The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations

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The past decade witnessed an increased use of antidumping measures.[1] Antidumping laws are now so frequently invoked that they constitute a threat to liberal trade. At both the Tokyo and Uruguay Rounds of Multilateral Trade Negotiations, negotiators tried to instill more discipline in the substantive rules guiding the use of antidumping laws. Improvements to the dispute settlement system were also geared toward this goal. At the Uruguay Round,[2] the standard of review in antidumping cases assumed an unprecedented importance because the United States,[3] backed by the European Union, insisted that a very limited standard be written into the 1994 Antidumping Code (AD Code). The crucial question was how much deference GATT[4] Panels should accord national authorities when reviewing their determinations.

The effectiveness of international surveillance of antidumping laws depends partly on the level of scrutiny that GATT Panels apply in reviewing the determinations of national au-

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1. The United States, Canada, Australia, and the European Community are the four jurisdictions that most actively use their antidumping laws. *See* ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY (John H. Jackson & Edwin A. Vermulst eds., 1989).

2. The results of the Round are found in GATT MULTILATERAL TRADE NEGOTIATIONS, THE URUGUAY ROUND (Institute for International Legal Information ed., 1993) (Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993) [hereinafter UR RESULTS].

3. *See U.S. Requests Reopening of GATT Antidumping Text, Seeks Major Changes*, INSIDE U.S. TRADE, Dec. 18, 1992, at S-1.

4. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. Pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

thorities. Most nations, particularly developing nations, favored broader standards of review to halt the encroaching protectionist abuses of antidumping laws.[5] To them, the broad discretion which successive antidumping codes allow domestic authorities could be counter-balanced by allowing Panels wide powers of review. The United States and the European Union, however, insisted on a highly restrictive standard of review that may compromise the reforms achieved at the Uruguay Round.

Even though express provisions on standards of review did not exist prior to the 1994 AD Code,[6] GATT Panels had confronted the issue in a number of antidumping cases. Parties disagreed on the extent of a Panel's power to second guess domestic authorities. GATT Panels consistently avoided taking a definite stand on this question. In the absence of specific guidelines, they adopted a case-by-case approach, but a review of the cases shows that Panels often deferred to the conclusions of national authorities. At the same time, Panels resisted any attempts to unduly restrain their power to undertake an in-depth review where necessary.

This Article examines standards of review in GATT jurisprudence prior to 1994 and analyzes the likely impact of Article 17.6 of the 1994 AD Code on the performance of GATT Panels. It explores the extent to which Panels are likely to be constrained by the prescribed standard, and whether that standard differs significantly from pre-Uruguay Round practice.

The Article is divided into five parts. Part I explains the nature of antidumping laws. Part II examines the improvements made to the general dispute settlement system.[7] Part III analyzes the standard of review applied in antidumping cases in the United States and the European Union. Judicial review of antidumping cases in both jurisdictions is characterized by considerable deference to the agencies in charge of administering antidumping laws. These agencies are allowed wide discretionary powers that enable them to manipulate antidumping laws for protectionist purposes.[8] Part IV analyzes antidumping cases

5. Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491, 491-96 (1993).

6. Agreement on Implementation of Article VI of the GATT 1994, *in* UR RESULTS, *supra* note 2 [hereinafter 1994 AD Code].

7. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, *in* UR RESULTS, *supra* note 2 [hereinafter DSU].

8. For a comparative analysis of antidumping laws and practice in the main user countries, see ANTIDUMPING LAW AND PRACTICE, *supra* note 1; NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf &

to determine the standard of review Panels observed when no guidelines were expressly provided in the AD Code, and how this compares with the standard of review in Article 17.6. Finally, part V discusses the standard of review incorporated in Article 17.6 of the 1994 AD Code.

This Article concludes that the effectiveness of GATT dispute resolution in antidumping cases may ultimately depend on the integrity of Panelists. Notwithstanding the constraints of the standard of review prescribed by Article 17.6, a courageous Panel could still find a way to realize the goals of consistency and uniformity in the application of antidumping laws. In addition, the political will of Members to accept unfavorable decisions is crucial to GATT's credibility.[9]

I. THE NATURE OF ANTIDUMPING LAWS

Antidumping laws serve as countermeasures to anti-competitive behavior. They also serve as an "interface" mechanism, bridging the regulatory differences that exist between economies, even those that are otherwise very similar.[10] Unfortunately, these laws increasingly stray from their original purpose and are frequently used for protectionist purposes.[11] The 1980s saw an explosive use of antidumping laws for safeguard pur-

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Ernst-Ulrich Petersman eds., 1993); TRADE LAWS OF THE EUROPEAN COMMUNITY AND THE UNITED STATES IN A COMPARATIVE PERSPECTIVE (P. Demaret et al. eds., 1991).

9. Such political will seems to be lacking in the United States where the GATT implementing legislation provides that the United States should pull out of the WTO if the latter renders judgment against the United States three consecutive times. Charles M. Gastle & Jean-G. Castel, Q.C., *Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases be Reformed in the Light of* Softwood Lumber III*?*, 26 LAW & POL'Y INT'L BUS. 823, 893 (1995). It was because of this compromise that the U.S. Congress approved the WTO Bill.

10. JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 650-51 (1986).

11. The U.S. Council of Economic Advisers concluded in its 1994 Report to the President that antidumping laws, in the United States and elsewhere, are often used for "protecting domestic industries from foreign competition." F. Amanda DeBusk, *Dumping Laws Still Endanger the Deal*, N.Y. TIMES, April 17, 1994, § 3, at 13.

Jagdish Bhagwati, who consistently defends AD measures, has subsequently decried the capture of the processes by protectionist forces who have turned them into *de facto* instruments of protection. Jagdish Bhagwati, *Is Free Trade Passe After All?*, 125 WELTWIRTSCHAFTLICHES ARCHIV 17, 25 (1980).

poses.[12] With significant tariff reductions achieved at previous rounds, governments succumbed to pressures from domestic producers to use antidumping laws to reduce foreign competition.

The antidumping policies of GATT signatories are based, in principle, on Article VI of the GATT. Because Article VI lacked specificity, it was supplemented by successive AD Codes. The first AD Code,[13] negotiated in 1966-67 during the Kennedy Round, was eventually replaced by the 1979 Code[14] that emerged from the Tokyo Round. Further revision at the Uruguay Round yielded the 1994 AD Code.[15] The GATT does not prohibit dumping.[16] Instead, it vests in the contracting parties the right to levy antidumping duties in defined circumstances.

