

The litigation of anti-dumping disputes before the World Trade Organization

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I. Introduction

It was perhaps inevitable that the World Trade Organization (“WTO”) would play host to a rash of disputes during its first five years. After all, the Uruguay Round of multilateral trade negotiations produced approximately 60 new international trade agreements and schedules, and introduced much of the world’s trade—and many of the world’s trade officials—to “binding dispute settlement.”²

What few predicted, including the author, is that the pace of WTO dispute settlement would show signs of slowing before the end of the 20th century. Indeed, in 1999, the number of disputes referred to the WTO dropped by more than 30 per cent.³ Beneath the surface of this trend, however, lies a development that is moving in the opposite direction. In 1995, there was only one dispute over the application of anti-dumping duties referred to the WTO.⁴ In 1996 this number tripled⁵ and in 1998 it nearly tripled again.⁶

¹ The author practices international trade law at King & Spalding in Washington, D.C. In one form or another, he has been involved in four out of the first five anti-dumping disputes to go before a panel or the Appellate Body established by the World Trade Organization in Geneva, Switzerland. For example, in 1998, the author was lead counsel to the United States in the anti-dumping case brought by Korea involving trade in certain semiconductors. The views express herein, and any errors, are the author’s own.

² Prior to January 1, 1995, a losing party in a dispute under the 1947 General Agreement on Tariffs and Trade (“1947 GATT”) could unilaterally prevent adverse rulings from having any effect under international law. See, e.g., Davey, *Dispute Settlement in GATT*, 11 *Fordham Int’l L.J.* 51, 94 (1987) (“if the losing party prevents formation of a consensus, the report is not adopted and has no effect”). As of January 1, 1995, however, the WTO Dispute Settlement Understanding eliminates the ability of a Member country to unilaterally block an adverse panel report. Thus, the losing Member in a WTO dispute must either comply with the panel’s recommendation or be subject to a loss of trade concessions.

³ *WTO’s Unique System of Settling Disputes Nears 200 Cases in 2000*, WT/Press/180, June 5, 2000.

⁴ See Request for Consultations, *Venezuela—Anti-dumping Investigation in Respect of Imports of Certain Oil Country Tubular Goods*, WT/DS23, December 5, 1995. When Venezuela terminated its anti-dumping investigation, Mexico withdrew its request on May 6, 1997.

⁵ In 1996 there were three requests for consultations: Request for Consultations, *United States—Anti-dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico*, WT/DS49, July 1, 1996; Request for Consultations, *United States—Anti-dumping Measures on Imports of Solid Urea from the Former German Democratic Republic*, WT/DS63, November 28, 1996; and, Request for Consultations, *Guatemala—Anti-dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60, October 15, 1996. The first dispute has been settled and the second has been dormant ever since the measure at issue was revoked by the United States. See *Solid Urea from the Former German Democratic Republic: Final Results (Revocation of Order) of Changed Circumstances Antidumping Duty Order*, 63 Fed. Reg. 16471 (1998). The third dispute led to the establishment of a panel on March 20, 1997 and a panel report that was circulated to all WTO Members on June 19, 1998. See Report of the Panel, WT/DS60/R, adopted as modified by Appellate Body November 25, 1998 (“*Guatemala—Cement*”).

⁶ In 1998 there were five new requests for consultations: Request for Consultations, *Australia—Anti-dumping Measures on Imports of Coated Woodfree Paper Sheets*, WT/DS119, February 20, 1998; Request for Consultations, *Thailand—Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel; H-Beams from Poland*, WT/DS122, April 6, 1998 (“*Thailand—Steel Products*”); Request for Consultations, *Mexico—Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132, May 8, 1998; Request for Consultations, *European Communities—Anti-dumping Investigation Regarding Unbleached Cotton Fabrics from India*, WT/DS140, August 3, 1998; and, Request for Consultations, *European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed-Linen from India*, WT/DS141, August 3, 1998 (“*E.C.—Bed Linen*”).

During 1999, there were a total of six new requests for consultations over the application of anti-dumping duties and six panels were active.⁷ In January, 2000, alone, there were two new requests for consultations over anti-dumping duties.⁸

Some observers may attribute this rise in anti-dumping disputes to a natural sorting-out process in which rights and obligations under the new Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD" Agreement) are tested and decided.⁹ While this is, to some extent, no doubt the case—a second explanation warrants consideration.

During the Uruguay Round, it was widely known that Japan, Korea, and numerous other countries that depend heavily on exports to sustain their economies tried to weaken the anti-dumping laws of various WTO Members, especially the United States and the European Communities. To a certain extent, they were successful.¹⁰ But to these countries, the Uruguay Round was just one battle in a long war. Challenging anti-dumping duties and anti-dumping laws under the WTO's new binding dispute settlement scheme is part of that war. By litigating these cases at every level (*i.e.* before national courts and administrative agencies, and now at the international level), these countries hope to (i) rewrite the rules on dumping, and (ii) put the cost of seeking anti-dumping duties beyond the reach of most industries.

It is interesting to note that during the first five years of the WTO, only 25 per cent of all anti-dumping investigations were initiated by the United States and the European Communities, yet 50 per cent of all WTO anti-dumping complaints were directed at these two Members. In addition, of all the anti-dumping complaints brought against the United States during this period, well over half were brought by Japan and Korea. It is also

In addition, two requests for consultations were made during 1997. Both resulted in requests for panels; however, one request was withdrawn on January 5, 1998. See Request for Consultations, *United States—Anti-dumping Duties on Imports of Color Television Receivers from Korea*, WT/DS89, July 10, 1997. The other resulted in the establishment of a panel on January 16, 1998 and a panel report that was circulated to WTO Members on January 29, 1999. See Report of the Panel, *United States—Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, adopted March 19, 1999 ("*United States—DRAMs*"). Finally, the panel that heard Mexico's first complaint against Guatemala over cement was active throughout the first part of 1998. See *Guatemala—Cement*, *supra* note 5.

