup>36</sup> Article XXIII of the GATT 1947, *supra* note 14, provided for dispute settlement when a contracting party considered that "any benefit accruing to it" was "nullified or impaired" by the action of another contracting party, whether as a result of an actual violation of a GATT obligation or not. *Id.* art. XXIII:1. The Dispute Settlement Understanding (DSU) incorporates this very broad conception of the WTO's jurisdiction. DSU, *supra* note 35, art. 3.1. In the context of binding dispute settlement, such wide authority to decide even those claims not based on a violation of a WTO provision could be extremely troubling. See generally Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 Harv. Int'l L.J. 311 (1998). To date, however, no major WTO cases have been brought exclusively under the "nullification or impairment" provision.

<sup>37</sup> DSU, *supra* note 35, art. 4.

<sup>38</sup> *Id.* art. 4.7. The panel must be established within a specific time, and establishment cannot be delayed indefinitely by the defending party as under the GATT system. See *id.*

is made up of three independent experts, chosen after nomination by the WTO Secretariat, either by mutual agreement of the parties or, if no agreement can be had, by appointment of the WTO Director-General.<sup>39</sup> The panel is charged with making "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant [WTO] agreements."<sup>40</sup>

The DSU also includes two features not found in the previous GATT regime. First, a standing Appellate Body of seven Members, sitting in panels of three, is charged with hearing appeals from panel decisions, but only on questions of law.<sup>41</sup> Second, the Dispute Settlement Body (DSB), in which each WTO Member is represented,<sup>42</sup> automatically adopts all panel reports, as modified by the Appellate Body reports, unless it decides by unanimous consensus to reject them.<sup>43</sup> Since this procedure requires the agreement of the prevailing party to reject a report, adoption of panel and Appellate Body reports is virtually automatic.<sup>44</sup>

The DSB is also responsible for monitoring the implementation of adopted decisions<sup>45</sup> and has sole authority to authorize, as a "last resort," the suspension of "the application of concessions or other obligations" towards the party that fails to comply with an adverse ruling.<sup>46</sup> The possibility of trade sanctions as the ultimate coercive weapon in the WTO's arsenal may give the DSU more "bite" than the usual international agreement, but in practice this remedy is rather limited. The DSU prohibits the level of trade sanctions from exceeding the damage caused by the Member's failure to comply,<sup>47</sup> leading at least one scholar to conclude that the DSU merely requires, in Holmesian fashion,<sup>48</sup> that Members taking WTO-inconsistent measures accept countermeasures that restore the balance of mutually ne-

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art. 6.1; see also, e.g., Jackson, *supra* note 2 (contrasting dispute settlement procedures of WTO and GATT).

<sup>39</sup> DSU, *supra* note 35, art. 8.

<sup>40</sup> *Id.* art. 11.

<sup>41</sup> See *id.* art. 17.

<sup>42</sup> See Trebilcock & Howse, *supra* note 9, at 36.

<sup>43</sup> See DSU, *supra* note 35, art. 17.14 (setting forth consensus requirement). "Consensus," for WTO purposes, means that no Member present at the meeting in which the decision is taken makes a formal objection. See WTO Agreement, *supra* note 1, art. IX:1.

<sup>44</sup> In no case to date has the DSB achieved a consensus to reject a panel decision. See WTO Secretariat, *supra* note 12.

<sup>45</sup> See DSU, *supra* note 35, art. 21.

<sup>46</sup> See *id.* art. 3.7.

<sup>47</sup> *Id.* art. 22.4.

<sup>48</sup> Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.").

gotiated concessions.<sup>49</sup> Moreover, trade sanctions often hurt the nation imposing them as much as the target nation,<sup>50</sup> although targeted punitive tariffs conceivably could induce an unwilling WTO Member to comply with an unfavorable ruling.<sup>51</sup> Even the “binding” WTO dispute settlement system, therefore, must rely on the voluntary cooperation of Members who believe that supporting and legitimizing the WTO system as a whole provides greater long-term benefits than losses from individual adverse decisions.<sup>52</sup> Nevertheless, by requiring that any suspension of concessions receive DSB approval, the DSU succeeded in achieving what seems to have been the primary motive for creating a binding dispute settlement system in the Uruguay Round negotiations: preventing countries, especially the United States, from using the failure of GATT dispute settlement as an excuse to impose trade sanctions unilaterally.<sup>53</sup>

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<sup>49</sup> See Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 *Am. J. Int'l L.* 416, 418 (1996) (“The only truly binding WTO obligation is to maintain the balance of concessions negotiated among members.”). For a view suggesting, in opposition to Bello, that WTO dispute settlement rulings create an international law obligation to comply, see John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 *Am. J. Int'l L.* 60, 60 (1997).

<sup>50</sup> See *Decision of the Arbitrators, European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/ARB (Apr. 9, 1999), ¶ 2.13 (noting that “the suspension of concessions is not in the interest of either” party in dispute over European Communities’ failure to comply with decision finding its banana importation regime inconsistent with WTO rules). In the classical economic model of international trade, the erection of trade barriers results in economic loss to both sides, while even a unilateral lowering of tariffs creates benefits to the importing country in lower consumer prices and greater competition. See *Who Needs the WTO?*, *Economist*, Dec. 4, 1999, at 74, 74 (characterizing WTO sanctions principle as equivalent of saying that “[i]f another country refuses to build more roads, the WTO allows you to tear up your own”).

<sup>51</sup> The United States, frustrated by the lack of European compliance in the banana dispute, see *supra* note 50, recently enacted a provision to rotate periodically any sanctions it imposes on a noncompliant WTO Member. See *Africa Growth and Opportunity Act*, Pub. L. No. 106-200, § 407, 114 Stat. 251, 293-94 (2000) (to be codified at 19 U.S.C. § 2416). This U.S. action already has become itself the object of a WTO dispute settlement proceeding. See *Request for Consultations by the European Communities, United States—Section 306 of the Trade Act of 1974 and Amendments Thereto*, WTO Doc. WT/DS200/1 (June 13, 2000). To avoid polarizing the dispute further, the U.S. government has agreed to postpone action under the new statute. See Joseph Kahn, *President Delays New Import Duties for Europe Goods*, *N.Y. Times*, Sept. 14, 2000, at A1.

<sup>52</sup> See Hudec, *supra* note 2, at 10 (noting advantages of rule-based trade dispute system); see also Bello, *supra* note 49, at 417 (“When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.”).

<sup>53</sup> Concerns about unilateral enforcement of claimed GATT violations increased dramatically when the United States significantly strengthened its “Section 301” trade sanctions policy in 1988. See generally *Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System* (Jagdish Bhagwati & Hugh T. Patrick eds., 1990). The

As a first attempt to provide a structure for binding dispute settlement, the DSU suffers from a number of flaws.<sup>54</sup> For example, while the Appellate Body cannot review a panel's fact-finding,<sup>55</sup> neither can it remand a case back to the panel for additional development of the facts,<sup>56</sup> a procedural deficiency which played a significant role in the *Guatemala Cement* case.<sup>57</sup> More importantly, however, binding dispute settlement presents a great temptation to engage in "judicial activism."<sup>58</sup> The DSU is clear that dispute proceedings "cannot add to or diminish the rights and obligations" of Members;<sup>59</sup> further, DSB decisions do not have precedential effect, but rather are limited to settling the disputes actually brought before the panels.<sup>60</sup> Nonetheless, the DSU also charges the dispute settlement process with "clarify[ing] the existing provisions of [WTO] agreements in accordance with customary rules of interpretation of public international law,"<sup>61</sup> and Appellate Body decisions in fact routinely cite prior

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quick, and to many observers surprising, move in the Uruguay Round negotiations to a binding dispute settlement system seems to have been motivated primarily by the U.S. threat. See Hudec, *supra* note 2, at 13-14. Also, many developing countries expected that a more judicialized process would give them more leverage with the big powers than had the diplomacy-based system. See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 *Duke L.J.* 829, 848 (1995). In the end, therefore, the acceptance of binding dispute settlement seems less to have been motivated by a consensus that the trading system was ready for a true judicial system than by a general fear of the destabilizing prospect of American self-help.

<sup>54</sup> For an overview of the outstanding problems with the DSU structure, see John A. Ragosta, *Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?*, 31 *Law & Pol'y Int'l Bus.* 739, 746-65 (2000).

<sup>55</sup> See *supra* note 41 and accompanying text.

<sup>56</sup> See DSU, *supra* note 35, art. 17.13 ("The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel."); see also David Palmeter, *The WTO Appellate Body Needs Remand Authority*, 32 *J. World Trade* 41 (1998).

<sup>57</sup> See *infra* notes 216-23 and accompanying text.

<sup>58</sup> See Robert E. Hudec, "Transcending the Ostensible": Some Reflections on the Nature of Litigation Between Governments, 72 *Minn. L. Rev.* 211, 226 (1987) ("GATT dispute settlement will probably always teeter on the edge of crisis, for there will always be a tendency to use it to cover up substantive failures."); see also Jeffrey Schott, *After Seattle*, *Economist*, Aug. 26, 2000, at 66, 66 ("Further empowering panellists broadly to interpret WTO rules would raise sovereignty issues that could undercut [WTO] support . . .").

<sup>59</sup> DSU, *supra* note 35, art. 3.2; accord *id.* art. 19.2.

<sup>60</sup> *Id.* art. 3.4 ("Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter . . .").

<sup>61</sup> *Id.* art. 3.2. The Appellate Body has from the beginning understood those "customary rules of interpretation" to be those codified in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 *U.N.T.S.* 331, 8 *I.L.M.* 679 (1969). See Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 16-17 (Apr. 29, 1996) (adopted May 20, 1996); see also Peter C. Maki, *Interpreting GATT Using the Vienna Convention on the Law of Treaties: A Method to Increase the Legitimacy of the Dispute Settlement System*, 9 *Minn. J. Global Trade* 343, 352 (2000).

reports as authority.<sup>62</sup> Moreover, amendments to the WTO agreements themselves normally require a two-thirds majority (and then apply only to those Members who have accepted them),<sup>63</sup> and official interpretations of those agreements require a three-fourths majority,<sup>64</sup> while binding dispute settlement reports are adopted virtually automatically. The obstacles to de facto amendment by judicial interpretation, therefore, are much lower than the hurdles presented by the official amendment process, and thus—within the limits required to maintain the legitimacy of the dispute settlement system<sup>65</sup>—it would not be surprising to find attempts to use dispute settlement to achieve results that cannot be obtained directly by negotiation.<sup>66</sup>

The temptation to use dispute settlement as a substitute for negotiations is particularly intense in areas, such as antidumping, in which negotiation has been unsuccessful in resolving key legal issues.<sup>67</sup> As discussed in Part II, the *Guatemala Cement* case provides a good example of this problem.