Many experts consider the economic justification for antidumping action weak, and its concept of unfair price unprincipled.[17] A fundamental conflict exists between antidumping policies and domestic competition policies.[18] Unlike domestic competition laws, GATT antidumping law is criticized because it does not require proof of any predatory intent.[19] The difficulty

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12. David Palmeter & Gregory J. Spak, *Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict*, 24 LAW & POL'Y INT'L BUS. 1145, 1145-46 (1993).

13. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, art. 2, 19 U.S.T. 4348.

14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, BISD 26th Supp. 171 (1980).

15. See *supra* note 6. Unlike the previous codes, the 1994 AD Code is mandatory for all members of the WTO. *Id.*

16. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 402 (1969) [hereinafter JACKSON, WORLD TRADE]. Article VI provides, *inter alia*, that "the Contracting Parties recognize that dumping . . . is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." GATT, *supra* note 4, art. VI, sec. 1.

17. *See* John J. Barcelo III, *A History of GATT Unfair Trade Remedy Law—Confusion of Purposes*, 14 WORLD ECON. 311 (1991); 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 1, at 425, 459-60; Edwin A. Vermulst, *A European Practitioner's View of the GATT System: Should Competition Law Violations Distorting International Trade Be Subject to GATT Panels?*, 27 J. WORLD TRADE, Apr. 1993, at 55.

18. Barcelo, *supra* note 17, at 313. Barcelo describes GATT antidumping law as "a hybrid of antitrust and safeguard policies awkwardly resting on a confused notion of unfairness." *Id.*

19. Klaus Stegemann, *The International Regulation of Dumping: Protection Made Too Easy*, 14 WORLD ECON. 375, 376 (1991).

of proving predatory intent might justify its exclusion from this highly sensitive area of trade policy.

Notwithstanding the existence of adjudicatory processes at the agency level and of domestic judicial review, the practical application of antidumping laws lacks coherence.[20] This incoherence results partly because courts find it more difficult to adjudicate result-oriented rules that leave much discretion to administrative authorities.[21] In addition, antidumping laws are drafted in highly technical terms that deliberately enhance their ambiguity and vagueness and thus insulate their application from the charged political atmosphere that surrounds trade disputes.[22]

Protection is obtained more easily under antidumping laws than under Article XIX Safeguard Provisions. This probably explains the increased use of antidumping protection as a substitute for safeguard protection.[23] The triggering level of injury to domestic producers is lower for antidumping laws than for the Safeguard Provisions.[24] Furthermore, antidumping laws do not require compensation or retaliation.[25] McGee sums up the criticisms of antidumping laws as follows:

> [A]ntidumping laws . . . serve no public interest, but merely protect producers at the expense of everyone else. They result in deadweight

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20. Robert E. Hudec, *The Role of Judicial Review in Preserving Liberal Foreign Trade Policies, in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW, *supra* note 8, at 503, 512. Recent legal scholarship concludes that the work product of U.S. agencies and courts under the antidumping laws is lacking in any overall theory, full of inconsistent concepts, and conspicuously unstable over time. *Id.* at 512 n.22.

21. Ernst-Ulrich Petersmann, *International Competition Rules for the GATT-MTO World Trade and Legal System,* 27 J. WORLD TRADE, Dec. 1993, at 35, 68.

22. Richard Boltuck & Robert E. Litan, *America's "Unfair" Trade Laws, in* DOWN IN THE DUMPS: ADMINISTRATION OF UNFAIR TRADE LAWS 2 (Richard Boltuck & Robert E. Litan eds., 1991) (describing U.S. antidumping and countervailing duty statutes as having been designed to ensure their obscurity and insulation from the political atmosphere that surrounds trade disputes).

23. Stegemann, *supra* note 19, at 385-89; Barcelo, *supra* note 17, at 311-12.

24. The GATT's Safeguard Provision requires that the increased imports must "cause 'serious injury' to domestic producers . . . ." GATT, *supra* note 4, at art. XIX. The GATT clauses concerning antidumping measures, by contrast, provide for "material injury" as a precondition to invoking an antidumping remedy. *Id.* at art. VI; 1994 AD Code *supra* note 6. Although the various injury concepts are devoid of any precise definitions, "it is generally thought that the 'serious injury' test of the escape clause [safeguards] is the most stringent, in the sense that it is hardest to show that it is fulfilled." JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 236-37 (1989) [hereinafter JACKSON, THE WORLD TRADING SYSTEM].

25. Palmeter & Spak, *supra* note 12, at 1150.

> loss to the economy, destroy more jobs than they create and lower living standards. . . . Investigations can be started easily by competitors who merely want to reduce the pressure of competition. The charges do not have to be well founded or even accurate. . . . The mere threat of an antidumping action chills commerce, reduces competition and raises prices. The antidumping laws are ambiguous and vague. Producers never know by which standard they will be held accountable because there are many standards. . . . Many of the rules and procedures used to arrive at a conclusion of dumping are irrational.[26]

Antidumping policy is not completely indefensible. Economist Jagdish Bhagwati offers two systemic arguments in defence of antidumping measures.[27] First, he argues that a free trade regime must "frown upon dumping, insofar as it is a technique used successfully to secure an otherwise untenable foothold in world markets."[28] Second, he argues that the perception of unfairness in the cheapness of the imported goods undermines political support for free trade.[29] He concedes, however, that antidumping laws are often captured by protectionist forces and turned into *de facto* instruments of protection.[30] The ultimate explanation for antidumping measures as we know them today might be that they are occasionally useful for defusing political pressures at home. Thus, one writer concludes:

> In order to preserve the formal integrity of the system, the parties permit each other the relatively generous use of a "pressure valve" that has been labelled anti-dumping policy. Thus the *de facto* justification of anti-dumping measures is based on the systemic need for an escape clause rather than on the need for regulation of allegedly unfair trade practices.[31]

Because antidumping laws are susceptible to abuse, participants in the Uruguay Round expected extensive reform of GATT antidumping policy. The original draft of the AD Code in the Dunkel Draft[32] included major reforms. Later in the Round, however, negotiators yielded to pressure by the European Union and the United States and substantially revised the draft

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26. McGee, *supra* note 5, at 561-62. *See generally* Klaus Stegemann, *The Efficiency Rationale of Anti-Dumping Policy and Other Measures of Contingency Protection, in* NON-TARIFF BARRIERS AFTER THE TOKYO ROUND 21-69 (John Quinn & Philip Slayton eds., 1982) (explaining why antidumping is economically inefficient).

27. JAGDISH BHAGWATI, PROTECTIONISM 33-35 (1988).

28. *Id.* at 34.