⁷ See Request for Consultations, *Guatemala—Definitive Anti-dumping Measure Regarding Grey Portland Cement from Mexico*, WT/DS156, January 5, 1999 ("*Guatemala—Cement II*"); Request for Consultations, *Argentina—Anti-dumping Measure on Imports of Drill Bits from Italy*, WT/DS157, January 14, 1999; Request for Consultations, *South Africa—Anti-dumping Duties on the Import of Certain Pharmaceutical Products from India*, WT/DS168, April 1, 1999; Request for Consultations, *United States—Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179, July 30, 1999 ("*United States—Korean Steel*"); Request for Consultations, *Ecuador—Provisional Anti-dumping Measure on Cement from Mexico*, WT/DS182, October 5, 1999; and, Request for Consultations, *United States—Anti-dumping Measures Affecting Certain Hot-Rolled Steel Products from Japan*, WT/DS184, November 18, 1999.

The six WTO panels that were active in 1999 were: *United States—DRAMs*, *supra* note 6; *Mexico—Corn Syrup*, *infra* note 34; *Thailand—Steel Products*, *supra* note 6; *Guatemala—Cement II*, *supra* note 7; *EC—Bed Linen*, *supra* note 6; and, *United States—Korean Steel*, *supra* note 7.

⁸ See Request for Consultations, *Trinidad and Tobago—Provisional Anti-dumping Measures on Macaroni and Spaghetti from Costa Rica*, WT/DS187, January 17, 2000; and, Request for Consultations, *Argentina—Definitive Anti-dumping Measures on Carton-board Imports from Germany and Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189, January 27, 2000.

⁹ The AD Agreement is the successor to the Tokyo Round Anti-dumping Code which, itself, was the successor to the original Anti-dumping Code concluded by a group of industrialized countries during the Kennedy Round of multilateral trade negotiations (1964-67).

¹⁰ It is beyond the scope of this article to tally the "wins and losses" on anti-dumping duties during the Uruguay Round of multilateral trade negotiations. For an overview of this subject, see P. Rosenthal & T.C. Vermeylen, *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 (2000) ("*Antidumping Objectives*").

reasonable to assume that the pace of anti-dumping disputes will accelerate as more WTO Members develop their own anti-dumping regimes. For example, new anti-dumping laws are currently being developed in Jordan and Jamaica.

This paper takes a “behind-the-scenes” look at this growing aspect of WTO dispute settlement. It is intended for the trade practitioner or government official that is familiar with the AD Agreement and the application of anti-dumping duties in the municipal legal context, but who may not be familiar with the litigation of these cases before the WTO. Part II addresses issues that arise before the competence of the panel and the scope of its review are established. Often these issues are the subject of “preliminary objections” raised by a Member before the panel has turned to the issues and claims in the case. Part III examines the “procedural” issues that typically arise once the jurisdiction of the panel is established. For example, who has the burden of proof and what is the standard of review? Finally, Part IV looks at the substantive anti-dumping issues and methodologies that have been addressed by dispute settlement panels during the first five years of the WTO.

II. Jurisdiction of the Panel

What is the Trade “Measure” at Issue?

The WTO dispute settlement process begins with a written request for consultations. If the Member that receives the request does not respond within 10 days and enters into consultations within “no more than 30 days,”¹¹ or if the consultations “fail to settle” the dispute within 60 days,¹² the complaining Member may ask the WTO to establish a panel (typically composed of three experts on international trade law) to decide the dispute.¹³

Under Article 4.4 of the WTO Dispute Settlement Understanding (“DSU”), the request for consultations must include the reasons for the request, including the identification of the “measures” at issue and an indication of the legal basis for the complaint. Article 6.2 of the DSU specifies that the written request for the establishment of the panel 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.”

In the first anti-dumping dispute to go before a WTO panel, *Guatemala—Anti-dumping Investigation Regarding Portland Cement From Mexico*, Mexico argued that Guatemala’s initiation of an anti-dumping investigation constituted a “measure” that could be challenged within the meaning of Article 6.2 of the DSU.¹⁴ Guatemala and the United States, which participated in the case as a third party, argued that Article 6.2 should be read in harmony with Article 17.4 of the AD Agreement.¹⁵ Article 17.4, they maintained, identified only three “measures” that could be the subject of a panel request: a definitive (*i.e.* final) anti-dumping duty, a price undertaking, or a provisional measure. While any aspect of an anti-dumping proceeding could be challenged, including initiation, Guatemala and the United States insisted that there could be no “nullification or

¹¹ Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, Art. 4.3.

¹² *ibid.* Art. 4.7.

¹³ At anytime during the 60-day period, the complaining Member may request the establishment of a panel if the “consulting parties jointly consider that consultations have failed to settle the dispute.” *ibid.*

¹⁴ *Guatemala—Cement*, *supra* note 5, paras. 4.57-58, 4.63, 4.65, and 7.5.

¹⁵ *ibid.* paras. 4.49-56, 4.59-62, 4.64, 4.66-67, and 5.18-32. Citing Article 1.2 of the DSU, Guatemala and the United States argued that Article 17.4 of the AD Agreement was a “special or additional rule” that complemented, not contradicted, Article 6.2. *ibid.* paras. 5.19 and 7.4.

impairment" of a WTO benefit, and therefore no justiciable dispute, until the investigation had resulted in one of the three "measures" identified in Article 17.4.

The panel rejected these arguments. In a decision circulated to WTO Members on June 19, 1998, the panel ruled that the existence of a "measure" is only important as a "timing" mechanism that controls when the establishment of a panel may be requested.¹⁶ What was important, according to the panel, was the "matter" in dispute. Any action taken (or not taken) by an investigating authority during the course of an anti-dumping proceeding, including the decision to initiate an investigation, could constitute the "matter" referred to the panel.¹⁷

The WTO's new Appellate Body reversed the panel on November 2, 1998.¹⁸ It held that a "matter" consists of two elements—the specific "measure" at issue and the "claims" relating to it.¹⁹ Next, it held that Article 17.4 of the AD Agreement specifies the types of "measures" that may be referred, as part of the "matter," to a panel.²⁰ These measures, as Guatemala and the United States had urged, were a definitive (*i.e.* final) anti-dumping duty, a price undertaking, and a provisional measure. As for the "claims" that could be directed at the measure, the Appellate Body stated:

This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the Anti-dumping Agreement.²¹

Careful observers of the second anti-dumping dispute to go before a WTO panel, *United States—Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above From Korea*, discovered that reading the Appellate Body report in *Guatemala—Cement AB* too literally might be a mistake.²² In *United State—DRAMs*, Korea challenged the refusal of the United States to terminate an anti-dumping duty after three years of no dumping pursuant to Article 11.2 of the AD Agreement. In addition, Korea challenged various other determinations and actions, including the "scope" of the duty (*i.e.* the products covered by the anti-dumping "order") and the "*de minimis*" dumping margin threshold applied by the United States in its duty assessment proceedings under Article 9.3 of the AD Agreement.²³ What is interesting about this history is that the United States lodged numerous objections against the claims advanced by Korea. For example, the United States succeeded in showing that its original scope determination was not subject to the provisions of the AD Agreement and could not be reviewed by any panel established under the auspices of the WTO;²⁴ however, the United States never questioned the authority of the panel to hear Korea's complaints about the *de minimis* standard. This silence was particularly notable given the fact that the United States had *not* applied the contested standard to imports of DRAMs from Korea.