### B. Antidumping

According to standard free-trade economics, industries and firms that are too inefficient to compete in a global market should be allowed to fail; consumers benefit from cheaper products, and capital and labor shift to more efficient uses.<sup>68</sup> While WTO rules permit importing Members in certain circumstances to take unilateral “safeguard” measures in order to ease these sorts of dislocations, such relief must be temporary and designed only to facilitate the transition

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<sup>62</sup> See generally Bhala, *supra* note 3 (arguing that clear line of decisional authority exists in WTO Appellate reports); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. Transnat'l L. & Pol'y 1 (1999) (noting regularity of citations to prior Panel and Appellate Body reports in WTO Appellate Body decisions).

<sup>63</sup> See WTO Agreement, *supra* note 1, art. X:5.

<sup>64</sup> See *id.* art. IX:2.

<sup>65</sup> See Shell, *supra* note 53, at 897-98 (noting that de facto automatic adoption of dispute settlement reports constitutes potential exception to flexibility of “Regime Management” model of most GATT law).

<sup>66</sup> One commentator recently has identified the “central problem” with the current WTO system as

the inappropriateness of placing on dispute settlement the burden of resolving major issues among the largest trading nations that in the final analysis cannot be resolved other than by negotiation among sovereign nations. It is a serious error to try to obtain by panel decision what could not be agreed to by negotiation among nations.

Alan Wm. Wolff, *The Conduct of International Trade Relations: The Corrosive Effects of an Excessive Reliance on Litigation*, Address Before the New America Foundation (Jan. 4, 2001), available at <http://www.dbtrade.com>.

<sup>67</sup> See *infra* notes 97-107 and accompanying text.

<sup>68</sup> See, e.g., Trebilcock & Howse, *supra* note 9, at 112-14.

to an open market.<sup>69</sup> In some circumstances, however, a competitive advantage enjoyed by imports in a given country may be the result of structural factors in the producing country rather than true economic efficiency: Governmental or business practices (e.g., subsidies, cartelization, etc.) in one nation may have the design or effect of distorting foreign markets and giving advantages to its exporters' products in those markets.<sup>70</sup> From the beginning, the GATT has recognized the right of contracting parties to take unilateral defensive measures against these trade-distorting or "unfair trade" practices.<sup>71</sup> WTO rules, however, attempt to control the extent to which nations resort to such defensive measures and try to ensure that they are taken only for legitimate purposes (to "level the playing field") and do not become de facto protectionist shields for inefficient industries.<sup>72</sup>

The most widely used remedy for unfair trade is the antidumping duty.<sup>73</sup> "Dumping," in the trade context, refers to the practice of discriminatory pricing by individual sellers, who offer products at a lower price in a foreign market than they do in their domestic markets.<sup>74</sup> A WTO Member finding that dumping by another Member has caused material injury to one of its own domestic industries may impose an antidumping duty calculated to raise the price of the dumped goods to its domestic level in the exporting country. While the administrative procedure by which antidumping duties are imposed varies from

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<sup>69</sup> See GATT 1947, *supra* note 14, art. XIX (providing general rules for application of temporary safeguard or "escape clause" measures); Agreement on Safeguards, WTO Agreement, *supra* note 1, annex 1A, at 275 (implementing Article XIX).

<sup>70</sup> The precise boundary between injury resulting from this sort of "unfair" competition and the effects of ordinary, healthy competition is often difficult to draw with precision, leading some scholars to suggest that the distinction is of little practical significance. See, e.g., Andreas F. Lowenfeld, *Fair or Unfair Trade: Does It Matter?*, 13 *Cornell Int'l L.J.* 205 (1980).

<sup>71</sup> See GATT 1947, *supra* note 14, art. VI. For a history of the various agreements developing and implementing the antidumping provisions of Article VI, see *supra* note 14.

<sup>72</sup> See, e.g., Paul C. Rosenthal & Robert T.C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives During the Uruguay Round?*, 31 *Law & Pol'y Int'l Bus.* 871, 871-72 (2000) (discussing United States's protectionist stance and defense of U.S. antidumping and countervailing duty laws during Uruguay Round negotiations).

<sup>73</sup> The other major unfair trade remedy is the use of countervailing duties to offset subsidies, a practice regulated by the WTO Agreement on Subsidies and Countervailing Measures, WTO Agreement, *supra* note 1, annex 1A, at 231. At least until recently, the United States was the main user of countervailing duties. See Finger, *supra* note 25, at 7 (noting that in mid-1980s "the United States became almost the sole user" of countervailing duties). Antidumping duties, by contrast, are used by a larger, and broader, group of nations. See *supra* note 25.

<sup>74</sup> See Antidumping Agreement (1994), *supra* note 14, art. 2.1. If there is no home market or no reliable export price for a given product, dumping may be found when the export price is below some measure of cost. See *id.* art. 2.2-3.

country to country,<sup>75</sup> all three elements (dumping, material injury to the domestic industry producing the “like product” to the dumped products, and causal link between dumping and injury) must be demonstrated within a defined procedural framework.<sup>76</sup>

As even this brief overview makes clear, an antidumping investigation entails a large number of calculations based on subjective estimates and judgment calls. What, for example, counts as a “like product” for purposes of price comparisons? What is “material injury” to a domestic industry, and how does one know whether it has been caused by dumped imports or some other factor? How does one measure an “arm’s length” export price if sales are made from a foreign subsidiary of a corporation to a domestic subsidiary of the same corporation? The agencies charged with administering the antidumping laws inevitably have a good deal of discretion in making these judgments, and exporters, in particular, tend to look upon the whole process as arbitrary at best.<sup>77</sup>

Given the strong subjective element in antidumping determinations, it is not surprising to find, especially among economists, the view that antidumping is generally little more than protectionism “with a good public relations program.”<sup>78</sup> Like any barrier to free trade, antidumping duties place costs on the country imposing them as well as the alleged dumper.<sup>79</sup> This is especially true since, unlike anti-trust sanctions, antidumping duties are imposed based on the expected benefit to competitor producers without regard for the costs to

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<sup>75</sup> See generally *Antidumping Law and Practice: A Comparative Study* (John H. Jackson & Edwin A. Vermulst eds., 1989); *Anti-Dumping Under the WTO: A Comparative Review* (Keith Steele ed., 1996). For a general overview of the U.S. procedures, see, e.g., Greg Mastel, *Antidumping Laws and the U.S. Economy* 7-29 (1998).

<sup>76</sup> See *Antidumping Agreement* (1994), *supra* note 14, art. 2 (determination of dumping); *id.* art. 3 (determination of injury); *id.* art. 4 (definition of domestic industry); *id.* art. 5 (conduct of investigation).

<sup>77</sup> See N. David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier*, in *Down in the Dumps: Administration of the Unfair Trade Laws* 64, 66 (Richard Boltuck & Robert E. Litan eds., 1991) (stating that biased U.S. procedures “ensure that, at the end of the day, an exporter determined to have been selling in the United States below fair value has probably been doing no such thing in any meaningful sense of the word ‘fair’”).

<sup>78</sup> J. Michael Finger, *The Origins and Evolution of Antidumping Regulation*, in *Antidumping: How It Works and Who Gets Hurt*, *supra* note 25, at 13, 13. This is probably the majority view among economists. See Jagdish Bhagwati, *The World Trading System at Risk* 19 (1991) (arguing that allegations of unfair trade used to defend domestic trade regulations is protectionist tool).

<sup>79</sup> See Int’l Trade Comm’n, *The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements* 4-1 (1995) (calculating that imposing antidumping and countervailing duties costs U.S. economy \$1.59 billion per year as of 1991).

consumers of higher prices.<sup>80</sup> Moreover, there is evidence to suggest that the antidumping investigation itself has a chilling effect on imports, even apart from the actual imposition of duties.<sup>81</sup> To the extent that these aspects of antidumping duties actually harm the public interest, it is not surprising that many conclude that their chief function is merely to protect “special interests” against legitimate foreign competition.

Defenders of antidumping suggest, on the other hand, that it is a legitimate and necessary strategy for countries with more-than-average openness to international trade to protect themselves against unfair trading practices of less-open countries.<sup>82</sup> From this perspective, no producer could sell overseas at less than fair value over the long run unless its profits in its home market are protected by some form of trade distortion. For example, a steel producer with a protected home market can charge an artificially high domestic price, but there may not be enough domestic demand for all the steel it manufactures. Since it is costly to start up and shut down steel mills, it makes economic sense for such a producer to export its excess steel at whatever price it can get, even at prices below its average cost. In an environment of a global surplus of steel production capacity, a steelmaker that does not have the benefit of domestic protection, and cannot counteract foreign market distortion with antidumping duties, will be at a disadvantage.<sup>83</sup> Critics of this view suggest that there is little empirical evidence that this scenario, while theoretically plausible, actually occurs in the real world.<sup>84</sup>

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<sup>80</sup> See, e.g., Richard J. Pierce, Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 *Antitrust L.J.* 725, 725 (2000) (“There is a consensus among economists that antidumping law interferes with pursuit of the goals of antitrust law.”); Alan Greenspan, *Remarks Before the Dallas Ambassadors Forum* (Apr. 16, 1999) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/current/19990416.htm>) (calling for limitation on use of antidumping duties to counter only predatory practices on antitrust model).

<sup>81</sup> See Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 *Nw. J. Int’l L. & Bus.* 49, 54 (1997) (stating that even rumor of investigation may chill imports and exports).

<sup>82</sup> See, e.g., Mastel, *supra* note 75, at 65-72.

<sup>83</sup> As U.S. steel industry representatives stated in a report to Congress:

The destruction or substantial contraction of the U.S. steel industry at the hands of [inefficient but subsidized] rivals would . . . constitute a serious indictment of the current world trading system, which enjoys the support of the American public, in large part, on the assumption that the opening of world markets will *benefit* competitive U.S. firms and productive workers . . . .

Thomas R. Howell & Brent L. Bartlett, *The New Crisis in Steel* 6 (Apr. 1999), <http://www.dbtrade.com>.