29. *Id* at 35. *But see* Stegemann, *supra* note 19, at 381-83.

30. Bhagwati, *supra* note 11, at 25.

31. Stegemann, *supra* note 19, at 382.

32. "THE DUNKEL DRAFT" FROM THE GATT SECRETARIAT (Institute for International Legal Information ed., 1992) (Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 20, 1991).

code, watering down some of the changes.[33] In addition, the narrow standard of review in Article 17.6 of the 1994 AD Code may further erode the effectiveness of the reforms. Thus, the new code might ultimately be more favorable to import protection than the 1979 AD Code.[34] The revised code leaves room for divergent interpretations, and the narrow standard of review may constrain GATT Panels from instilling consistency in antidumping laws.

Consequently, any assessment of the appropriateness of the prescribed standard of review in Article 17.6 must bear in mind the rhetoric and the reality of antidumping law and practice.

II. AN OVERVIEW OF THE IMPROVEMENTS TO THE GATT DISPUTE SETTLEMENT SYSTEM

The history of GATT dispute settlement procedures depicts an interplay between diplomatic and legal means.[35] The diplomatic method of dispute settlement, also known as the "power oriented" technique, is characterized by "flexibility of the procedures, control over the dispute by the parties, freedom to accept or reject a proposed settlement, avoidance of zero sum solutions, limited influence of legal considerations and the larger influence of the political weight of the parties."[36] By contrast, the legal or rule-oriented means of dispute settlement enables parties to obtain binding legal decisions in conformity with previously established rules. Thus, it limits opportunties for power plays by either or both parties to the dispute. Both techniques of dispute settlement are reflected in the GATT dispute settlement mechanism contained in Articles XXII and XXIII of the 1947 GATT, and in the special dispute settlement provisions of the Covered

33. Gary N. Horlick, *How the GATT Became Protectionist—An Analysis of the Uruguay Round Draft Final Antidumping Code,* J. WORLD TRADE, Oct. 1993, at 5, 16. In some respects, however, the revised code improved upon the previous code by providing greater specificity to some existing rules. *Id.*

34. *Id.*

35. *See generally* JACKSON, THE WORLD TRADING SYSTEM, *supra* note 24 (describing trade law and policy as an intricate interplay of law, economics and political science); PIERRE PESCATORE & WILLIAM J. DAVEY, HANDBOOK OF GATT DISPUTE SETTLEMENT (1991) (containing a comprehensive collection of GATT cases); William J. Davey, *Dispute Settlement in GATT,* 11 FORDHAM INT'L L.J., 51 (1987) (describing the GATT dispute settlement system and the major complaints lodged against it).

36. Ernst-Ulrich Petersmann, *Settlement of International and National Trade Disputes Through the GATT: The Case of Antidumping Law, in* ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW 77, 84 (Ernst-Ulrich Petersmann, & Günther Jaenicke eds., 1992); *see also* JACKSON, THE WORLD TRADING SYSTEM, supra note 24, at 85-86.

Agreements. Article XXII encourages the use of consultation and mediation, while Article XXIII provides for formal dispute settlement.[37]

Although the GATT legal system has shown an impressive mixture of both the power-oriented and rule-oriented techniques, it has cautiously but progressively moved toward a more rule-based system. This shift is understandable because economic matters require precision, certainty, and predictability — attributes of a rule-oriented system. A stable and predictable dispute settlement system will improve investment decision-making and enhance global welfare.[38] There is no consensus, however, on the precise extent of legalism needed to achieve greater transparency and credibility without jeopardizing the entire system. There is also disagreement as to the best way of achieving a rule-oriented system. Thus, the GATT dispute settlement mechanism remains vague, and even the rule-oriented dispute settlement provisions continue to emphasize achieving a mutually acceptable resolution.

The ambivalence in GATT dispute settlement provisions and practice can be attributed to the divergent attitudes of the European Union and the United States toward the international dispute settlement system. These two powerful economic blocs are the most frequent participants in the GATT dispute settlement system[39] and their influence pervades the entire process.

The European Union sees GATT dispute settlement as a conciliation process leading to mutually acceptable solutions. Consequently, it is a natural extension of the negotiation process through which substantive rules are determined.[40] The European Union rejects the GATT dispute settlement process as a law-creating mechanism. This approach, loosely referred to as the pragmatic approach, minimizes the poisoning effect of litigation and better accommodates politically disruptive cases,

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37. GATT, *supra* note 4, at arts. XXII, XXIII.

38. *See generally* JACKSON, THE WORLD TRADING SYSTEM, *supra* note 24, at 87-88 (enumerating other reasons for preferring a rule-oriented technique in economic matters). *But see* Peter Behrens, *Alternative Methods of Dispute Settlement in International Economic Relations, in* ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW, *supra* note 36, at 1 (explaining why ADR is relevant to international economic relations).

39. Robert E. Hudec et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989,* 2 MINN. J. GLOBAL TRADE 1, 29 (1993).

40. Ronald A. Brand, *Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement,* J. WORLD TRADE, Dec. 1993, at 117, 121.

thereby lessening the political pressures on an already fragile system.[41]

In contrast, the United States has traditionally favored a rule-based adjudication approach.[42] The European Union speaks of dispute resolution in terms of "conciliation," while the United States speaks in terms of "litigation".[43] It is worth noting that the United States has recently relaxed its traditional insistence on strong dispute settlement procedures in antidumping disputes. The increasing participation of the United States as defendant rather than plaintiff in antidumping cases may explain this change of position.[44] Naturally, plaintiffs will be more inclined to insist on strong dispute settlement rules than defendants.

The relative success of the GATT dispute settlement system notwithstanding, participants in the Uruguay Round argued that reforms are urgently needed in certain areas. Some of the problematic issues identified as plaguing the system include inordinate delays, non-adoption of reports, non-compliance, and a lack of uniformity caused by the fragmented procedures created by the 1979 Code.[45] Participants desired a more transparent, consistent, and predictable system. The need for an enhanced dispute settlement system was considered so urgent that during the 1989 midterm Ministerial Review, participants adopted a set of improvements known as the "1989 Improvements." These improvements were the precursor to the Uruguay Round reforms.[46]

The reforms on dispute settlement achieved at the Uruguay Round are embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[47] Not all

41. Davey, *supra* note 35, at 70-73.

42. *Id.* at 66.