¹⁶ *ibid.* paras. 7.16 and 7.18. The term "measure," the panel stated, was only a "shorthand reference to the many and varied situations in which obligations under the WTO Agreement might not be fulfilled by a Member, giving rise to a dispute, for which a resolution process is provided in the DSU." *ibid.* para. 7.26.

¹⁷ *ibid.* para. 7.16.

¹⁸ There was no Appellate Body under the 1947 General Agreement on Tariffs and Trade.

¹⁹ Report of the Appellate Body, *Guatemala—Anti-dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/AB/R, adopted November 25, 1998, para. 72 ("*Guatemala—Cement AB*").

²⁰ *ibid.* para. 79.

²¹ *ibid.* (emphasis in original). See *The Bluebook*, a Uniform System of Citation, §5.1 (16th ed.).

²² See *United States—DRAMs*, *supra* note 6, paras. 6.83-91.

²³ In the United States these proceedings are widely referred to as "administrative reviews" pursuant to section 751(a) of the Tariff Act of 1930, as amended (the "Act"). See 19 U.S.C. § 1675(a).

²⁴ *United States—DRAMs*, *supra* note 6, para. 6.17.

The U.S. position was, in fact, consistent with a long line of decisions by the WTO and the GATT which held that “mandatory” (as opposed to discretionary) legislation, such as the U.S. *de minimis* standard, “can be brought before a panel, even if such an adopted measure is not yet in effect, and independently of the absence of trade effect of such measure for the complaining party.”²⁵ What will be interesting to see over the next several years is the extent to which future anti-dumping disputes focus exclusively upon legislation and regulations, as opposed to the actual application of anti-dumping duties to imports.^{25a} Indeed, there is already evidence that some Members are probing the limits of this precedent. On May 19, 2000, Canada requested WTO consultations with the United States over provisions in its countervailing duty law which treat certain export restraints as a countervailable subsidy.²⁶ According to published reports, Canada hopes to establish before its bilateral agreement with the United States on softwood lumber expires on March 31, 2000 that Canada’s export restraints imposed on raw logs do not provide countervailable subsidies to exports of softwood lumber.²⁷ What is particularly interesting about this request is that Canada is not challenging a statutory or regulatory provision; instead, it is challenging legislative and regulatory *history* which may or may not come within the purview of the “mandatory measure” doctrine.

Specificity of Claims

A recurring issue in WTO litigation is the scope of panel review. Respondents invariably try to narrow the claims and measures before the panel, while complaining Members frequently try to expand the panel’s scope of review. The litigation of anti-dumping disputes before the WTO has not been immune to these forces. Generally speaking, a panel’s “terms of reference” are determined on the basis of the written panel request.²⁸ The terms of reference, in turn, help to define the jurisdiction of the panel. As the Appellate Body stated in *Brazil—Measures Affecting Desiccated Coconut*:

“[T]he ‘matter’ referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel’s terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference.”²⁹

²⁵ Report of the Panel, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, para. 6.45. See also WTO, *Analytical Index: Guide To GATT Law and Practice*, Updated 6th Edition (1995), 645-48, and 733-34.

^{25a} Any doubt about the ability of Members to challenge mandatory anti-dumping legislation was erased in *United States - Anti-dumping Act of 1916*. Report of the Panel, WT/DS136/R, circulated March 31, 2000 (“*United States - 1916 Act*”). In that case, which did not concern the application of anti-dumping duties, the panel determined that any other view would undermine the obligation imposed upon Members by Article 18.4 of the AD Agreement to conform their laws, regulations and administrative practices to the provisions of the AD Agreement, *ibid.* at para. 6.168.

²⁶ Request for Consultations, *United States—Measures Treating Export Restraints As Subsidies*, WT/DS194/1, May 19, 2000. See also *WTO Consultations Regarding Measures Treating Export Restraints as Subsidies*, 65 Fed. Reg. 35969 (June 6, 2000).

²⁷ *Canada Seeks WTO Consultations With U.S. On Countervail Actions On Export Restraints*, 17 BNA Int’l Trade Rep. 816 (May 25, 2000).

²⁸ Report of the Panel, *Canada—Measures Affecting The Export Of Civilian Aircraft*, WT/DS70/R, adopted August 20, 1999, para. 9.11 (“*Canada—Civilian Aircraft*”).

An exception to this rule arises when a request for panel establishment covers a measure that has not been the subject of a request for consultations.³⁰ It is less clear whether a second exception arises when the request for establishment covers a “claim” that was not identified in the complaining Member’s written request for consultations. Article 4.4, it will be recalled, explicitly states that the written request for consultations must include “an indication of the legal basis for the complaint.” Moreover, in *Guatemala—Cement*, the panel concluded that the “matter” consulted on under Article 17.3 of the AD Agreement and the “matter” identified in the request for a panel under Article 17.4 of the AD Agreement, “is in each instance the same matter...”³¹ At first, this language led the United States in the *DRAMs* case to insist that claims not identified in the written request for consultations could not be referred to a panel for disposition.³² Later in that same case, the United States backed away from this position. In response to a question from the panel, “the United States asserted that ‘a member should be permitted to refer a claim to a panel if it was actually raised during consultations, even though it may not have been included in the written request for consultations.’”³³

A new wrinkle in the specificity debate arose in the third anti-dumping dispute to be decided by a WTO panel, *Mexico—Anti-dumping Investigation Of High Fructose Corn Syrup (HFCS) From The United States*.³⁴ In that case, Mexico argued that the United States could not challenge the duration of a provisional measure under Article 7.4 of AD Agreement because its request for establishment of the panel only identified the final (*i.e.* definitive) measure as the “specific measure at issue.”³⁵ In rejecting Mexico’s objection, the panel found that “a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty.”³⁶ Otherwise, the panel noted, Members might not be able to challenge the duration of provisional measures since Article 17.4 of the AD Agreement suggests that provisional measures may *only* be attacked on the basis of claims under Article 7.1 of the AD Agreement.