<sup>84</sup> See Lowenfeld, *supra* note 70, at 206 (dismissing theory that comparatively high prices subsidize exports). And even if such a scenario did unfold, it is not clear that the

A middle position sees antidumping as a second-best form of interface between differing economic systems.<sup>85</sup> Countries that wish to gain from the benefits of trade nonetheless also desire to maintain the right to structure their societies according to their own values and perceived needs.<sup>86</sup> For those taking this view, antidumping duties do not so much counteract an “unfair” trading practice as stand in for a substantive agreement on how to deal with every national difference that affects international competition.<sup>87</sup>

Thus, despite the clear statement in the original GATT that dumping is a practice “to be condemned,”<sup>88</sup> fundamental disagreements persist as to precisely why it should be condemned and exactly what countries should do about it. Moreover, as the average level of world tariffs decreased over successive GATT negotiation rounds,<sup>89</sup> the perceived need for antidumping duties increased, as did the controversies about when and whether they were appropriate.<sup>90</sup> As the next Section shows, without a clear agreement within the GATT, and later the WTO, concerning the rationale and validity of antidumping duties, disputes concerning particular antidumping measures have proven particularly difficult to resolve.

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harm done to a U.S. domestic competitor outweighs the benefits to U.S. consumers from cheaper prices subsidized by foreign consumers.

<sup>85</sup> See Jackson, *supra* note 13, at 274 (describing antidumping rules as “buffer mechanism” effective in easing difficulties of interdependence between varying economic systems); Edwin A. Vermulst, *The Antidumping Systems of Australia, Canada, the EEC, and the USA: Have Antidumping Laws Become a Problem in International Trade?*, in *Antidumping Law and Practice*, *supra* note 75, at 425, 460 (stating that antidumping system is “one of the most important (if not most precise) interfaces in international trading relations”).

<sup>86</sup> For example, producers in countries like Japan, which maintain high debt/equity ratios and promote lifetime employment for workers in good times and bad, will have a higher percentage of fixed costs than will their American counterparts, which have lower debt/equity ratios and can easily lay off workers when demand is slow. During times of economic downturn, when companies are willing to sell (in the short run) at any price above their variable costs, Japanese companies will be able to undersell their competitors in the United States. See Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in *Antidumping Law and Practice*, *supra* note 75, at 23, 31-32.

<sup>87</sup> See Lowenfeld, *supra* note 70, at 219.

<sup>88</sup> GATT 1947, *supra* note 14, art. VI.

<sup>89</sup> See Raj Bhala, *Rethinking Antidumping Law*, 29 *Geo. Wash. J. Int'l L. & Econ.* 1, 3 (1995) (noting that average tariffs of industrial countries will decrease from 40% before GATT 1947 to 3.9% as result of Uruguay Round).

<sup>90</sup> See *id.* at 3-4 (noting that nontariff barriers, especially antidumping, have replaced tariffs as principal obstacles to trade); see also Messerlin, *supra* note 25, at 160 (asserting that future WTO negotiations are “doomed to be engulfed” by negotiations over antidumping and other trade remedies).

### C. *Antidumping as a Test Case for WTO Dispute Settlement*

In 1965, a group of countries drafted a set of guidelines for antidumping actions interpreting the sparse provisions of the GATT.<sup>91</sup> This Antidumping Agreement was modified somewhat as part of the Tokyo Round in 1979, which also saw the negotiation of a parallel agreement on subsidies and countervailing duties.<sup>92</sup> These side agreements were adopted only by a relatively small group of countries within the GATT.<sup>93</sup> One of the principal goals of the Uruguay Round was to bring all of the major GATT codes, including the antidumping agreement, into a unified whole.<sup>94</sup>

However, a fundamental difference in perspective between importing and exporting nations with regard to the appropriateness of antidumping duties presented a major obstacle to the success of the Uruguay Round antidumping negotiations. Exporting countries that aggressively seek foreign markets, such as Japan, Korea, and many of the less-developed countries, argued that antidumping duties ought to be limited as much as possible.<sup>95</sup> On the other hand, importing countries with relatively low barriers to international trade, such as the United States and the European Communities, defended antidumping duties as an essential device for keeping markets open in the face of unfair trading practices of other nations.<sup>96</sup>

The actual negotiations during the Uruguay Round made little progress in dealing with the controversy. The revised Antidumping Agreement contained some provisions desired by each side, but the final text was less the product of negotiation than of an uneasy juxtaposition of divergent views that left many important questions un-

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<sup>91</sup> Antidumping Agreement (1967), *supra* note 14.

<sup>92</sup> Antidumping Agreement (1979), *supra* note 14; Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 56 (1980) (Tokyo Round predecessor of WTO Agreement on Subsidies and Countervailing Measures).

<sup>93</sup> See John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 *Colum. J. Transnat'l L.* 157, 166 (1997) (contrasting Uruguay Round unified structure with previous "GATT à la carte" system).

<sup>94</sup> See Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 *Am. J. Int'l L.* 477, 478-79 (1994).

<sup>95</sup> See John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* 68 (2d ed. 1999).

<sup>96</sup> One U.S. government official praised the current WTO antidumping regime and rejected Japan's call to renegotiate it, stating that "we see no reason to open [the matter] again just to satisfy a country whose record on dumping is, to say the least, not admirable." Gary G. Yarkey & Toshio Aritake, *U.S. Accuses Japan of Masterminding Attack on U.S. Antidumping Laws in WTO*, 16 *Int'l Trade Rep. (BNA)* 1731, 1731 (Oct. 27, 1999) (quoting David L. Aaron, U.S. Undersecretary of Commerce for International Trade).

resolved.<sup>97</sup> Moreover, at the eleventh hour, the United States succeeded in writing a special antidumping standard of review into the dispute settlement provisions of the agreement, limiting the ability of WTO panels to second-guess the process by which antidumping duties are imposed.<sup>98</sup> WTO dispute settlement panels are directed to overturn a national antidumping authority's factual determinations only if its establishment of the facts was improper or its evaluation of those facts was biased or subjective;<sup>99</sup> moreover, if the relevant WTO legal texts admit "of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."<sup>100</sup> This limited standard of review, which appears to be based on the *Chevron* standard for U.S. judicial review of domestic administrative determinations,<sup>101</sup> has been widely criticized by scholars.<sup>102</sup>

While the United States, in particular, has insisted that it would not accept further restrictions on its right to impose antidumping duties and would keep the subject off the agenda of any future WTO negotiations,<sup>103</sup> antidumping reform remains near the top of the WTO

<sup>97</sup> As one account of the negotiating process noted:

The tentative agreement on anti-dumping in the Draft Final Act . . . was thus very much an arbitrated text, not a negotiated one. In the circumstances of deadlock and suspicion in which it was drawn up, the arbitrators could not be bold: their task was essentially to give each side enough to make the changes from the existing code on balance worth having at all.

Croome, *supra* note 95, at 265; see also Messerlin, *supra* note 25, at 171 (noting that "as illustrated by the absence of . . . principles of antidumping action, the Uruguay Round Agreement on Antidumping is an agreement to disagree" (quoting Mark Koulen, *The New Anti-Dumping Code Through Its Negotiating History*, in *The Uruguay Round Results: A European Lawyer's Perspective* 151, 232 (J.H.J. Bourgeois et al., eds. 1995))).

<sup>98</sup> See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 *Am. J. Int'l L.* 193, 194-95 (1996).

<sup>99</sup> See *Antidumping Agreement* (1994), *supra* note 14, art. 17.6(i).

<sup>100</sup> *Id.* art. 17.6(ii).

<sup>101</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984) (holding that courts must defer to administrative agency interpretations of law when multiple interpretations of law are possible).

<sup>102</sup> See Croley & Jackson, *supra* note 98, at 202-06 (drawing, and criticizing, parallels with *Chevron*); see also John H. Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization*, 31 *N.Y.U. J. Int'l L. & Pol.* 823, 829 (1999) (characterizing attempt to import *Chevron* doctrine into WTO jurisprudence as "totally inappropriate"). But see Philip A. Akakwam, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, 5 *Minn. J. Global Trade* 277, 309 (1996) (concluding that more stringent antidumping standard of review might be politically "unworkable").

<sup>103</sup> See Gary G. Yerkey, *Reps. Visclosky, Ney Introduce Resolution Urging U.S. to Uphold AD, CVD Laws in WTO*, 16 *Int'l Trade Rep. (BNA)* No. 38, at 1566 (Sept. 29, 1999) (describing pre-Seattle congressional initiative to urge U.S. administration "not to participate in any international negotiations that deal with antidumping or anti-subsidy rules" and to enforce antidumping laws vigorously).

agenda of many exporting countries.<sup>104</sup> Precisely because of this clash of perspectives, dispute settlement under the antidumping codes had presented the old GATT system with some of its most difficult cases; a majority of panel reports failed to achieve the consensus necessary for adoption.<sup>105</sup> The new binding dispute system, however, offered possible judicial solutions to the negotiating impasse. Would the economists' preference for free trade mean vigorous enforcement of WTO limitations on the use of antidumping duties?<sup>106</sup> Or would the deferential standard of review enhance the discretion of WTO Members to resort to antidumping duties?<sup>107</sup> The *Guatemala Cement* case provided the first opportunity to observe how the new dispute settlement system would deal with antidumping in practice.

## II

### THE WTO'S FIRST ANTIDUMPING CASE: *GUATEMALA CEMENT*

The WTO dispute settlement system had been in existence for nearly four years when the reports in *Guatemala Cement*, the first completed WTO dispute settlement case to deal with a national antidumping determination,<sup>108</sup> were finally adopted.<sup>109</sup> The first panel

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<sup>104</sup> See New Round Should Include Antidumping Issue, Says Yosano, Japan Wkly. Monitor, Aug. 16, 1999, 1999 WL 8899044 (quoting Japan's International Trade and Industry Minister Kaoru Yosano as announcing that Japan would pursue antidumping reform at Seattle and saying that "[m]any countries think U.S. antidumping provisions incomprehensible"); Daniel Pruzin, Antidumping Review Urged in Next WTO Negotiating Round, 16 Int'l Trade Rep. (BNA), No. 37, at 1516 (Sept. 22, 1999) (describing Seattle proposal by developing countries for renegotiation of Antidumping Agreement).

<sup>105</sup> See, e.g., Rosenthal & Vermeylen, *supra* note 72, at 875-78 (discussing failure of pre-WTO GATT dispute settlement to solve antidumping disputes).

<sup>106</sup> In one of the final dispute settlement reports under the old GATT system, Norway and the United States offered differing interpretations of the place of antidumping duties in the GATT system. See generally Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, GATT B.I.S.D. (41st Supp.), at 229 (1997). Norway cited passages from earlier GATT cases (passages the United States dismissed as "dicta") that suggested that antidumping duties are an extraordinary remedy, and thus the imposing country has the burden of proof to validate its actions. See *id.* ¶¶ 68-92. The Panel did not address the question directly.