43. Brand, *supra* note 40, at 122. Americans are content with a relatively literal interpretation of substantive provisions and tend to use individual cases to fill gaps and resolve ambiguities. Peter D. Ehrenhaft, *The U.S. View of the GATT*, 14 INT'L BUS. LAW. 146, 149 (1986). Europeans, by contrast, view international agreements such as the GATT as a codification of the customs existing at the time the agreement was entered into. *Id.*

44. Palmeter & Spak, *supra* note 12, at 1148. The shift of the United States away from its traditional position is evidenced in its proposal on the standard of review in antidumping cases at the Uruguay Round. *Id.*

45. *See* Ivo Van Bael, *The GATT Dispute Settlement Procedure*, J. WORLD TRADE, Aug. 1988, at 67, 71-73 (listing several commonly voiced criticisms of the GATT dispute settlement procedure).

46. The final dispute settlement understanding of the Uruguay Round contains a number of features that are not found in the 1989 improvements.

47. DSU, *supra* note 7.

the objectives regarding dispute settlement were realized in the Uruguay Round, but the general success of the Round is significant and encouraging. Some of the reforms included: i) the stipulation of a clear time-frame for the settlement of disputes;[48] ii) the establishment of the Dispute Settlement Body (DSB)[49] charged with administering and coordinating the GATT dispute settlement mechanism;[50] iii) a provision for automatic adoption of panel reports;[51] iv) the establishment of an Appellate Body to hear and determine appeals on questions of law from Panel reports;[52] and v) a provision for any persons knowledgeable in international trade law to serve as a Panel Member.

Both the new DSU and the special procedures in the Covered Agreements retain a link with Articles XXII and XXIII of the GATT.[53] Panels are required to adhere to the rules of interpretation of public international law in clarifying the rights and obligations of Members under the Covered Agreements.[54]

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48. *Id.* at para. 20.1; *see also id.* at paras. 12.8-.10, 21.4.

49. The General Council of the WTO shall convene, as appropriate, to discharge the responsibilities of the DSB. Agreement Establishing the Multilateral Trade Organization, art. IV.3, *in* UR RESULTS, *supra* note 2.

50. Paragraph 1 of the DSU states that dispute settlement will apply to disputes relating to the consultations and dispute settlement provisions of the legal instruments annexed to the WTO Agreement. DSU, *supra* note 7, at para. 1. The establishment of the DSB is intended to curb the confusion that ensued from the fragmented system created by the Tokyo Round, but the objective of establishing a uniform system was only partially realized. There are still special and additional procedures for the Covered Agreements, some of which are inconsistent with other texts. Under paragraph 1.2 of the 1993 DSU, inconsistencies are resolved in favor of the special or additional dispute settlement procedures. *Id.* at para. 1.2. Although complete uniformity was not achieved, a more streamlined system and the coordination of the whole system by the DSB might reduce, if not eliminate, the problem of forum shopping.

51. A panel report or, where there has been an appeal, the appellate report, shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the report. *Id.* at para. 16.4. Time-frames are stipulated for this purpose: 60 days for adoption of a Panel report and 30 days for adoption of an appellate report. *Id.* Automatic adoption should be applauded even though adoption does not necessarily guarantee compliance or implementation.

52. *Id.* at para. 17.6. The Appellate Body will also serve as an authority on the interpretation of multilateral trade agreements. *Id.*

53. *See* Palitha T. B. Kohona, *Dispute Resolution Under the World Trade Organisation: An Overview,* J. WORLD TRADE, Apr. 1994, at 23, 28. This link ensures the continued usefulness of GATT jurisprudence built up over the years on the basis of Articles XXII and XXIII. *Id.* at 28.

54. This requirement will contribute toward enhancing "the security, certainty and predictability of the system and provide a greater juristic basis for the decision of the DSB." *Id.* at 29.

Generally, the new DSU represents a remarkable shift toward a more rule-based system. Nonetheless, the historic emphasis on mutually acceptable solutions has not been abandoned.[55] Negotiators feared that an overly legalistic system might risk the integrity and effectiveness of the entire system.[56] To some, the continued emphasis on amicable settlement is considered a point of weakness of the GATT dispute settlement system.[57] To others, it is the system's strength because it reflects a recognition of the difficulties involved in the enforcement of legal rights and obligations where economic and political realities are often beyond the control of the participating parties.

The impact of the reforms on antidumping dispute settlement depends on how Panels interpret the standard of review prescribed in the AD Code. It seems that the strength of the reforms was deliberately minimized by the inclusion of a narrow standard of review.

IV. THE STANDARD OF REVIEW IN ANTIDUMPING CASES AT THE DOMESTIC LEVEL: EU AND U.S. COURTS

National legal processes constitute important dimensions for the implementation of international economic policies.[58] In most nations, GATT law is not directly applicable.[59] Consequently, "the effectiveness of GATT's rules depends, [in part,] on their incorporation into domestic [law] and their enforcement

55. For instance, the DSU urges Panels to give the parties to a dispute adequate opportunity to develop a mutually satisfactory solution to the dispute, provides for settlement through good offices, conciliation and mediation, makes provision for a time controlled consultation process, and urges parties to exercise restraint in the use of the dispute settlement procedures. DSU, *supra* note 7, at paras. 11.1, 5.1, 4.3, 3.7.

56. Kohona, *supra* note 53, at 24.

57. Professor Hudec for example, described the GATT dispute settlement system thus:

> GATT's dispute settlement machinery has been celebrated as a major victory along the road to enforceable norms—and rightly so. But on the tree of legal evolution GATT's adjudication machinery is still down at the level studied by legal anthropologists, right alongside dispute resolution ceremonies practiced among primitive societies.

Robert E. Hudec, *Public International Economic Law: The Academy Must Invest,* 1 MINN. J. GLOBAL TRADE 5, 6, (1992).

58. *See generally* JACKSON, WORLD TRADE, *supra* note 16.

59. *See, e.g.,* Joined Cases 21 to 24/72, International Fruit Co. v. Produktschap voor Groenten en Fruit, 1972 E.C.R. 1219, [1974 Transfer Binder] Common Mkt. Rep. (CCH) para. 8194 (1972).

through domestic [agencies] and courts."[60] As the most common users of antidumping measures, the European Union and the United States invariably influence the negotiation of substantive and procedural rules at the GATT level. The AD Code requires "[e]ach Member, whose national legislation contains provisions on anti-dumping measures [to] maintain judicial, arbitral or administrative tribunals or procedures for the purpose . . . of the prompt review" of the final determinations of administrative authorities.[61] Such tribunals or procedures must be independent of the authorities whose decisions they review.[62]

Judicial review of administrative actions is a tool of democratic governments because it operates as a check on the excesses of executive bodies. It helps legitimize bureaucratic decision-making. International trade matters present a special dilemma, however, because they typically involve political, social, and economic policy issues about which the courts may lack judgment. Critics fear that allowing courts a strong role in such areas might frustrate the policies of elected officials.[63] On the other hand, it can be argued that because the decision-making process in international trade matters is largely removed from public scrutiny, the democratic input is suspect and a stringent review is, therefore, desirable.