III. Procedural Issues

Who Has The Burden Of Proof?

Much has been written about the burden of proof in WTO dispute settlement proceedings.³⁷ The present article has no intention of repeating these efforts. Instead, the following discussion focuses on the way in which WTO panels in anti-dumping disputes have assigned the burden of proof.

²⁹ Report of the Appellate Body, WT/DS22/AB/R, adopted March 20, 1997, at 22-23 (“*Brazil—Coconut*”).

³⁰ As the panel explained in *Canada—Civilian Aircraft*, Article 4.4 of the Agreement on Subsidies and Countervailing Measures and Article 4.7 of the DSU, read together, “prevent a Member from requesting the establishment of a panel with regard to a ‘dispute’ on which no consultations were requested.” *Canada—Civilian Aircraft*, *supra* note 28, para. 9.13. Likewise, Article 17.4 of the AD Agreement and Article 4.7 of the DSU, when read together, prevent a Member from requesting the establishment of a panel with regard to a dispute over an anti-dumping measure on which no consultations were requested.

³¹ *Guatemala—Cement*, *supra* note 5, para. 7.15.

³² See *United States—DRAMs*, *supra* note 6, paras. 4.4 and 6.6.

³³ *ibid.* para. 6.8 (quoting representation made by the United States).

³⁴ Report of the Panel, WT/DS132/R, adopted February 24, 2000, paras. 7.44-55 (“*Mexico—Corn Syrup*”).

³⁵ *ibid.* para. 7.44.

³⁶ *ibid.* para. 7.53.

³⁷ See, e.g., P. 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 (1996).

The Appellate Body in *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India* articulated what is widely considered the prevailing doctrine on burden of proof:

“[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense.”³⁸

In order to meet its burden, a complaining Member must establish a *prima facie* case of inconsistency with a provision of a covered agreement (e.g. the AD Agreement) or the 1994 General Agreement on Tariffs and Trade (“1994 GATT”) that is within the panel’s terms of reference before the burden of showing consistency with the provision in question shifts to respondent. As the Appellate Body stated in *E.C.—Measures Concerning Meat and Meat Products (Hormones)*:

“[t]he initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.”³⁹

“In case of uncertainty, *i.e.* in case all the evidence and arguments remain in equipoise,” a panel must “give the benefit of the doubt” to the defending Member.⁴⁰

For the most part, WTO panels considering anti-dumping disputes have respected these rules. In *United States—DRAMs*, for example, Korea initially argued that anti-dumping measures constitute “derogations” from alleged free-trade principles of the WTO.⁴¹ This argument appeared to embrace a brief line of cases decided under the 1947 GATT which viewed anti-dumping measures (and their companion—countervailing duty measures) as “exceptions” to other GATT obligations.⁴² These cases also provided that the burden of proof should be on the party applying the anti-dumping or countervailing duty measure.⁴³ To its credit, the panel in *United States—DRAMs* rejected these notions.⁴⁴ In

³⁸ Report of the Appellate Body, WT/DS33/AB/R, adopted May 23, 1997, at 16 (footnote omitted) (“*United States—Wool Shirts*”).

³⁹ Report of the Appellate Body, WT/DS26/AB/R, adopted February 13, 1998, para. 98 (“*EC—Hormones*”).

⁴⁰ Report of the Panel, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted January 27, 2000, para. 7.14.

⁴¹ *United States—DRAMs*, *supra* note 6, para. 4.90. Later in the proceeding, Korea distanced itself from this assertion.

⁴² See, e.g., Report of the GATT Panel, *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R, adopted July 11, 1991, BISD 38S/30, para. 4.4. (“*Canadian Pork*”).

⁴³ *ibid.*

⁴⁴ In the *EC—Hormones* case, the Appellate Body placed, in effect, a dagger through the heart of the *Canadian Pork* case and its progeny:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of

dismissing one particular challenge directed at a determination by the U.S. Department of Commerce ("DOC"), the panel noted that Korea had failed to "advance anything beyond conclusory arguments in support of its claim that the DOC should not have rejected the Flamm study."⁴⁵ Consequently, the panel held that Korea had failed to establish a *prima facie* case that the United States had violated any provision of the AD Agreement.⁴⁶

Another aspect of this issue that has come up in anti-dumping disputes before the WTO concerns the burden of proving municipal law and practice. In *United States—DRAMs*, the United States presented evidence and argument in order to show that its regulatory scheme for the termination of duties after three years of no dumping did not, as a matter of U.S. law, place the burden of proof upon foreign exporters to show that a resumption of dumping is "not likely."⁴⁷ The United States attempted to show that the ultimate burden of proof in these types of administrative proceedings was on its investigating authority⁴⁸ to determine whether the "continued imposition of the duty is necessary to offset dumping."⁴⁹ Korea sought to refute this evidence. It referred the panel to several judicial decisions in the United States where the courts appeared to take the opposite view.⁵⁰ In finding that the regulation in question was inconsistent with Article 11.2 of the AD Agreement, the panel did not rely on the evidence presented by Korea. Instead, the panel based its finding, in large part, on what it considered a "conceptual" difference between "establishing something as a positive finding, and failing to establish something as a negative finding."⁵¹

This approach by the panel to a question that seemed to turn primarily, if not exclusively, upon the proper meaning of regulatory language *under U.S. law*, is at odds with controlling international legal principles. Specifically, it is settled international law that municipal law (and practice) is a *fact* to be proven before an international tribunal, such as a WTO panel.⁵² Unfortunately, the panel in *DRAMs* appears to have approached the question more like an issue of statutory or treaty interpretation—relying, as it did, on what it perceived to be the "common usage" of certain terms.⁵³

showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

E.C.—Hormones, *supra* note 39, para. 104 (emphasis added).