<sup>107</sup> See Croley & Jackson, *supra* note 98, at 212-13 (indicating that ultimate effect of standard of review would depend on actual dispute settlement practice).

<sup>108</sup> Earlier, Mexico had brought two requests for consultations about antidumping investigations. See Request for Consultations by Mexico, United States—Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico, WTO Doc. WT/DS49/1 (Jul. 8, 1996) (challenging antidumping investigation then underway as WTO-incompatible); Request for Consultations by Mexico, Venezuela—Anti-Dumping Investigation in Respect of Imports of Certain Oil Country Tubular Goods, WTO Doc. WT/DS23/1 (Jan. 4, 1996) (same). However, both complaints were resolved when the investigations were terminated without the imposition of antidumping duties. See Communication from Venezuela, Venezuela—Anti-Dumping Investigation in Respect of Imports of Certain Oil

report in *Guatemala Cement* was not only strongly critical of the Guatemalan authorities' decision to initiate the antidumping investigation of Mexican cement,<sup>110</sup> but also concluded that Guatemala's improper initiation of the investigation could not be remedied without revoking the antidumping duties.<sup>111</sup> In doing so, the panel report interpreted the Antidumping Agreement in the most restrictive way possible.<sup>112</sup> The Appellate Body reversed on a procedural technicality, thereby avoiding the need to pronounce on the validity of the Panel's restrictive reading of the Agreement.<sup>113</sup> In October 2000, a second panel report came to substantive conclusions similar to those of the first, but construed the Antidumping Agreement more flexibly.<sup>114</sup> This Part examines these reports, arguing that the Appellate Body's decision can be understood best as controlling the damage from the first panel's activist construction and initiating a line of cases that more consciously balances the differing interests among WTO Members.

### A. *The Guatemalan Investigation*

Shortly after Guatemala became a WTO Member,<sup>115</sup> the sole Guatemalan cement producer, Cementos Progreso, filed an application for an antidumping investigation with the Guatemalan Ministry

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Country Tubular Goods, WTO Doc. WT/DS23/2 (Jan. 15, 1996) (announcing termination of investigation one week after Mexico's request for consultations); Stephen J. Powell & Mark A. Barnett, *The Role of United States Trade Laws in Resolving the Florida-Mexico Tomato Conflict*, 11 Fla. J. Int'l L. 319, 321-22 (1998) (noting October 1996 agreement between Mexico and United States to suspend U.S. antidumping investigation).

<sup>109</sup> One reason for the delay is that only antidumping duties imposed pursuant to investigations initiated after the WTO agreements came into force are subject to WTO dispute settlement. See Antidumping Agreement (1994), *supra* note 14, art. 18.3 (limiting scope of agreement to "investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement"); see also Report of the Panel, *Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WTO Doc. WT/DS99/R (Jan. 29, 1999) (adopted Mar. 19, 1999) [hereinafter Report of the Panel, *Korean DRAMS*] ("[P]re-WTO measures do not become subject to the [1994 Antidumping] Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement . . ."); cf. Report of the Appellate Body, *Brazil—Measures Affecting Desiccated Coconut*, WTO Doc. WT/DS22/AB/R (Feb. 21, 1997) (adopted Mar. 20, 1997) (declining to review countervailing duties imposed by Brazil pursuant to investigation begun before Brazil acceded to WTO).

<sup>110</sup> See *infra* notes 151-56, 180-90 and accompanying text.

<sup>111</sup> See *infra* notes 191-93 and accompanying text.

<sup>112</sup> See *infra* Part II.B.

<sup>113</sup> See *infra* notes 214-17 and accompanying text.

<sup>114</sup> See *infra* notes 226-33 and accompanying text.

<sup>115</sup> Guatemala, having only become a GATT contracting party in 1991, formally joined the WTO on July 21, 1995. See WTO, *supra* note 28, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (providing dates of accession for WTO Members); WTO, *The 128 Countries That Had Signed GATT by 1994*, at <http://www.wto.org/english/>

of the Economy.<sup>116</sup> Founded in 1899,<sup>117</sup> Cementos Progreso had enjoyed a de facto monopoly in the Guatemalan cement market for most of its history.<sup>118</sup> Although a shortage of cement had led to steps to encourage imports,<sup>119</sup> Cementos Progreso continued to hold more than ninety-nine percent of the Guatemalan cement market as late as June 1995.<sup>120</sup>

In that month, Cruz Azul,<sup>121</sup> a Mexican producer with a manufacturing facility near the Guatemalan border, began to sell cement in Guatemala.<sup>122</sup> Taking advantage of a newly-privatized distribution system that Cementos Progreso had set up in Guatemala<sup>123</sup> and excess capacity due to decreased domestic demand following the sharp recession resulting from the devaluation of the Mexican peso in December 1994,<sup>124</sup> Cruz Azul captured nearly a quarter of the Guatemalan cement market within six months of entry.<sup>125</sup> The arrival of competition in that market was likely to have been attractive to Cementos Progreso customers who had experienced the company's "intimidatory, exclusive and monopolistic policy."<sup>126</sup> While the emergence of competition apparently did not cause immediate problems for Cementos

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thewto\_e/gattmem\_e.htm (visited Mar. 30, 2001) (providing same for GATT contracting parties).

<sup>116</sup> See Report of the Panel, *Guatemala Cement I*, supra note 18, ¶ 2.1 (describing application by Cementos Progreso on September 21, 1995).

<sup>117</sup> See web site of Cementos Progreso, S.A., at <http://www.cempro.com/QuienesSomos/defaultQuienesSomos.htm> (visited July 11, 2001).

<sup>118</sup> See Int'l Bank for Reconstruction & Dev., *The Economic Development of Guatemala* 111 (1951) ("One plant in Guatemala City supplies most of the country's cement requirements . . ."). Although the Guatemalan government had a tradition of raising revenue through the sale of licenses to operate domestic monopolies, see U.S. Tariff Comm'n, *Economic Controls and Commercial Policy in Guatemala* 9 (1947), the historic monopoly of Cementos Progreso primarily has been attributed to the poor transportation network within Guatemala. Cf. Int'l Bank for Reconstruction & Dev., supra, at 66 ("Improvements in transportation . . . should, by allowing for cheaper [cement] imports, go far to meet any threat of monopoly.").

<sup>119</sup> See Economist Intelligence Unit, *Country Report: Guatemala, Third Quarter 1998* (1998), 1998 WL 16845117 (describing doubling of cement demand in Guatemala in late 1980s and early 1990s); *The Region—Cement Shortage*, in *Central America, Caribbean Update*, Aug. 1, 1994, 1994 WL 2238245 (describing cement shortage and measures taken in response).

<sup>120</sup> See Report of the Panel, *Guatemala Cement I*, supra note 18, ¶ 4.287 (giving Cementos Progreso's June 1995 market share as 99.85%).

<sup>121</sup> The full name of the firm is *Cooperativa Manufacturera de Cemento Portland la Cruz Azul, S.C.L.* Id. ¶ 1.1.

<sup>122</sup> See id. ¶ 4.131.

<sup>123</sup> See *The Region—Cement Shortage*, supra note 119.

<sup>124</sup> See Report of the Panel, *Guatemala Cement I*, supra note 18, ¶ 4.131.

<sup>125</sup> See id. ¶ 4.303 (noting increase in Cruz Azul's 1995 Guatemalan market share from 0.15% in June to 23.54% by end of year).

<sup>126</sup> Id. ¶ 4.302.

Progreso,<sup>127</sup> the Guatemalan producer had just begun a significant three-year expansion project,<sup>128</sup> and it worried about its long-term ability to compete in an open market.<sup>129</sup>

In response to this threat from Cruz Azul, Cementos Progreso sought relief under Guatemala's antidumping statute.<sup>130</sup> While Guatemala had never conducted an antidumping investigation,<sup>131</sup> upon joining the WTO it had accepted the 1994 Antidumping Agreement and was bound by its terms.<sup>132</sup> Thus, Cementos Progreso was required to submit a formal application for an antidumping investigation, providing evidence of dumping, injury, and causation,<sup>133</sup> as well as all information "reasonably available to the applicant" on four specific issues.<sup>134</sup>

As evidence of dumping, Cementos Progreso included in its application photocopies of sales documents for two large shipments of cement from Cruz Azul to Guatemalan distributors, presumably obtained from its distribution network.<sup>135</sup> To get a Mexican domestic price for comparison, Cementos Progreso sent representatives to Mexico where they purchased individual sacks of cement on the spot

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<sup>127</sup> See *id.* ¶ 4.113 (summarizing Mexico's argument that Cementos Progreso continued to operate at or near full capacity through period of antidumping investigation). But see *id.* ¶ 4.278 (detailing Guatemala's claim that partial shutdown of Cementos Progreso in March 1996 was result of import competition).

<sup>128</sup> See *id.* ¶ 4.187.

<sup>129</sup> See *id.* ¶ 4.153 (detailing potentially devastating consequences of increased cement imports for Cementos Progreso and Guatemala's economy).

<sup>130</sup> See *id.* ¶ 2.1. Guatemala's formal incorporation of the 1994 Antidumping Agreement into its domestic law did not come into effect until June 1996. See Guatemala, Notification of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements, WTO Doc. G/ADP/N/1/GTM/2 (Oct. 2, 1996) (incorporating text of Administrative Decision No. 178-96 of May 27, 1996 and revised Central American Regulations on Unfair Business Practices of December 16, 1995). At the time Cementos Progreso filed its application, Guatemala was operating under a temporary statute. See Guatemala, Notification of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements, WTO Doc. G/ADP/N/1/GTM/1 (Apr. 3, 1995).

<sup>131</sup> See Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶ 5.2 (citing third-party submission of El Salvador which noted that no Central American country had previously conducted antidumping investigations).

<sup>132</sup> See WTO Agreement, *supra* note 1, art. XIV:1 (providing that acceptance of WTO Agreement includes acceptance of annexed Multilateral Agreements, including Antidumping Agreement (1994)).

<sup>133</sup> See Antidumping Agreement (1994), *supra* note 14, art. 5.2.