A common feature of judicial review of antidumping determinations in both the European Union and United States is its introverted nature. Judicial review is undertaken solely from the point of view of domestic law, with little or no account taken of the GATT obligations. The rule-based U.S. system has been criticized as being unduly costly and burdensome, and as constituting a non-tariff barrier.[64] The EU system vests administrative agencies with wide discretion, the exercise of which the

60. Petersmann, *supra* note 36, at 119. Implementation by national institutions enhances the political legitimacy of the GATT system within the domestic realm. *Id.*

61. *See* DSU, *supra* note 7, at art. 13.

62. *Id.*

63. Thomas J. Schoenbaum & Douglas S. Arnold, *Judicial Review of International Trade Law Decisions: A Comparative Analysis, in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW, *supra* note 8, at 475, 476. "Judicial review in international trade matters may disrupt rather than legitimize the democratic process." *Id.*

64. *See, e.g.*, Carl J. Green, *The New Protectionism,* 3 NW. J. INT'L L. & BUS. 1, 15-19 (1981). *See also* David Palmeter, *The Antidumping Law: A Legal and Administrative Nontariff Barrier, in* DOWN IN THE DUMPS: ADMINISTRATION OF UNFAIR TRADE LAWS, *supra* note 22, at 64; *cf.* John Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States,* 82 MICH. L. REV. 1570 (1985) (analyzing the costs

European Court of Justice (ECJ) is often reluctant to scrutinize. Both jurisdictions have come under intense attack from experts for what is seen as the protectionist flavor of their antidumping measures.

A. JUDICIAL REVIEW OF ANTIDUMPING DECISIONS IN THE EU

Discretion is a key element in EU antidumping law and practice.[65] EU institutions enjoy a margin of discretion in choosing the means needed to achieve their policies, and they may alter these means in the exercise of their powers.[66] This wide discretion is further strengthened by undue confidentiality[67] and the *ad hoc* nature of their decisions.

The ECJ applies a lax standard of review in antidumping cases. It defers considerably to the judgment of EU institutions.[68] The court limits its review to determining whether the antidumping authorities committed manifest errors in the assessment of the facts, failed to observe the procedural guarantees of antidumping law or based the reasons for their decision on considerations amounting to an abuse of power.[69] The ECJ does not undertake a "searching and careful" inquiry into the facts to determine whether the agencies have exercised their discretion in conformity with the international obligations of the

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and benefits of the U.S. system and concluding that the benefits far outweigh the costs).

65. Community institutions enjoy considerable discretion in both the finding of dumping and the determination of injury. Sylvia Ostry, *Europe 1992 and the Evolution of the Multilateral Trading System*, 22 CASE W. RES. J. INT'L L. 311, 326 (1990).

66. Case 258/84, Nippon Seiko KK v. Council, 1987 E.C.R. 1923, [1985-86 Transfer binder] Common Mkt. Rep. (CCH) para. 14,369 (1987). Although the EC basic antidumping regulation (EEC No. 2423/88) specifies the relevant economic factors to be considered by the Commission in its determination of injury, the list is merely indicative and leaves the Commission with wide discretion which is often exploited for naked protectionism. *See* Bodo Boerner, *The Purpose of EEC Antidumping Law*, 6 KEIO L. REV. 127, 136-37 (1990); Georg Ress & Joerg Ukrow, *Direct Actions Before the EC Court of Justice: The Case of EEC Anti-Dumping Law*, *in* ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW, *supra* note 36, at 159, 184.

67. For instance, the Commission is entitled to use confidential information in constructing a normal value without informing the other party thereof. Joined Cases 260/85 & 106/86, Tokyo Electric Co. v. Council, 1988 E.C.R. 5855, [1986-88 Transfer Binder] Common Mkt. Rep. (CCH) para. 14,512 (1988). For a critique of this practice, see Boerner, *supra* note 66, at 127.

68. James K. Lockett, *EEC Antidumping Law and Trade Policy After Ballbearings II: Discretionary Decisions Masquerading as Legal Process?*, 8 NW. J. INT'L L. & BUS. 365, 388 (1987).

69. *Nippon Seiko*, 1987 E.C.R. at 1923. *See also* Ress & Ukrow, *supra* note 66, at 210; Lockett, *supra* note 68, at 388.

European Union.[70] This scant factual inquiry may preclude the court from intervening even when the issue is the truth of the proposition that a product has been dumped and is causing injury.[71] The usual reason given for the court's limited involvement is that the court cannot appraise complex economic conditions.[72] The ECJ's reluctance to address economic complexities is, to some extent, understandable, given that the court is not necessarily composed of persons knowledgeable in this area of law.[73] Inherent difficulties may arise when courts assess complex economic situations, thus they tend to shy away from cost-benefit analysis.[74] It is questionable, however, whether this factor alone can justify the considerable measure of deference shown by the ECJ to EU institutions.[75]

The ECJ rarely second-guesses the Commission's judgement on the causal link between dumping and the resulting injury to domestic industries.[76] Causation is a matter of judgment on which reasonable people can differ. Thus, it is difficult to refute the Commission's finding of a causal link.[77] In deciding whether to impose a duty, EU institutions are free to take into consideration community interests calling for protection and the objectives of the EC Treaty. In practice, the EU's interest has been equated with the need for protecting an ailing European

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70. In the United States, some courts have shown their readiness to engage in a "searching and careful" inquiry into the facts to determine whether the agencies have exercised their discretion in a manner consistent with the legislative intent of the underlying law. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

71. Brian Hindley, *Antidumping Action and the EC: A Wider Perspective, in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW, *supra* note 8, at 386.

72. *Nippon Seiko*, 1987 E.C.R. at 1923.

73. On this point, the U.S. system has an edge because the Court of International Trade (CIT), which hears antidumping cases, is a specialized court whose judges are more likely than not to be well-versed in trade and economic issues. GATT Panels are also more likely to be composed of experts in trade and economic issues.

74. Hindley doubts that antidumping cases necessarily require the court to perform complex economic assessments. He argues that the court is called upon to do simple arithematic, which it is well disposed to do. Hindley, *supra* note 71, at 386.