⁴⁵ *United States—DRAMs*, *supra* note 6, para. 6.69.

⁴⁶ *ibid.* See also *ibid.* para. 6.80.

⁴⁷ See, e.g. *ibid.* para. 4.253.

⁴⁸ *ibid.* para. 4.237.

⁴⁹ *ibid.* para. 6.44.

⁵⁰ See, e.g., *ibid.* para. 4.237.

⁵¹ *ibid.* para. 6.45.

⁵² *Case Concerning Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, at 19; *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, [1929], PCIJ Rep., Series A, No 15, at 124-25. See also I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), pp. 40-42.

⁵³ *ibid.* para. 6.46. The panel in *United States—1916 Act*, unlike the panel in *Drams*, seemed to approach this type of question in exactly the right manner. In that case, the panel acknowledged that international law treats municipal law (and practice) as a fact to be proven. *United States—1916 Act*, *supra* note 25a, para. 6.46. It then went to great lengths to develop an understanding of how the law in question was understood within the U.S. legal system, *ibid.* paras 6.51, 6.120 and 6.135.

The Standard Of Review

The standard of review to be applied by WTO panels in anti-dumping disputes is set forth in Article 17.6 of the AD Agreement. Indeed, the AD Agreement is unique. It is the only covered agreement that contains its own, special standard of review.⁵⁴ In sub-paragraph "(i)," panels are instructed not to substitute their judgment for that of the national investigating authorities:

"in its assessment of the facts of the matter, the panel shall determine whether the authorities' *establishment of the facts was proper* and whether their *evaluation of those facts was unbiased and objective*. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the panel might have reached a different conclusion, the evaluation shall not be overturned...*"⁵⁵

Moreover, when applying this standard, Article 17.5(ii) directs panels to limit their review to the facts that were before the investigating authority when it made its determination (*i.e.* the evidence contained in the administrative record).⁵⁶ In reviewing *legal* questions that turn on the proper meaning to be ascribed to the AD Agreement, sub-paragraph "(ii)" of Article 17.6 states:

"the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits 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."⁵⁷

This language was intended by its authors, primarily the United States with the support of the European Communities, to provide authorities with a certain degree of flexibility. Particularly where the language of the AD Agreement is undefined or otherwise ambiguous, Article 17.6(ii) contemplates that panels will defer to an investigating authority's permissible interpretations of the AD Agreement. To date, the application of Article 17.6 by panels and the Appellate Body has not generated a great deal of controversy. This is surprising given how heated the debate over this provision was during the Uruguay Round. It is particularly surprising that in the one instance where a case could be made that Article 17.6's deferential standard was weakened, the United States was largely to blame.

⁵⁴ Report of the Appellate Body, *Argentina—Safeguard Measures On Imports of Footwear*, WT/DS121/AB/R, adopted January 12, 2000, para. 118. For a brief discussion of the negotiating strategies that produced a separate standard of review for anti-dumping disputes, see *Antidumping Objectives*, *supra* note 9, at 873-81.

⁵⁵ AD Agreement, Art. 17.6(i) (emphasis added).

⁵⁶ In *United States—Wool Shirts*, the panel refused to reinvestigate the market situation at issue. Instead, it held that the purpose of panel review is to review the "evidence used by the importing Member in making its determination to impose the measure" in question. Report of the Panel, *United States—Measure Affecting Imports of Woven Wool Shirts*, WT/DS33/R, adopted May 23, 1997, para. 7.21. The covered agreement at issue in *United States—Wool Shirts*, the Agreement on Textiles and Clothing, does not contain a special standard of review like the AD Agreement.

⁵⁷ AD Agreement, Art. 17.6(ii).

The instance in question was highlighted in the *Corn Syrup* case. The panel in that case equated the standard of review in Article 17.6 with the standard set forth in *United States—Measures Affecting Imports of Softwood Lumber from Canada* (“*Softwood Lumber*”).⁵⁸ In doing so, the panel quoted extensively from the *Guatemala—Cement* case where the United States expressly embraced the standard of review in *Softwood Lumber*.⁵⁹ The problem with *Softwood Lumber* is that it does not prohibit, as does Article 17.6(i), a panel from overturning an investigating authority’s evaluation of the facts unless the establishment of the facts was improper or the evaluation of the facts was biased. Indeed, in place of the need to show either bias, lack of objectivity, or failure to establish facts in a proper manner (as required by Article 17.6(i)), *Softwood Lumber* contains a less deferential standard. It only requires a complainant to show prejudice or lack of reasonableness.

The only other controversy over Article 17.6 to arise in the context of a WTO dispute settlement proceeding escaped the attention of most observers because it was never mentioned in a panel or Appellate Body report. Before the Appellate Body in *Guatemala—Cement AB*, Guatemala argued that the deferential standard of review found in Article 17.6 was applicable to disputes over the *application* of anti-dumping duties. However, in the case of disputes over anti-dumping laws and regulations pursuant to Article 18.4 of the AD Agreement, Guatemala urged the Appellate Body to find that Article 17, including the standard of review in paragraph 6, was not applicable.⁶⁰ This prompted a loud objection from the United States, which participated in the dispute before the panel and the Appellate Body as a third party. Fortunately for the United States, the issue was never mentioned in the report of the Appellate Body and, to date, has not resurfaced.

Judicial Economy

Under the GATT, there were numerous examples of situations where a panel, having found that a country’s law or actions violated one provision of the 1947 GATT or a Tokyo Round agreement, refrained from ruling on whether those laws or actions violated other provisions.⁶¹ One commentator attributes this practice to considerations of judicial economy,⁶² and notes that the practice is similar—both in its dimensions and rationale—to other practices developed by panels.⁶³

⁵⁸ *Mexico—Corn Syrup*, *supra* note 34, paras. 7.94-.95 (citing Report of the GATT Panel, SCM/162, BISD40S/358, adopted October 27-28, 1993).

⁵⁹ *ibid.* para. 7.94 (quoting *Guatemala—Cement*, *supra* note 5, paras. 7.54-.57).