<sup>134</sup> *Id.* The four issues on which all reasonably available information must be provided are (1) the identity of the applicant, the domestic industry, and the "like product" made by the applicant which competes with the allegedly dumped imports; (2) the identity of the exporters and known persons importing the allegedly dumped products; (3) the prices of the allegedly dumped goods when sold for export and when destined for the domestic market; and (4) the evolution of the volume of imports and their effects on the domestic industry. *Id.*

<sup>135</sup> See Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶ 4.136.

market.<sup>136</sup> While the domestic Mexican price of Cruz Azul cement was nearly double the export price to Guatemala, certainly some, if not all, of the price difference could be attributed to the differences in the terms of sale.<sup>137</sup> As to injury, Cementos Progreso did not have data on the exact volume of imports from Mexico, but it asserted that the increase in imports had been “massive” and requested that the government collect more precise data from customs officials.<sup>138</sup> Even without that data, Cementos Progreso asserted that the potential long-term effects on the Guatemalan economy of price undercutting by imported cement would be disastrous and thus constituted a threat of injury sufficient to begin an antidumping investigation.<sup>139</sup>

On the basis of this application, Guatemala decided to initiate an antidumping investigation, though it is questionable whether the application met the requirements of the Antidumping Agreement.<sup>140</sup> Given the close ties between the Guatemalan business elite and the new government elected in the same week that the investigation was initiated,<sup>141</sup> the Mexican view that Cementos Progreso was simply using its political connections to obtain protection to safeguard its monopoly is not implausible. Nonetheless, after Cruz Azul submitted data in response to the investigation, Guatemala made a preliminary determination that Cruz Azul was indeed engaged in dumping and imposed a provisional duty of 38.72%.<sup>142</sup> To verify Cruz Azul’s data, Guatemala scheduled a verification visit to the Cruz Azul production

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<sup>136</sup> See *id.* ¶ 4.177.

<sup>137</sup> According to the sales documents presented by Cementos Progreso, the domestic price of Cruz Azul cement in Mexico was the equivalent of 27.62 quetzales per sack, while the export price to Guatemala was only 14.77 quetzales per sack. See *id.* ¶ 7.61. However, the sacks of cement sold in Guatemala weighed 42.6 kilograms (94 pounds), see *id.* ¶ 7.62, while in Mexico Cruz Azul sells 50-kilogram sacks of cement, see *id.* ¶¶ 4.119(ii), 4.167(a). Moreover, the domestic price was calculated on the basis of two retail sales of single cement sacks, see *id.* ¶ 4.141, while the export price was based on two wholesale transactions for 7035 and 4221 sacks, respectively, see *id.* ¶ 4.132.

<sup>138</sup> See *id.* ¶ 4.140.

<sup>139</sup> See *id.* ¶ 4.153.

<sup>140</sup> See *infra* notes 160-79 and accompanying text.

<sup>141</sup> The rightist Party of National Advancement (PAN) won a majority in the Congress in the first round of elections on November 12, 1995, and its Presidential candidate, Alvaro Arzú Irigoyen, won a runoff on January 7, 1996, taking office a week later. See Departamento de Estudios Especiales, *Infopress Centroamericana, Guatemala—Elecciones '95*, at 4 (1995) (outlining calendar of 1995 election). PAN has close ties to the business community and its principal organization, the Coordinating Committee of Agricultural, Commercial, Industrial, and Financial Associations (CACIF). See Economist Intelligence Unit, *Country Profile: Guatemala/El Salvador, 1999-2000*, at 8-9 (noting close ties between Arzú administration and “the influential Comité Coordinadora de Asociaciones Agrícolas, Comerciales, Industriales y Financieras (CACIF), the chambers of commerce, industry, and agriculture”).

<sup>142</sup> See Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶ 2.1.

facilities, but abruptly canceled it when the Mexican authorities objected that two of Guatemala's nongovernmental experts had conflicts of interest.<sup>143</sup> Because the data provided by Cruz Azul thus was never verified, the Guatemalan authorities simply accepted Cementos Progreso's view of events and imposed a permanent antidumping duty of 89.54% on cement from Cruz Azul, whereupon Mexico requested the establishment of a WTO panel to examine Guatemala's conduct of the investigation.<sup>144</sup>

### B. *The First Panel Report*

The Mexican request for a WTO dispute settlement panel alleged, "by way of example," fifteen separate procedural violations by Guatemala in the course of the investigation.<sup>145</sup> Ultimately, however, only two proved decisive for the Panel: Guatemala's tardy notification to Mexico of the initiation of the investigation, and the lack of sufficient evidence to initiate an investigation.

The Antidumping Agreement provides that "before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned."<sup>146</sup> However, while Guatemala published a notice of initiation on January 11, 1996, it did not officially inform Mexico of the investigation until January 22.<sup>147</sup> Guatemala asserted that, since it did not take any affirmative steps in its investigation until January 23, it had not violated the notification provision.<sup>148</sup> Moreover, Guatemala claimed that it had more than compensated for the delay by granting Cruz Azul a two-month extension of its deadline to reply.<sup>149</sup> Therefore, even if the delay constituted a technical violation of WTO rules, the error involved was "harmless" and should be ignored by the Panel.<sup>150</sup>

The Panel, however, found that Guatemala's late notification was in fact a violation of the Antidumping Agreement.<sup>151</sup> The Guatemalan announcement published on January 11 fulfilled the Agreement's definition of the "initiation" of an antidumping investigation as "the

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<sup>143</sup> See *id.* ¶¶ 4.336-340 (describing how Guatemalan experts also were advising U.S. cement companies seeking antidumping duties on Mexican cement).

<sup>144</sup> See *id.* ¶¶ 2.1-3.1.

<sup>145</sup> See Request for the Establishment of a Panel by Mexico, Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico, WTO Doc. WT/DS60/2 (Feb. 13, 1997).

<sup>146</sup> Antidumping Agreement (1994), *supra* note 14, art. 5.5.

<sup>147</sup> See Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶ 7.30.

<sup>148</sup> See *id.* ¶ 4.201.

<sup>149</sup> See *id.* ¶ 4.202.

<sup>150</sup> *Id.* ¶ 4.213.

<sup>151</sup> See *id.* ¶ 8.4.

procedural action by which a Member formally commences an investigation.”<sup>152</sup> More importantly, the Panel also rejected Guatemala’s argument that the delay constituted “harmless error.”<sup>153</sup> According to the DSU, any infringement of an obligation under a covered agreement creates a rebuttable presumption that other WTO Members have been impacted adversely.<sup>154</sup> Therefore, the Panel reasoned, Guatemala would have to demonstrate that the delay “*could* not have had any effect on the course of the investigation.”<sup>155</sup> Without addressing Guatemala’s assertions that its deadline extensions had compensated for the delay, the Panel found that it could not “say with *certainty*” that the delay was without effect, and thus was unable to conclude that Guatemala had rebutted the presumption of adverse effects.<sup>156</sup>

If a violation did not result in demonstrable harm, the Panel concluded, the proper response is not to deny that a violation occurred, but to take the absence of harm into consideration in suggesting a remedy.<sup>157</sup> Given the Panel’s other findings, it decided it did not need to reach the question of the proper remedy for Guatemala’s delay in this case.<sup>158</sup> Nonetheless, it is significant that the Panel placed such a high burden on a WTO Member conducting an antidumping investigation. Even relatively minor procedural errors that do not noticeably affect the course of an investigation, in the Panel’s view, are sufficient for a finding of a violation unless the offending Member can show with certainty that nothing was changed by the error. Since, as the United States argued in its third-party submission, there are “hundreds, if not thousands” of individual decisions in the course of a typical antidumping investigation,<sup>159</sup> the burden placed on the investigating Member by the Panel’s approach is extraordinarily high.

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<sup>152</sup> Antidumping Agreement (1994), *supra* note 14, n.1. The Guatemalan announcement published on January 11 specifically stated that the investigation would “take effect as from the day on which the notice is published,” Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶ 7.30, and other Guatemalan documents confirm Guatemala’s intention that the investigation officially begin at the time of publication, *id.* ¶ 7.35 (citing two official governmental decisions). The Panel also decided it appropriately could consider a fax Guatemala sent to Mexico apologizing for the notification delay, which it attributed to clerical error due to inexperience in conducting antidumping investigations. *Id.* ¶¶ 7.30, 7.37.

<sup>153</sup> See Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶¶ 7.40-43.

<sup>154</sup> See *id.* ¶ 7.41 (citing DSU, *supra* note 35, art. 3.8).

<sup>155</sup> *Id.* ¶ 7.42 (emphasis added).

<sup>156</sup> *Id.* (emphasis added).

<sup>157</sup> See *id.* ¶ 7.43.

<sup>158</sup> See *id.* ¶¶ 8.3-4.

<sup>159</sup> *Id.* ¶ 5.25.

The Panel then considered Mexico's claim that the evidence presented by Cementos Progreso did not constitute "sufficient evidence" as required by the Antidumping Agreement.<sup>160</sup> Under the Agreement, a domestic industry application for an investigation must include evidence, and not a mere assertion, of dumping, injury, and a causal link between them.<sup>161</sup> Once a WTO Member receives the application, its antidumping authorities are required to "examine the accuracy and adequacy of the evidence in the application to determine whether there is sufficient evidence to justify the initiation of an investigation."<sup>162</sup> If the authorities find that there is not sufficient evidence, the application is to be rejected.<sup>163</sup>

According to Mexico, the only evidence of dumping offered by Cementos Progreso involved sales at different levels of trade (wholesale vs. retail), in different currencies, and on different conditions (spot cash vs. credit),<sup>164</sup> whereas the Antidumping Agreement requires that a finding of dumping be based on a "fair comparison" of prices.<sup>165</sup> Instead of offering evidence of a threat of material injury, Cementos Progreso merely alleged what would happen if it were unable to complete its expansion plans, or even to go out of business,<sup>166</sup> without addressing any of the factors suggested in the Antidumping Agreement as possible indicators of a threat of injury.<sup>167</sup> Thus, Mexico alleged, Guatemala did not have sufficient evidence of dumping or injury at the time of the initiation of the investigation and, a fortiori, could not have had evidence of a causal link between the two.<sup>168</sup>

Guatemala justified its decision to initiate the investigation on two principal grounds. First, Guatemala argued that the provisions of the Antidumping Agreement which specify the adjustments to be made in arriving at a fair price comparison and the factors to be considered in demonstrating a threat of material injury pertain to the de-

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<sup>160</sup> Antidumping Agreement (1994), supra note 14, art. 5.3 (applying to investigations initiated pursuant to applications by domestic industry); id. art. 5.6 (applying same standard to investigations initiated on authorities' own motion).

<sup>161</sup> See id. art. 5.2.

<sup>162</sup> Id. art. 5.3.

<sup>163</sup> See id. art. 5.7.

<sup>164</sup> See Report of the Panel, *Guatemala Cement I*, supra note 18, ¶ 4.119.

<sup>165</sup> Antidumping Agreement (1994), supra note 14, art. 2.4 (specifying that comparison be made "at the same level of trade," at the same time, with appropriate adjustments for differing terms of sale, taxation, levels of trade, quantities, physical characteristics, and other factors affecting price comparability).