75. Undue discretion leads to corruption and protection of special interests. It undermines predictability and transparency. On the other hand, absence of discretion sacrifices flexibility, which could sometimes be adverse to national interests. Jackson, *supra* note 64, at 1581.

76. *See* Lockett, *supra* note 68, at 400.

77. Hindley, *supra* note 71, at 380.

industry and the desirability of having a virile European competitor at the global level.[78]

Given the level of discretion at the disposal of EU institutions, it is unfortunate that the ECJ has remained reluctant to move beyond a literal interpretation of the infringement of procedural guarantees, commission of manifest errors, or misuse of powers.[79] A recent decision of the EC General Affairs Council to abolish the qualified majority vote required to adopt definitive antidumping measures will, in effect, leave more powers to the Commission because it will diminish democratic control by the Member States over the Commission's proposals.[80] With inadequate legislative and judicial checks and balances, the discretionary regulatory policies of the EU will remain "re-distributive politics for the benefit of the powerful and protectionist producer lobbies and to the detriment of EC consumers."[81] Hindley concludes that EU antidumping policy has become not a means of restoring conditions of fair trade between EU producers and their foreign competitors, but a means of tilting the playing field sharply against those foreign competitors.[82]

The 1994 Antidumping Code may necessitate some changes in EU antidumping law and practice. The EU may have to change its method of calculating normal value and export price in cases involving related sales companies, and its treatment of negative dumping.[83] The enhanced specificity in the Code rules may also limit the discretion enjoyed by EU institutions. The Code remains vague, however, on many issues and could be interpreted to justify the old ways.[84]

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78. Stegemann, *supra* note 19, at 393-94.

79. It is apparent that the ECJ is too busy and lacks the time necessary to conduct in-depth review in antidumping cases. Thus, one regrets the denial of antidumping jurisdiction to the more recent Court of First Instance. The Court of First Instance was a lost opportunity for a deeper level of judicial scrutiny over the antidumping determinations of Community institutions.

80. *See* Paul Waer & Edwin Vermulst, *EC Anti-Dumping Law and Practice After the Uruguay Round—A New Lease of Life?*, J. WORLD TRADE, Apr. 1994, at 5, 8.

81. Petersmann, *supra* note 21, at 81.

82. Hindley, *supra* note 71, at 385.

83. These are some of the most unfair and criticized aspects of EC antidumping law and policy. Waer & Vermulst, *supra* note 80, at 21.

84. *Id.*

B. JUDICIAL REVIEW OF ANTIDUMPING DECISIONS IN THE UNITED STATES

The Court of International Trade (CIT)[85] and the Court of Appeals for the Federal Circuit (CAFC) adjudicate most of the international trade disputes in the United States. Appeals go to the CIT from the antidumping and countervailing duty determinations of the International Trade Administration (ITA) or the International Trade Commission (ITC).[86] The CIT also hears appeals concerning applications for orders directing the agencies to make confidential information available. Final judgments of the CIT may be appealed to the CAFC.

The CIT's standard of review can be placed into two categories. In reviewing preliminary determinations of agencies, the court confines its consideration to whether such determination was "arbitrary, capricious or otherwise contrary to the law."[87] The standard for reviewing final determinations is whether the determination was supported by "substantial evidence . . . or otherwise not in accordance with the law."[88] These standards are essentially identical to those applied by U.S. courts generally under the Administrative Procedure Act (APA) when they review non-trade decisions of other agencies.[89]

As a general principle, U.S. courts show deference to administrative agencies since those charged with administering a statute possess some expertise in the area, and courts should not rush to second-guess their judgments. Thus, *de novo* review is uncommon in most review of agency decisions.[90] This is an important principle of administrative law in the United States and the Supreme Court has often reiterated the need for reviewing courts to adhere to it. In *Chevron U.S.A. v. Natural Resources*

85. The CIT was established by Congress in 1980 pursuant to Article III of the U.S. Constitution. Because it is an Article III court, CIT judges possess security of tenure and guaranteed non-reduction of salary. This guarantees more independence in the discharge of their judicial functions.

86. The ITA determines whether a foreign product is being dumped, while the ITC determines the existence of injury to domestic industry. These determinations are made more or less simultaneously, which enhances the potential for fairness in the U.S. system.

87. Algoma Steel Corp. v. U.S., 865 F.2d 240, 241 (Fed. Cir. 1989).

88. Atlantic Sugar, Ltd. v. U.S., 744 F.2d 1556, 1559 (Fed. Cir. 1984).

89. The APA generally establishes a "substantial evidence" standard for agency actions taken on a record, and an "arbitrary capricious" standard for other agency action. *See* 28 U.S.C. § 2640(d) (1994).

90. In antidumping cases, *de novo* review applies only to disputes on the confidentiality of information submitted to the ITC.

Defense Council,[91] the Supreme Court explained the role of the courts as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme that it is entrusted to administer. . . .[92]

The above passage embodies the principle of deference as applied under U.S. administrative law. This same principle applies to the review of trade decisions by the courts. The CAFC has overturned a number of CIT decisions for failing to strictly adhere to the limits imposed by this principle.[93] In reviewing the determinations of the ITA and/or ITC, the CIT is not to substitute its judgment for that of the agency, provided the agency's interpretation is "sufficiently reasonable."[94] This directive stands whether the court is applying the "arbitrary and capricious" test or the broader standard of "substantial evidence."[95]

The CIT is required to uphold any permissible interpretation of an ambiguous provision of the trade statutes. Given that antidumping laws are vague, various provisions may allow for more than one reasonable interpretation. Thus, the court will often defer to an agency. The agency's interpretation need not be the one the court would have adopted had the question initially arisen in judicial proceedings. Like the ECJ, U.S. courts rarely consider GATT law in deciding the antidumping cases before them; when they do, they resolve any conflict in favor of domestic legislation that is later in time.