⁶⁰ See Third Party Submission of the United States, *Guatemala—Anti-dumping Investigation Regarding Cement From Mexico, AB-1998-6*, September 14, 1998, para. 30. A copy of the third-party submission by the United States is available in the public reading room of the Office of the United States Trade Representative in Washington.

⁶¹ See, e.g., Report of the GATT Panel, *Norway—Procurement of Toll Collection Equipment for the City of Trondheim*, GPR.DS2/R, adopted May 13, 1992, BISD 40S/319, 339-40, paras. 4.12, 4.14, and 4.16; Report of the GATT Panel, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, adopted on November 7, 1990, BISD 37S/200.222, para. 71; Report of the GATT Panel, *EC—Regulation on Imports of Parts and Components, U6657*, adopted on May 16, 1990, BISD 37S/132, 193, 197-99, paras. 5.10, 5.22, and 5.27.

⁶² P. Nichols, *GATT Doctrine*, 36 Va. J. Int’l L. 379, 420 (1996).

⁶³ *ibid.* at 419-21 (author notes the following practices under which: (1) panels did not examine applicable exceptions to the 1947 GATT if defendants did not invoke them; (2) panels would not consider provisions of the 1947 GATT that were not argued before it by one of the disputants; (3) panels would not provide detailed findings when the complainants did not ask for them; and, (4) if a complainant did not challenge a defendant’s defense or did not specify which benefit or provision of the 1947 GATT was nullified or impaired, panels took no further action).

This practice has continued under the WTO.⁶⁴ Indeed, the Appellate Body itself has declined to issue findings that it considers unnecessary to the resolution of a dispute. For example, in the *Underwear* case, Costa Rica challenged the panel's finding regarding the effective date of a U.S. temporary safeguard measure, arguing that the date chosen by the United States was inconsistent with Article 6.10 of the Agreement on Textiles and Clothing ("ATC") and Article XIII:3(b) of the 1994 GATT.⁶⁵ Agreeing with Costa Rica that the U.S. effective date was inconsistent with Article 6.10, the Appellate Body expressly declined to rule on its consistency with Article XIII:3(b):

"Considering the conclusion we have above reached in respect of the first issue, there is no necessity for dealing with this second issue at any length. Had we concluded that under Article 6.10, ATC, backdating the effectivity of a restraint measure remained permissible, it would have been necessary to determine whether a different result would be compelled by Article XIII (3)(B) of the *General Agreement*..."⁶⁶

Increasingly, though, the principle of judicial economy has collided with another feature of WTO dispute settlement—the lack of remand authority on the part of the Appellate Body.⁶⁷ For example, in *Canada—Certain Measures Concerning Periodicals*, the United States maintained that Canada's law on "split-run" periodicals violated the first and second sentences of Article III:2 of the 1994 GATT.⁶⁸ The panel determined that the law violated the first sentence of Article III:2. It declined, however, to examine the law's consistency with the second sentence of the same article. In its report, the Appellate Body acknowledged that the DSU limited its review to legal interpretations contained in the panel's report; however, it said it would be "remiss" if it did not "complet[e]" the analysis by examining the law's consistency with the second sentence of Article III.⁶⁹

In order to avoid these sorts of predicaments, panels are starting to interpret the principle of judicial economy more flexibly. For example, in *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the panel determined that an export subsidy maintained by Canada violated Article 9 of the WTO Agreement on Agriculture.⁷⁰ Even though it could have stopped there, the panel ruled on a second allegation regarding the same subsidy because it recognized that the Appellate Body might reverse its finding on Article 9.

Future anti-dumping disputes are likely to follow the example set in the *Dairy Products* case. For example, where a final (*i.e.* definitive) anti-dumping measure is challenged on various grounds, including a claim that the initiation is infirm, the author expects future panels to rule on the initiation *and* all other claims directed at the measure in order to avoid the kind of piecemeal litigation that occurs when claims go unaddressed and the Appellate Body reverses.

⁶⁴ See, e.g., *United States—Wool Shirts*, *supra* note 38, at 23 ("a panel need only address those claims that must be addressed in order to resolve the matter at issue").

⁶⁵ Report of the Appellate Body, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted February 25, 1997.

⁶⁶ *ibid.* at 20.

⁶⁷ The Appellate Body may "uphold, modify or reverse the legal findings and conclusions of the panel." DSU, *supra* note 11, Art. 17.13. It does not have the authority to remand decisions to a panel for further factual or legal findings.

⁶⁸ Report of the Appellate Body, WT/DS31/AB/R, adopted July 30, 1997, at 9-16.

⁶⁹ *ibid.* at 24.

⁷⁰ Report of the Panel, WT/DS103/R, WT/DS113/R, adopted October 27, 1999, pt. I para. 1.1.

IV. Substantive Issues

Only three WTO panels have, to date, issued reports concerning the application of anti-dumping duties. Within the next several months, the panel hearing Mexico's second complaint against Guatemala over cement should circulate its report⁷¹ and later this fall, the panel hearing India's complaint against the European Communities over cotton bed linens, is expected to issue its report.⁷²

Despite this limited reservoir of reports to draw from, the number of substantive issues and anti-dumping methodologies addressed at this point is too numerous to receive a detailed treatment in these pages. Therefore, the following merely summarizes the substantive issues and methodologies that *appear* to be settled at this point in the history of the WTO.⁷³

The Initiation Of Anti-dumping Investigations

The initiation of anti-dumping investigations was addressed in two of the first three disputes to result in the issuance of panel reports: *Guatemala—Cement* and *Mexico—Corn Syrup*. Although some of the conclusions in *Guatemala—Cement* will undoubtedly be revisited and perhaps revised in *Guatemala—Cement II*, the following issues and methodologies appear to be settled:

- Article 5 of the AD Agreement establishes the requirements for initiating an anti-dumping investigation. Under Article 5.2, an applicant cannot simply assert that dumping and consequent injury exist. It must substantiate its allegations with relevant evidence—that is, the information described in subparagraphs (i)—(iv) of Article 5.2. Although the application must contain some evidence of dumping, injury, and causal link, the extent of this evidence depends on what is “reasonably available to the applicant.”⁷⁴
- Article 5.3 provides, in turn, that “[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.” If the authority determines that there is sufficient evidence, Article 5.1 authorizes the initiation of “an investigation to determine the existence, degree and effect of any alleged dumping...”