<sup>166</sup> See Report of the Panel, *Guatemala Cement I*, supra note 18, ¶¶ 4.139-140.

<sup>167</sup> See Antidumping Agreement (1994), supra note 14, art. 3.7(i)-(iv) (listing factors as increased rate of importation, increased capacity, price suppression, and decreased inventories).

<sup>168</sup> See Report of the Panel, *Guatemala Cement I*, supra note 18, ¶ 4.150.

terminations which are made in the course of the actual investigation, and are not meant to apply strictly to the beginning of the investigation, when much of the relevant information is not yet available.<sup>169</sup> Indeed, the only way Cementos Progreso learned the spot price for individual sacks of Cruz Azul cement in Mexico was by sending representatives to Mexico to buy some for themselves.<sup>170</sup> Further, the necessary adjustments would have depended on data obtained from Cruz Azul during the course of the investigation, and thus Guatemala could not have calculated them in advance.<sup>171</sup> Likewise, detailed information about the exact volume of Cruz Azul cement being imported into Guatemala was not collected routinely by the Guatemalan customs service, and was not available until well after the investigation had begun.<sup>172</sup> Guatemala claimed that, in the meantime, it reasonably relied on circumstantial evidence of massive imports,<sup>173</sup> and its own familiarity with the domestic cement market<sup>174</sup> to assess the "accuracy and adequacy" of the application submitted by Cementos Progreso.<sup>175</sup>

Second, Guatemala noted that the final text of the Antidumping Agreement did not include the proposal of certain countries during the Uruguay Round negotiations that a Member establish a *prima facie* case of dumping, injury, and causation before initiating an investigation,<sup>176</sup> nor a draft proposal requiring verification of the information presented in the application.<sup>177</sup> The actual text of the Antidumping Agreement, as adopted, merely requires that the authorities satisfy themselves that the evidence provided is sufficient to justify initiation of the investigation and does not establish any particular standard or procedure for measuring that sufficiency.<sup>178</sup> Whether the evidence was sufficient in any particular case is a factual question, and the Panel is not authorized to conduct a *de novo* review of a Member's assessment of the data.<sup>179</sup>

The Panel rejected these arguments and found that Guatemala could not have found properly, on the evidence available to it at the time, that there was sufficient evidence to justify initiation of an an-

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<sup>169</sup> See *id.* ¶ 4.116 (stating Guatemala's argument that Mexico's interpretation would require investigation prior to initiation).

<sup>170</sup> See *id.* ¶ 4.177.

<sup>171</sup> See *id.* ¶ 4.136.

<sup>172</sup> See *id.* ¶¶ 4.146-148.

<sup>173</sup> See *id.* ¶ 4.147.

<sup>174</sup> See *id.* ¶ 4.195.

<sup>175</sup> See *id.* ¶ 4.147.

<sup>176</sup> See *id.* ¶ 4.133 (citing GATT Doc. MTN.GNG/NG8/W/51,4 (Sept. 12, 1989)).

<sup>177</sup> See *id.* ¶ 4.164 & n.71.

<sup>178</sup> See *id.* ¶ 4.164.

<sup>179</sup> See *id.* ¶¶ 4.117, 4.166.

tidumping investigation.<sup>180</sup> Relying on a GATT panel report examining the requirements for initiating a countervailing duty investigation under the Tokyo Round Subsidies Code,<sup>181</sup> the Panel held that, while the “quantum and quality” of evidence sufficient to initiate an investigation are less than what ultimately will be required to establish the necessary elements for an antidumping order, evidence sufficient for initiation must be “relevant” to what ultimately must be proved.<sup>182</sup> In this case, as Mexico had argued, the only evidence of dumping on the record at the time of initiation was based on sales at different volumes and levels of trade. There was also nothing to indicate that Guatemala even attempted to make the adjustments which would be necessary for a fair comparison of domestic and export prices of Cruz Azul cement.<sup>183</sup> The required type of evidence (price differentials at equivalent levels of trade) was lacking and therefore insufficient for initiating an investigation.<sup>184</sup> Likewise, the Panel found that the evidence on the record of a threat of injury was merely conjectural<sup>185</sup> and did not include much relevant data that Cementos Progreso could have provided.<sup>186</sup>

In reaching its conclusion, the Panel restricted itself to the evidence that was available in the written record at the time the investigation was initiated.<sup>187</sup> In particular, the Panel refused to consider facts that the Guatemalan Ministry of Economy claimed to know, such as transport costs in Guatemala and the deep recession in Mexico, but which were not stated explicitly in the record.<sup>188</sup> Guatemala had claimed that it evaluated Cementos Progreso’s application by making inferences based on this kind of general information already known to the government apart from the application.<sup>189</sup> Further, Guatemalan authorities gathered additional data in undocumented oral conversations with Cementos Progreso that had begun even before the formal application was received.<sup>190</sup> By eliminating from its

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<sup>180</sup> See id. ¶ 7.80.

<sup>181</sup> Report of the Panel, United States—Measures Affecting Softwood Lumber from Canada, Oct. 27, 1993, GATT B.I.S.D. (40th Supp.) at 358 (1995) [hereinafter Report of the Panel, *Softwood Lumber*].

<sup>182</sup> Report of the Panel, *Guatemala Cement I*, supra note 18, ¶ 7.55 (quoting Report of the Panel, *Softwood Lumber*, supra note 181, ¶ 332).

<sup>183</sup> See id. ¶ 7.65.

<sup>184</sup> See id. ¶ 7.66-67.

<sup>185</sup> See id. ¶ 7.71.

<sup>186</sup> See id. ¶¶ 7.72-74 (suggesting ways Cementos Progreso could have substantiated its claims of threatened injury).

<sup>187</sup> See id. ¶ 7.60.

<sup>188</sup> See id. ¶ 7.68 n.242.

<sup>189</sup> See id. ¶ 4.195.

<sup>190</sup> See id. ¶ 4.189.

consideration data gathered informally by Guatemala, a small, developing country that had never before conducted an antidumping investigation, the Panel thus significantly distorted the picture of the evidence available to the Guatemalan officials at the time of their decision to begin a formal investigation.

Having concluded, nonetheless, that Guatemala's initiation of the investigation was based on insufficient evidence, the Panel was required by the DSU to "recommend" that Guatemala bring its measure into compliance with its WTO obligations.<sup>191</sup> The Panel also decided, however, to exercise its option to make a nonbinding "suggestion" about how Guatemala might do that.<sup>192</sup> Since the basis of the entire investigation was flawed, in the Panel's view it should never have been conducted. Given that such a violation cannot be corrected in the course of the investigation, the Panel "suggest[ed]" that the "only appropriate" means of implementing the recommendation was for Guatemala to revoke the antidumping duty on Cruz Azul cement.<sup>193</sup>

### C. *The Appellate Body Report*

By imposing an "exclusionary rule" on duties imposed following procedurally flawed investigations,<sup>194</sup> the Panel raised the procedural bar to making dumping determinations. This approach, had it been upheld by the Appellate Body, clearly would have shifted the balance of WTO antidumping rules against nations imposing antidumping duties.<sup>195</sup> The United States, whose interests as a major user of antidumping duties would be harmed by such a rule, argued to the Appellate Body that, even granting Guatemala's procedural violations, the Panel's decision should be read as confined to the specific

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<sup>191</sup> See DSU, *supra* note 35, art. 19.1.

<sup>192</sup> See Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶¶ 8.3-4 (noting that while Member need not follow suggestions, inadequate compliance would subject Member to further dispute settlement proceedings).

<sup>193</sup> *Id.* ¶ 8.6.

<sup>194</sup> Since the Panel did not reach any issues beyond those related to the initiation of the investigation, it made no conclusions about the correctness of Guatemala's ultimate determination that Cruz Azul was, in fact, engaged in injurious dumping. Applying the Panel's reasoning, if the investigation had discovered incontrovertible evidence that injurious dumping was in fact occurring, the procedural errors still would have prevented Guatemala from taking any remedial action whatsoever without starting the investigative process over from the beginning.

<sup>195</sup> See Steel Companies Call for Reinforcement of WTO Dumping Review Rules, Inside U.S. Trade, July 10, 1998 (quoting spokespersons for U.S. steel industry as denouncing "striking reluctance by the [*Guatemala Cement*] panel to respect the negotiated limits" on antidumping review), <http://www.insidetrade.com> (on file with the *New York University Law Review*).

facts of the case.<sup>196</sup> But, as was generally recognized at the time, the Panel's approach in fact made it more difficult to initiate an antidumping investigation and imposed a significant penalty on improper initiation.<sup>197</sup>

However, Guatemala (and the United States, as a third party) argued that the Appellate Body ought not to affirm the Panel's report because the Panel lacked jurisdiction over the case.<sup>198</sup> In general, a panel's "terms of reference," or jurisdictional mandate, are defined by the party bringing the dispute in its request for the establishment of a panel.<sup>199</sup> This request must "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."<sup>200</sup> Since a deficiency in pleading, coupled with the lack of DSB discretion in establishing the panel,<sup>201</sup> can defeat the jurisdiction of panels, virtually every defendant in a dispute settlement case urges that the dispute is not properly before the panel, though such claims are usually unsuccessful.

The jurisdictional argument in *Guatemala Cement*, however, was not entirely without merit. The Antidumping Agreement provides that Members may seek consultations on the usual broad range of subjects,<sup>202</sup> and that if consultations fail to achieve resolution, the

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<sup>196</sup> See Report of the Appellate Body, *Guatemala Cement I*, supra note 18, ¶ 53.

<sup>197</sup> See Tara Gingerich, Comment, Why the WTO Should Require the Application of the Evidentiary Threshold Requirement in Antidumping Investigations, 48 Am. U. L. Rev. 135, 173 (1998) ("In the [*Guatemala Cement I*] panel report, the WTO undeniably took the strongest stance that it or the GATT has taken to date with regard to insisting that applications meet a minimum threshold before a national authority can initiate an antidumping investigation.")

<sup>198</sup> See Report of the Appellate Body, *Guatemala Cement I*, supra note 18, ¶¶ 5-17 (argument of Guatemala), ¶¶ 50-52 (argument of United States).

<sup>199</sup> See DSU, supra note 35, art. 7.1 (describing standard terms of reference). The terms of reference of the *Guatemala Cement I* Panel, for example, were:

To examine, in the light of the relevant provisions of the covered agreements cited by Mexico in document WT/DS60/2, the matter referred to the DSB by Mexico in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

Communication from the DSB Chairman, Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico: Constitution of the Panel Established at the Request of Mexico, WTO Doc. WT/DS60/3 (May 5, 1997), ¶ 2.