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91. 467 U.S. 837 (1984).
92. *Id.* at 842-44 (footnotes omitted).
93. *See, e.g.,* Springfield Ind. Corp. v. U.S., 842 F.2d 1284 (Fed. Cir. 1988).
94. American Lamb Co. v. U.S., 785 F.2d 994, 997 (Fed. Cir. 1986).
95. *Id.*

Notwithstanding the limitations imposed by the principle of deference, the CIT's review is more liberal than the ECJ's. In some cases, the CIT had taken an activist posture and has been more intrusive than it should be given the principle of deference. Indeed, the court "has not hesitated to substitute its views for those of the ITA and ITC" in some cases.[96] The CIT ensures that agencies exercise their discretion in accordance with the legislative intent of the underlying law. It remands cases for further proceedings where the agency fails to properly articulate its determinations.[97]

The CAFC hears appeals from the CIT. Such appeals are infrequent because decisions must be final before appeals can be made. The CAFC undertakes a mere systemic review of the CIT decision and shows deference to agencies. The CAFC has sometimes acted as a check on the activist posture of the CIT by overturning non-deferential decisions.[98]

There is significant opportunity for judicial review of antidumping determinations in the United States. The legalistic nature of its antidumping system seemingly enhances the chances of fairness;[99] however, it has been abused by frivolous petitioners to the detriment of competition.[100] The U.S. standard of review is narrow, but seems liberal compared to the ECJ standard of review. At a minimum, the occasionally intrusive attitude of the CIT is preferable to the deferential attitude of the ECJ. Nevertheless, the reality of both systems is that they are tailored to shield domestic producers from foreign competition. Thus, while "the United States applies protectionist rules, the European Community applies protectionist discretion. The result in both cases is protection."[101]

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96. *See* JACKSON & DAVEY, *supra* note 10, at 677.

97. *See, e.g.*, USX Corp. v. U.S., 655 F. Supp. 487 (CIT 1987). For a discussion of the CIT's influence on the conduct of antidumping and countervailing duty investigations, see James A. Toupin, *The U.S. Court of International Trade and the U.S. International Trade Commission After 10 Years—A Personal View*, 14 FORDHAM INT'L L.J. 10, 12 (1990).

98. *See American Lamb*, 785 F.2d at 994.

99. Although antidumping proceedings have the appearance of adjudications, they are not subject to the procedural safeguards of the APA. The ITA considers the proceedings to be non-adjudicatory, as does the CIT. *See* Budd Co. Ry. Div. v. U.S., 507 F. Supp. 997 (CIT 1980).

100. *See* Bhagwati, *supra* note 11, at 25.

101. J. Michael Finger, *The Origins and Evolution of Antidumping Regulation, in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 13, 32 (J. Michael Finger ed., 1993)

IV. GATT PANEL REVIEW OF NATIONAL AUTHORITIES: LIMITING GATT'S INFLUENCE BY STANDARD OF REVIEW

It is uncertain whether GATT Panels should defer to the factual and legal findings of national authorities in antidumping cases or whether Panels should second-guess such findings. Such deference may not be compatible with the goal of checking the protectionist abuse of antidumping laws and measures by national agencies. If Panels are mere figureheads for rubber-stamping the protectionist determinations of national agencies, then the GATT may be unable to prevent the use of antidumping measures to undermine the goals of the global trade regime. On the other hand, Panels that are too intrusive and indifferent to the efforts of national agencies could jeopardize the legitimacy and effectiveness of the GATT. Neither of the two extreme positions is palatable for the GATT. The difficult intellectual task, then, is how to use the concept of standard of review as an effective instrument for allocation of power. The primary goal of this task is to hold the balance between an over-intrusive GATT Panel and a figurehead Panel. It is difficult to craft the level of deference that will be compatible with the need to check protectionist antidumping practices. The dilemma is accentuated by some policy issues and practical considerations typical of the international constitutive order.

A. JUDICIAL REVIEW BY INTERNATIONAL TRIBUNALS: THE PRIMACY OF DOMESTICITY

The authority of domestic courts to sit in review of executive actions is firmly established in most of the world's democracies. In many democratic nations, courts are significant institutions of public order and the ultimate arbiters of the legality of government actions. That notwithstanding, courts consider it in the interest of their institutional integrity to exercise restraint whenever necessary. They resort to various doctrines to explain their prudential deference to the political branches.

At the international level, the effectiveness of judicial review is suspect. The emotive effects of the municipal courts as symbols of public order cannot be transposed to the international legal system. The functional limits of judicial bodies are highly magnified at the international level, in both trade and non-trade areas. The international political system involves unique problems, and various policy issues must necessarily be considered when crafting legal institutions or appraising their

performance in the global constitutive process. For any international legal framework to be workable it must take into account the distribution of effective power. Elegantly crafted international documents can be inspiring, but are worthless if unworkable. This explains the continued popularity of power-oriented techniques of dispute settlement at the international level. It explains why the GATT continues to emphasize that an amicable settlement is to be preferred. The present state of the international legal system precludes rigidity in constitutional measures.[102]

The tendency of other nations to compromise to pressure from the European Union and United States to largely limit the standard of review in antidumping cases should be viewed in this light. Antidumping measures are very sensitive in both the European Union and the United States, and these "big powers" consider unrestricted review by GATT Panels as unpalatable. The political realities at home may cause them to disobey unfavorable outcomes from an unrestricted review. International trade decision-making is more politics than law. GATT dispute settlement requires not only giving effect to agreed rights and obligations, but at the same time keeping in mind the frustrating limitations imposed by political, economic and social factors.[103] States are still reluctant to leave the determination of issues of vital national interest in the hands of third parties over whom they have no control. Sovereignty and protection of national interests continue to be symbols of resistance to international adjudication.[104] The common denominator is the use of standard of review to limit the power of Panels to produce results that will be politically unpalatable at home and that could question the legitimacy of the global trade system. To this extent, standard of review is a means to allocate power.

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102. A similar difficulty arises in the United Nations' constitutional process. The dilemma therein is how to balance the wisdom of imposing constitutional restraints on the Security Council with the need for swift and effective enforcement of international security in times of threat. As one commentator noted, "[t]he intellectual task will be to see to what extent responsible participation and constitutional control can be made compatible with effective security." W. Michael Reisman, Note, *The Constitutional Crisis in the United Nations,* 87 AM. J. INT'L L. 83, 98 (1993).

103. Kohona, *supra* note 53, at 24.

104. The first proposed global trade organization, the ITO, became stillborn in the U.S. Congress largely because of fears that such organizations would encroach upon U.S. sovereignty. Similar fears were strongly expressed by Senators during the debate on approving the results of the Uruguay Round Multilateral Trade Negotiations.

Policy issues aside, there are also practical difficulties that serve to limit the effectiveness of judicial review at the international level. One readily cited example is the limited fact-finding capabilities of international tribunals. Limited resources and jurisdictional problems imposed by parties to a case may hamper effective fact-finding by GATT Panels. Any justification based on presumed expertise of domestic agencies is not strong in the GATT situation, however, because Panels are more likely to be better experts on GATT law than the domestic administrative agencies whose objectivity will often be suspect. Justifications based on functional considerations are more tenable.