Article 5.3 only requires the investigating authority to determine whether there is sufficient evidence to justify initiation. It “does not impose an obligation on the investigating authority to set out its resolution of all underlying issues considered in making that determination.”⁷⁵

Compliance with the requirements of Article 5.2 does not, *ipso facto*, mean that there is sufficient evidence to justify initiating an investigation under Article 5.3.⁷⁶

⁷¹ *Guatemala—Cement II*, *supra* note 7, panel established September 22, 1999.

⁷² *E.C.—Bed Linen*, *supra*, note 6, panel established 27 October 1999.

⁷³ In a sense, none of these issues and methodologies are truly “settled” because none of them have been addressed by the WTO’s Appellate Body.

⁷⁴ AD Agreement, Art. 5.2.

⁷⁵ *Mexico—Corn Syrup*, *supra* note 34, para. 7.102 (emphasis in original).

⁷⁶ *Guatemala—Cement*, *supra* note 5, para. 7.51.

- Although the panel in *Guatemala—Cement* did not define what constitutes “sufficient evidence” to initiate an investigation,⁷⁷ it did agree with the panel in *Softwood Lumber* that the “quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation.”⁷⁸
- Article 5.2(iv)’s reference to Articles 3(2) and (4) is merely suggestive of the kinds of information on material injury that should be included in an application. Which factors and indices to include in an application in order to demonstrate the consequent impact of imports on the domestic industry will vary from case to case.⁷⁹
 “Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation.”⁸⁰

Injury Determinations And Analysis

- “Article 3.7 [of the AD Agreement] sets forth several factors which must be considered, among others, in making a determination regarding the existence of threat of injury.”⁸¹ In other words, factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination of threat of injury.
 Moreover, a threat of injury determination must include an analysis of the consequent impact of imports on the domestic industry. This follows from the fact that “in making a determination regarding the threat of material injury, the investigating authority must conclude that ‘material injury would occur’ (emphasis added) in the absence of an anti-dumping duty or price undertaking.”⁸²
- The “listed factors in Article 3.4 must be considered in all cases,” including all threat of injury cases,⁸³ “even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case.”⁸⁴
- “[T]hat dumped imports will increase, and will have adverse price effects, does not, *ipso facto*, lead to the conclusion that the domestic industry will be injured—if the industry is in very good condition, or if there are other factors at play, dumped imports may not threaten injury.”⁸⁵
- Article 3.6 permits an authority to consider information concerning production of a broader group of products than the like product produced by the domestic industry. It does *not* allow the investigating authority to consider information concerning production of a product sub-group that is narrower than the like product produced by the domestic industry.⁸⁶

⁷⁷ *ibid.* para. 7.54.

⁷⁸ *ibid.* para. 7.57.

⁷⁹ *Mexico—Corn Syrup*, *supra* note 34, para. 7.73.

⁸⁰ *ibid.* para. 7.99. It is unclear whether this language signals the panel’s belief that Articles 5.3 and 5.8 are redundant, or whether Article 5.8 applies *after* the initiation of an investigation. This issue may be resolved in *Guatemala—Cement II*.

⁸¹ *ibid.* para. 7.124 (emphasis in original).

⁸² *ibid.* para. 7.125 (quoting AD Agreement, Art. 3.7).

⁸³ *ibid.* para. 7.128.

⁸⁴ *ibid.*

⁸⁵ *ibid.* para. 7.141.

⁸⁶ *ibid.* para. 7.157.

The Duration Of Anti-dumping Measures Under Article 11.2 Of The AD Agreement

Although the panel in *United States—DRAMs* found the “not likely” standard in the regulations administered by the United States to be contrary to the requirements of Article 11.2 of the AD Agreement,⁸⁷ it nonetheless upheld the overall approach of the United States to reviews under this provision in several important respects:

- The AD Agreement does not require the automatic termination of anti-dumping duties as soon as dumping ceases after the date of imposition of the duties.
- A prospective analysis is appropriate in determining whether to terminate or maintain a definitive anti-dumping measure.
- An investigating authority need not have mathematical certainty of recurrence of dumping in order to maintain an anti-dumping measure.
- The mere absence of dumping for three years does not require authorities to self-initiate an injury review of a definitive anti-dumping measure.⁸⁸

Miscellaneous

A number of issues and methodologies resolved by WTO panels are important even though they do not fit neatly within discreet categories. These include:

- Notification of expected investigations under Article 5.5 of the AD Agreement must precede the formal commencement of the investigation. Generally speaking, this date will correspond to the publication date of the notice of initiation.⁸⁹
- A 0.5 per cent *de minimis* standard for the post-investigation phase of an anti-dumping proceeding is consistent with Article 5.8 of the AD Agreement. The 2 per cent *de minimis* standard in Article 5.8 applies only to the investigation phase of an anti-dumping proceeding.⁹⁰
- Article 6.6 of the AD Agreement does not require formal “verification” of all information relied upon by an investigating authority during an anti-dumping investigation/review. As the panel in *United States—DRAMs* noted, there are many ways that authorities may “satisfy themselves as to the accuracy of the information” without proceeding to “some type of formal verification.”⁹¹ For example, an authority may rely on the “reputation of the original source of the information.”⁹²

⁸⁷ See notes 22-23, 47-51 *supra* and accompanying text.

⁸⁸ For each of these propositions, see *United States—DRAMs*, *supra* note 6, paras. 6.29, 6.33, 6.43, 6.50, and 6.59.

⁸⁹ *Guatemala—Cement*, *supra* note 5, para. 7.39. Although the panel left open the possibility that another event could constitute the procedural action by which an investigating authority “formally commences” its investigation, it is unlikely that another event will supplant a notice of initiation, especially if the notice establishes the date of publication as the date for the initiation of the investigation. See *ibid.* paras. 7.38-.39. Further guidance on this issue will probably be provided by the panel in *Guatemala—Cement II*.

⁹⁰ *United States—DRAMs*, *supra* note 6, para. 6.89.

⁹¹ *ibid.* para. 6.86.