<sup>200</sup> DSU, supra note 35, art. 6.2.

<sup>201</sup> See Report of the Panel, Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, WT Doc. WT/DS126/R (May 25, 1999) (adopted June 16, 1999), ¶¶ 9.10-15 (finding that panel establishment is automatic and that propriety of panel establishment is not matter to be determined by panel itself); supra note 38 (explaining that establishment of panel can no longer be blocked by defending party under WTO DSU).

<sup>202</sup> The Antidumping Agreement (1994), supra note 14, art. 17.3, provides:

If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of

“matter” may be referred to the DSB if one of three events has occurred, the relevant one in this case being the imposition of final antidumping duties.<sup>203</sup> In its request for a panel, Mexico had challenged Guatemala’s conduct of the antidumping investigation,<sup>204</sup> rather than the antidumping duties themselves. In fact, Mexico initially requested consultations before Guatemala had fixed the final antidumping duty, though the final duty was in place at the time Mexico requested the panel.<sup>205</sup> The Panel had found that even though Mexico had not identified the final antidumping duty as the “specific measure[ ] at issue,”<sup>206</sup> its request for a panel had set forth its complaint with sufficient precision<sup>207</sup> and had been made after Guatemala had imposed the final duty. Therefore, the Panel concluded, it properly had jurisdiction over the case.<sup>208</sup>

The Appellate Body, however, disagreed. The provision in the Antidumping Agreement that a “matter” may be referred to the DSB only if one of three events has occurred is not a timing provision stating *when* a panel may be requested, as the Panel held, but rather a subject matter provision stating *what* measures may be the subject of a dispute settlement under the Antidumping Agreement.<sup>209</sup> This “matter” must, as the DSU provides,<sup>210</sup> include the “measure” complained

any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question.

<sup>203</sup> See *id.* art. 17.4 (providing that DSB referral may also follow “price undertakings,” or agreement not to export below specified price as provided in article 8 of Antidumping Agreement (1994), or provisional measure that “has a significant impact”).

<sup>204</sup> Indeed, both the two earlier WTO antidumping disputes had been brought by Mexico to challenge an ongoing antidumping investigation and had been settled by the parties before the imposition of antidumping duties. See *supra* note 108.

<sup>205</sup> Mexico’s request for WTO consultations was made on October 15, 1996, and consultations were held with Guatemala on January 9, 1997. Report of the Panel, *Guatemala Cement I*, *supra* note 18, at ¶¶ 1.1-2. Guatemala’s final antidumping duty was announced on January 17, 1997. *Id.* ¶ 2.4. Mexico then made its formal request for the establishment of a panel on February 4, 1997. *Id.* ¶ 1.3.

<sup>206</sup> DSU, *supra* note 35, art. 6.2.

<sup>207</sup> Mexico alleged “[b]y way of example” fifteen separate procedural violations, stating in each case the particular steps taken by the Guatemalan authorities and the WTO provisions alleged to be violated. Request for the Establishment of a Panel by Mexico, *supra* note 145.

<sup>208</sup> Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶ 7.27.

<sup>209</sup> Report of the Appellate Body, *Guatemala Cement I*, *supra* note 18, ¶ 77.

<sup>210</sup> The DSU provides that certain listed provisions of various WTO agreements shall take precedence over the DSU to the extent that “there is a difference” between them. DSU, *supra* note 35, art. 1.2. According to the Appellate Body, conflicts between the DSU and these “special or additional rules,” *id.*, are to be construed narrowly, and both should be complied with wherever possible. See Report of the Appellate Body, *Guatemala Cement I*, *supra* note 18, ¶ 65. Article 17.4 of the Antidumping Agreement (dealing with request for panel in antidumping case), but not Article 17.3 (dealing with request for con-

of as well as the legal “claims” made against it.<sup>211</sup> Complaints with regard to the conduct of the investigation may constitute the legal “claims” against the measure, but cannot be the “measure” itself.<sup>212</sup> The “measure” must be one of the three triggering events mentioned—here, the final antidumping duty.<sup>213</sup>

Thus, the Appellate Body reasoned, the procedural violations complained of by Mexico were not “measures” that are the appropriate subject matter for dispute settlement, but were, at most, “claims” expressing why an appropriate subject matter, the final antidumping duty, was alleged to be invalid. Even though the Appellate Body recognized that Mexico explicitly had sought the revocation of the final antidumping duty if its claims were upheld,<sup>214</sup> Mexico did not identify the final antidumping duty as the “specific measure at issue.”<sup>215</sup> Therefore, the Panel’s terms of reference did not include any proper subject matter for an antidumping case, and the Panel was without jurisdiction.<sup>216</sup> While Mexico would be free to begin again and pursue another dispute settlement complaint, the Appellate Body concluded:

Having found that this dispute was not properly before the Panel, we consider that the merits of Mexico’s claims in this case are not properly before us. Therefore, we cannot consider any of the substantive issues raised . . . in this appeal. Accordingly, we have no choice but to come to no conclusions as to whether the Panel was right or wrong in finding that Guatemala had acted inconsistently with its obligations . . . or in making its recommendations and suggestion . . . .<sup>217</sup>

The Appellate Body’s decision is puzzling. Its restriction of the appropriate subject matter of an antidumping dispute is at best implied, rather than stated, in the text of the Antidumping Agreement. Moreover, the restriction comes at a certain cost. First, while WTO Members have the right to be free from antidumping investigations

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sultations) is listed as such a “special or additional rule.” DSU, *supra* note 35, app. 2. Thus, the Appellate Body concluded, the general DSU requirement (in Article 6.2, see *supra* note 200), to state with specificity the “measures at issue” as well as “the legal basis of the complaint” must apply along with the provisions of Article 17.4, since both can be complied with simultaneously. Report of the Appellate Body, *Guatemala Cement I*, *supra* note 18, ¶ 75.

<sup>211</sup> DSU, *supra* note 35, art. 6.2.

<sup>212</sup> See Report of the Appellate Body, *Guatemala Cement I*, *supra* note 18, ¶ 79.

<sup>213</sup> *Id.* ¶ 80 (“We find that in disputes under the *Anti-Dumping Agreement* relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB . . . .”).

<sup>214</sup> See *id.* ¶ 85.

<sup>215</sup> See *id.*

<sup>216</sup> See *id.* ¶ 89.

<sup>217</sup> *Id.*

not conducted in accordance with the mandated procedures—investigations that have potential chilling effects on trade even if no duties are eventually assessed<sup>218</sup>—the Appellate Body’s decision makes this a right without a remedy, a situation it normally goes out of its way to avoid.<sup>219</sup> In particular, as the Appellate Body has held elsewhere, subsequent developments in a matter that do not affect the substance of the dispute ought not to defeat a panel’s jurisdiction over them.<sup>220</sup> Further, to dismiss a case at the appellate level, even without prejudice, for what is essentially a pleading error that can be remedied without difficulty, is a particularly inefficient use of judicial resources,<sup>221</sup> another result the Appellate Body normally attempts to

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<sup>218</sup> See *supra* note 81 and accompanying text.

<sup>219</sup> In a case involving Canadian export subsidies to its aircraft industry, Canada had refused to provide certain information despite a mandatory request from the Panel in accordance with article 13.1 of the DSU. The Appellate Body held that the Panel had the right to make adverse inferences from Canada’s failure to comply with the request for information, even without a textual authorization for such inference, on the grounds of the potential consequences of a rule that would permit WTO Members to violate a WTO obligation without sanction:

To hold that a Member party to a dispute is not legally bound to comply with a panel’s request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU. So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceedings for which they bargained in concluding the DSU. We are bound to reject an interpretation that promises such consequences.

Report of the Appellate Body, *Canada—Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/AB/R, ¶ 189 (Aug. 2, 1999) (adopted Aug. 20, 1999).

<sup>220</sup> In a companion case involving Brazilian aircraft industry export subsidies, Canada and Brazil held inconclusive consultations in 1996, but Canada did not proceed to request a panel for two years. During that time, the Brazilian subsidy scheme was modified by certain regulatory amendments, and Brazil claimed that the scheme *as amended* was not properly before the Panel, since it had not been identified as such in the Panel’s terms of reference. See Report of the Appellate Body, *Brazil—Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/AB/R, ¶ 127 (Aug. 2, 1999) (adopted Aug. 20, 1999). The Appellate Body found that these new regulations “did not change the essence” of the subsidy program. *Id.* ¶ 132. Further, it held that the DSU does not “require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel.” *Id.* Even though the request for a panel did not acknowledge explicitly the regulatory amendments, the Appellate Body concluded that the entire program, including the amendments, was properly before the panel. *Id.* ¶¶ 132-133.

<sup>221</sup> One of the most frequent complaints about the WTO dispute settlement process is that it has inadequate financial and personnel resources to handle its growing caseload. See, e.g., Ragosta, *supra* note 54, at 762 (noting lack of resources available to U.S. agency for effective advocacy in WTO dispute settlement).

avoid.<sup>222</sup> This burden is particularly harsh, especially for parties that are developing nations.<sup>223</sup>

However, the Appellate Body's decision not to draw a conclusion as to the correctness of the Panel's restrictive interpretations of the Antidumping Agreement may be explained by the overall context of the WTO dispute settlement system and, in particular, of antidumping within the WTO. To affirm the Panel's reading, or to reverse it, would place the Appellate Body in the midst of the unresolved dispute among WTO Members about the place of antidumping within the world trading system. To take either position in its very first antidumping case would have raised questions of legitimacy within a significant sector of the WTO membership. By avoiding a substantive decision, the Appellate Body reasonably may have hoped that a future Panel would approach the case in a more nuanced way.<sup>224</sup> That hope, as it turned out, was not in vain.

#### D. *The Second Panel Report*

The second Panel in *Guatemala Cement* announced its decision in October 2000, more than four years after Mexico filed its initial requests for consultations.<sup>225</sup> Like the first Panel, the second Panel found that Guatemala had violated the Antidumping Agreement in failing to notify Mexico of the initiation of the investigation,<sup>226</sup> and also agreed that there was insufficient evidence for Guatemala to have initiated an antidumping investigation.<sup>227</sup> The second Panel, however, did not end its analysis with a consideration of the initiation, but pro-

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<sup>222</sup> See, e.g., Report of the Appellate Body, Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland, WTO Doc. WT/DS122/AB/R, ¶ 97 (Mar. 12, 2001) (adopted Apr. 5, 2001) [hereinafter Report of the Appellate Body, *Polish Steel*] (“[T]he ‘procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt, and effective resolution of trade disputes.’” (quoting Report of the Appellate Body, United States—Tax Treatment of “Foreign Sales Corporations,” WTO Doc. WT/DS108/AB/R, ¶ 166 (Feb. 24, 2000) (adopted Mar. 20, 2000))).

<sup>223</sup> See, e.g., Ragosta, *supra* note 54, at 758-60 (noting that financial burden on developing countries in WTO litigation is matter of major concern).

<sup>224</sup> Such a hope would not be unreasonable, given the significant influence that the WTO Secretariat has over the appointment of panels and the conduct of panel proceedings. See *id.* at 760-62; see also Lowenfeld, *supra* note 94, at 485 (relating experience of former GATT panel member that “[i]n GATT panel proceedings up to now the secretariat has played an important—sometimes decisive—role”).

<sup>225</sup> See Report of the Panel, *Guatemala Cement II*, *supra* note 18.

<sup>226</sup> See *id.* ¶ 8.111.

<sup>227</sup> See *id.* ¶ 8.58. However, the finding of the earlier Panel that the decision to initiate an investigation requires the same “type” of evidence of dumping, if not the same “quality and quantity,” Report of the Panel, *Guatemala Cement I*, *supra* note 18, ¶ 7.64, was not made by the second Panel, which limited its conclusion to the finding that Guatemala had made “no attempt . . . to take into account glaring differences” in the levels of trade in the

ceeded to find ten additional procedural violations by Guatemala in the actual conduct of the investigation.<sup>228</sup> Further, it found that Guatemala also had made substantive errors, by failing to include the effect of nondumped cement imports in its injury analysis<sup>229</sup> and consider some of the required elements for an injury determination.<sup>230</sup> However, on other claims, the Panel upheld the actions of the Guatemalan authorities.<sup>231</sup> In the end, the second Panel also suggested the withdrawal of the Guatemalan antidumping duties, but for the reason that the violations of the Antidumping Agreement were “of a fundamental nature and pervasive”<sup>232</sup> and were too numerous and systematic to be corrected by any conceivable remedial procedure,<sup>233</sup> and not because any single violation was fatal to the imposition of duties.

The second Panel report thus left open a number of questions, in ways that the first Panel report did not. It did not state precisely what the consequences of a flawed initiation might be. It showed that Guatemala’s imposition of antidumping duties was unjustified without significantly altering the balance of rights contained in the Antidumping Agreement. Significantly, it declined to suggest that Guatemala refund the antidumping duties it had collected during the three-and-a-half years of the WTO litigations, because such a request “raises important systemic issues regarding the nature of the actions necessary to implement a recommendation,” something beyond the Panel’s capacity to address.<sup>234</sup> In the end, Guatemala chose not to appeal the Panel’s finding and withdrew the antidumping duty on Cruz Azul in December 2000.<sup>235</sup>

## CONCLUSION

WTO dispute resolution seems not to have altered significantly the uneasy balance of interests between major users of antidumping

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evidence for Cruz Azul’s export and domestic prices, Report of the Panel, *Guatemala Cement II*, supra note 18, ¶ 8.39.

<sup>228</sup> See Report of the Panel, *Guatemala Cement II*, supra note 18, ¶ 9.1(e)-(n).

<sup>229</sup> See id. ¶¶ 8.268-272.

<sup>230</sup> See id. ¶ 8.285 (noting failure to consider return on investments and ability to raise capital); see also Antidumping Agreement (1994), supra note 14, art. 3.4 (“The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including . . . return on investments . . . [and] ability to raise capital or investments.”).

<sup>231</sup> See id. ¶¶ 8.68, 8.88, 8.157, 8.165, 8.174, 8.183, 8.189, 8.198, 8.206, 8.239, 8.251, 8.265-267.

<sup>232</sup> Report of the Panel, *Guatemala Cement II*, supra note 18, ¶ 9.6.

<sup>233</sup> See id.

<sup>234</sup> Id. ¶ 9.7.

<sup>235</sup> See WTO Secretariat, supra note 12.

duties and their primary targets. The only Panel report that might have affected this balance, the first *Guatemala Cement* Panel report, was sidestepped effectively by the Appellate Body, and the *Guatemala Cement* problem of pervasive procedural error is likely to be limited to antidumping investigations conducted by countries with little trade remedy administrative experience.<sup>236</sup> Whether, and to what extent, the WTO panels directly intended to preserve such a diplomatic balance is a question that only the decisionmakers themselves can answer. Nonetheless, the effect of rulings like that of the Appellate Body in *Guatemala Cement* is precisely to preserve that balance, and subsequent decisions establish this as a trend.<sup>237</sup>

As of March 2001, six additional WTO panel processes have been completed in antidumping cases,<sup>238</sup> and seven other trade remedy cases also have been decided.<sup>239</sup> While no trade remedy measure has

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<sup>236</sup> See supra note 131 and accompanying text (explaining that Cruz Azul investigation was Guatemala's first antidumping action).

<sup>237</sup> Cf. David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. Int'l L. & Pol. 865, 937 (2000) (concluding that, in WTO cases interpreting Sanitary and Phytosanitary Agreement, Appellate Body has "give[n] nations more latitude" than agreement's drafters probably intended, and that such decision "seems to have been politically wise").

<sup>238</sup> Report of the Appellate Body, *Polish Steel*, supra note 222; Report of the Appellate Body, *European Communities—Anti-Dumping Duties on Imports of Cotton Bed-Type Linen from India*, WTO Doc. WT/DS141/AB/R (Mar. 1, 2001) (adopted Mar. 12, 2001); Report of the Panel, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WTO Doc. WT/DS184/R (Feb. 28, 2001) (awaiting adoption; currently on appeal); Report of the Panel, *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WTO Doc. WT/DS179/R (Dec. 22, 2000) (adopted Feb. 1, 2001) [hereinafter *U.S. Plate and Sheet*]; Report of the Panel, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WTO Doc. WT/DS132/R (Jan. 28, 2000) (adopted Feb. 24, 2000) [hereinafter *Mexico HFCS*]; Report of the Panel, *Korean DRAMS*, supra note 109. Two additional cases, dealing with the U.S. Antidumping Act of 1916, 15 U.S.C. § 72 (1994), a virtually unused statute providing civil and criminal penalties for intentionally predatory dumping on an antitrust model, ended with determinations that the WTO did not permit additional forms of relief from dumping other than that provided in the Antidumping Agreement. See Report of the Appellate Body, *United States—Anti-Dumping Act of 1916*, WTO Docs. WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000) (adopted Sept. 26, 2000).

<sup>239</sup> One case involving countervailing duties has been decided under the WTO Agreement on Subsidies and Countervailing Measures, supra note 73. Report of the Appellate Body, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DS138/AB/R (May 10, 2000) (adopted June 7, 2000). Six cases involving challenges to safeguard measures under the Agreement on Safeguards, supra note 69, or similar provisions in other WTO agreements, also have been decided: Report of the Panel, *United States—Safeguard Measure on Imports of Fresh, Chilled, or Frozen Lamb from New Zealand*, WTO Doc. WT/DS177/R (Dec. 20, 2000) (appeal pending); Report of the Appellate Body, *United States—Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*, WTO Doc. WT/DS166/AB/R (Dec. 22, 2000) (adopted Jan. 19,

yet been upheld by the WTO, the measure in *Guatemala Cement* is the only one actually to have been struck down. The number of decided cases remains too small to permit easy generalizations.<sup>240</sup> Nonetheless, it is striking that every antidumping case other than *Guatemala Cement*, as well as every other trade remedy case, has had essentially the same result: Some, but not all, of the alleged violations are sustained, and the antidumping or other trade remedy measure is thus out of compliance with WTO norms, but no suggestion is made that the measure should be withdrawn.<sup>241</sup>

The preservation of the balance of interests among WTO Members is of particular importance in an area like antidumping, in which fundamental disagreement over the legitimacy and conditions of antidumping remedies curtails the possibility of unanimous consent to clear rules governing their use.<sup>242</sup> While binding WTO dispute resolution might, as in the first *Guatemala Cement* panel report, create such clear rules through common-law methods of adjudication, using dispute resolution to make law would create serious problems of legitimacy for the WTO itself. WTO Members, like parties to any long-term contract,<sup>243</sup> continually renegotiate the terms of their relationship—in the shadow of the contract and its provisions for dispute set-

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2001); Report of the Appellate Body, *Argentina—Safeguard Measure on Imports of Footwear*, WTO Doc. WT/DS121/AB/R (Dec. 14, 1999) (adopted Jan. 12, 2000); Report of the Appellate Body, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc. WT/DS98/AB/R (Dec. 14, 1999) (adopted Jan. 12, 2000); Report of the Appellate Body, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc. WT/DS33/AB/R (Apr. 25, 1997) (adopted May 23, 1997); Report of the Appellate Body, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WTO Doc. WT/DS24/AB/R (Feb. 10, 1997) (adopted Feb. 25, 1997).

<sup>240</sup> Cf. Brian K. Landsberg, *Race and the Rehnquist Court*, 66 Tul. L. Rev. 1267, 1274 (1992) (cautioning that drawing conclusions based on handful of statistics about case results is difficult because controlling for facts of individual cases is impossible).

<sup>241</sup> For example, in the *Korean DRAMS* case, Korea challenged a U.S. decision not to lift an existing antidumping duty, and explicitly disavowed any claim that U.S. law on its face violated the Antidumping Agreement. Report of the Panel, *Korean DRAMS*, supra note 109, ¶ 6.9. Nevertheless, the Panel based its findings on a determination that a U.S. regulation was facially inconsistent with WTO norms, a determination which it was not asked to make. *Id.* ¶ 6.51. However, the Panel's action allowed it to avoid deciding whether the U.S. decision would have been the same had the United States applied the correct standard. *Id.* ¶¶ 7.3-4.

<sup>242</sup> See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 Harv. Int'l L.J. 333, 350-51 (1999) (noting that incompletely specified contracts resulting in standards for later adjudication, rather than clearly defined ex ante rules, are common in international trade context).

<sup>243</sup> See generally Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal. L. Rev. 2005 (1987) (arguing that deference to party autonomy in contract, more than court-imposed contract adjustments, encourages cooperative long-term contractual relationships).

tlement, to be sure—and retain ownership of that process. The decision of the Appellate Body in *Guatemala Cement* to set aside the original Panel report has had the effect of shifting back onto the WTO Members themselves the obligation to continue to work out the role that antidumping and other unilateral trade remedies should assume within the system of international trade.





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