⁹² *ibid.*

- A public notice of initiation pursuant to Article 12.1 of the AD Agreement need not summarize all of the allegations contained in an application regarding the definition of the relevant domestic industry. “[A] summary of the factors on which the allegation of injury is based” is acceptable.⁹³

Still less can Article 12.1 be understood to require a summary of the “conclusions” of the investigating authority regarding the definition of the relevant domestic industry at the time of initiation. “Nor does it require a summary of the factors and analysis on which the investigating authority based that conclusion.”⁹⁴

V. Conclusion

There is every indication that the current pace of anti-dumping disputes before the WTO will remain brisk for the foreseeable future. Traditional opponents of these measures, such as Japan and Korea, are expected to continue their assault, and new anti-dumping regimes in countries such as Jordan and Jamaica will eventually generate new disputes. While every anti-dumping panel has, to date, found in favor of the complaining party, tales of “gloom and doom” from commentators who are philosophically inclined to support anti-dumping measures, seem misplaced.⁹⁵ In *United States—DRAMs*, for example, the panel found one aspect of the challenged regulation inconsistent with the AD Agreement, but it also rejected dozens of claims advanced by Korea.⁹⁶ Furthermore, the United States did not appeal this decision to the WTO’s Appellate Body because its impact on future anti-dumping proceedings at the municipal level appears to be slight.⁹⁷

Similarly, in *Mexico—Corn Syrup*, the panel rejected various aspects of the challenged measure, but it also upheld an initiation determination that was, at best, shaky.^{97a} Moreover, with respect to some of the claims that went against Mexico, the WTO violation was also apparent, the panel had no choice but to find in favor of the United States.^{97b}

As this paper notes, numerous anti-dumping disputes are in the “WTO pipeline.” Between now and this time next year, many important issues and anti-dumping methodologies will have been vetted. In *Guatemala—Cement II*, for example, the panel may, depending on its disposition of the case and perhaps its approach to judicial economy, rule on: (i) whether, and to what extent, Articles 2 and 3 apply at the time of

⁹³ *Mexico—Corn Syrup*, *supra* note 34, para. 7.86 (quoting AD Agreement, art. 12.1.1(iv)).

⁹⁴ *ibid.* para. 7.87.

⁹⁵ See, e.g., *Antidumping Objectives*, *supra* note 10, at 894 (“The early cases are not promising; to the contrary, they are cause for real concern.”).

⁹⁶ See, e.g., notes 87-88 *supra* and accompanying text.

⁹⁷ See *Final Results of Redetermination in the Third Administrative Review of the Antidumping Duty Order on Dynamic Random Access Memory Semiconductors of One Megabit or Above from Korea Pursuant to Section 129 of the Uruguay Round Agreements Act*, available at <http://ia.ita.doc.gov/remands/dram-1m.htm> (after amending its regulation to implement the panel ruling, the United States reached the same result it had reached under its old regulation). But see *Recourse by Korea to Article 21.5 of the DSU, United States—Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/7, March 9, 2000 (Korea maintains that the amended regulation does not implement the panel ruling).

^{97a} See *Mexico—Corn Syrup*, *supra* note 34, paras 7.56 - 110.

^{97b} For example, Mexico maintained the challenged provisional measure beyond the “clear and explicit” sixth-month period provided for in Article 7.4 of the AD Agreement, *ibid.*, paras 7.179 - 183.

initiation;⁹⁸ (ii) the extent to which the application of anti-dumping duties requires “special care,” within the meaning of Article 3.8 of the AD Agreement, when injury is only threatened by dumped imports;⁹⁹ (iii) the extent to which public notices of preliminary and final anti-dumping determinations must contain “sufficient detail,” within the meaning of Article 12.2 of the AD Agreement, of the authority’s “findings and conclusions”;¹⁰⁰ (iv) whether investigating authorities have the discretion to extend the period of investigation and to seek information corresponding to the extended period;¹⁰¹ (v) the extent to which Article 6.9 of the AD Agreement compels authorities to inform companies of the “essential facts” under consideration for purposes of the final anti-dumping determination;¹⁰² and, (vi) whether a final determination may be based upon present material injury when the preliminary determination in the same proceeding was based upon a threat of material injury.¹⁰³

In *EC—Bed Linen*, the panel is likely to rule on: (i) the circumstances under which a producer’s profit and its administrative, selling and general costs (“SG&A”) may be based upon the weighted-average profit and costs of another producer (or producers) pursuant to Article 2.2.2(ii) of the AD Agreement;¹⁰⁴ (ii) the circumstances under which an authority must make a level-of-trade adjustment pursuant to Article 2.4 of the AD Agreement;¹⁰⁵ (iii) the extent to which non-dumped sales may be excluded from the calculation of dumping margins pursuant to Article 2.4.2 of the AD Agreement;¹⁰⁶ (iv) the type of analysis that must be conducted to support a “causal link” determination pursuant to Article 3.5 of the AD Agreement;¹⁰⁷ and, (v) the extent to which Article 15 of the AD Agreement requires an authority to consider the “special situation” of developing country Members.¹⁰⁸

Undoubtedly, the panels hearing these disputes will address many more issues and methodologies than are listed here. Trade practitioners and government officials responsible for WTO dispute settlement matters will want to study these next few panel reports carefully and place them within the proper context of the law and practice examined in this paper.

⁹⁸ Request for Panel, *Guatemala - Cement II*, WT/DS156/2, July 15, 1999, at 2 (“Request for *Cement II* Panel”). In *Guatemala—Cement*, the panel said, on the one hand, that an application need not contain the “quantity and quality” of evidence on dumping that would be necessary to make a preliminary or final determination. See, e.g., *Guatemala—Cement*, *supra* note 5, para. 7.64. On the other hand, the panel insisted that an investigating authority could not “ignore the question of a fair comparison in determining whether there is sufficient evidence of dumping to justify initiation, particularly when the need for adjustments is apparent on the face of the application.” *ibid.* para. 7.65.

⁹⁹ Request for *Cement II* Panel, *supra* note 98, at 3.

¹⁰⁰ *ibid.* at 4.

¹⁰¹ *ibid.*

¹⁰² *ibid.* at 5.

¹⁰³ *ibid.*

¹⁰⁴ Request for Panel, *EC—Bed Linen*, WT/DS141/3, September 7, 1999, at 2.

¹⁰⁵ *ibid.* at 3.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.* at 4.

¹⁰⁸ *ibid.*