B. STANDARD OF REVIEW PRIOR TO THE 1994 AD CODE

Until the 1994 AD Code, there had been no express provision on the standard of review in GATT antidumping law.[105] Panels, however, confronted this issue in a number of cases. GATT Panels have carefully avoided taking a definite position on this issue. In the absence of specific provisions, Panels were apparently free to go to any depth in the review of both the factual and legal findings of the national authorities. The interpretive agreements on dispute settlement seem to suggest that ". . . panels may not only decide legal questions *de novo,* but are under no obligation to show any deference to the factual findings of municipal authorities".[106] Antidumping reports show that while Panels recognized this apparent plenary reviewing authority, they nevertheless exercised restraint in most cases by choosing to dispose of cases on procedural, rather than substantive, grounds. While Panels showed restraint, they also resisted any attempts by parties to unduly constrain the Panels' power to review the cases before them. Panels had more flexibility.

In *New Zealand - Imports of Electrical Transformers from Finland,* New Zealand raised the question of the appropriate standard of review to be applied by a Panel in reviewing its in-

105. Neither the 1979 AD Code nor the Dunkel Draft had any specific provision relating to standard of review.

106. Andrew W. Stuart, Note, *"I Tell Ya I Don't Get No Respect:" The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals,* 23 L. & POL'Y INT'L BUS. 749, 774 (1992) (citing Jackson's observation of the GATT Treaty's "considerable ambiguity about the appropriate role of third-party decision-making" (citation omitted)).

jury determinations.[107] New Zealand contended that the determination of material injury was a matter specifically reserved, under the terms of Article VI:6(a), to the contracting party levying the antidumping duty.[108] It stated that while other contracting parties may inquire whether such a determination has been made, they may not inquire into the nature of the determination itself.[109] In effect, New Zealand argued that the Panel's standard of review was limited to merely verifying whether the determination of injury was actually made, and that Panels could not go further to question the accuracy or validity of such determination.[110] Such analysis required the narrowest standard of review, which would have left Panels as mere rubber-stamping agents for national authorities. New Zealand predicated its argument mainly on sovereignty grounds.[111] Finland on the other hand, argued for the broadest possible review, contending that to allow contracting parties full discretion in the determination of injury would "open the door to anarchy without the possibility of international surveillance."[112]

The Panel rejected New Zealand's interpretation of the standard of review. It first agreed with New Zealand that "the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned."[113] The Panel then continued:

> However, the panel could not share the view that such a determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, . . . that its representation be given sympathetic consideration and eventually, if no satisfactory adjustment was effected, it might refer the matter to the Contracting Parties. . . . To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding antidumping cases without any possibility to review the action taken in the GATT.[114]

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107. GATT Dispute Settlement Panel, *New Zealand—Imports of Electrical Transformers from Finland*, BISD 32d Supp. 55 (1988) (panel report adopted July 18, 1985).

108. *Id.* at 61.

109. *Id.*

110. *Id.* at 62.

111. *Id.*

112. *Id.*

113. *Id.* at 67.

114. *Id.*

The Panel upheld New Zealand's dumping finding, but rejected its material injury determination.[115] Note, however, that the Panel ultimately reviewed only the methodology by which the New Zealand Customs Department arrived at its injury determinations.[116] The Panel did not, strictly speaking, examine the specific facts on which the Department's conclusions were based.

A similar argument for a very narrow standard of review had been raised and rejected in an earlier case involving Swedish antidumping duties.[117] In this case, the Panel reasoned that the condition in Article VI forbidding the imposition of antidumping duties unless "certain facts had been established," creates an obligation in the importing country to "establish the existence of these facts when its action is challenged."[118]

The question of the appropriate standard of review for Panels in antidumping cases was again raised in the Swedish complaints against U.S. antidumping duties on stainless steel.[119] The United States considered standard of review as a "central and novel question" to be addressed in the dispute.[120] Influenced by its administrative law doctrine, the United States distinguished between *de novo* review and systemic review and argued that the Panel's review should be limited to the latter.[121] It noted that agencies conducting antidumping investigations are usually confronted with hundreds of decisions and judgment calls.[122] The United States then argued as follows:

> The dispute settlement mechanism of the Agreement could be applied to accomplish a variety of objectives, ranging from the examination of each of the many administrative decisions or judgment calls on the one hand to a broader, systemic analysis of the consistency with the Agreement of determinations by investigating authorities on the other. The first approach most closely resembled *de novo* review while the second approach reflected the type of systemic review traditionally undertaken by a court of appeal. A review of antidumping determinations in the context of a dispute settlement procedure under the Agreement

115. *Id.* at 68.

116. *Id.*

117. GATT Dispute Resolution Panel, *Sweden—Swedish Anti-Dumping Duties,* B.I.S.D. 3d Supp. 81 (1955) (panel report adopted Feb. 26, 1955).

118. *Id.* at 85-86.

119. GATT Dispute Resolution Panel, *United States—Anti-Dumping Duties on Imports of Stainless Steel Hollow Prods.,* GATT Doc. ADP/47 para. 3.11 (1990) [hereinafter *Stainless Steel*].

120. *Id.*

121. *Id.*

122. *Id.* Specifically, the Panel noted agencies such as the U.S. Department of Commerce and the U.S. International Trade Commission. *Id.*

> was most appropriately conducted in accordance with the second, systemic type of review. The US recognized, however, that any mechanism for review of antidumping determinations must necessarily include a consideration of issues of fact as well as issues of law. The relevant question, therefore, was what was the appropriate level of scrutiny that a reviewing body should apply to a consideration of the factual findings made by the national investigation authority which had compiled the administrative record. . . . Absent evidence that an investigating authority deliberately acted in a way which would prejudice the outcome of an investigation in favour of one party or was seriously negligent in the manner in which it conducted the investigation, it was appropriate that a judicial body reviewing the results of an investigation accord some deference to the judgment of the investigating authority.[123]

The above passage is, perhaps, the most detailed articulation of the question of standard of review before a GATT Panel. To its credit, the United States did not dispute that a Panel's review must necessarily involve both issues of fact and law. It regarded this as settled. What was not settled, according to the U.S. argument, was how much deference Panels should give to national authorities. In addition, the United States contended that Sweden should not be allowed to introduce new evidence or raise fresh arguments which its exporters had not raised in the proceedings below.[124] On its part, Sweden argued that Panels should reconsider all evidence and show no deference to the factual conclusions of national agencies.[125] It contended that the Panel should undertake a detailed analysis of the factual information on which the U.S. agencies based their determinations.

The Panel declined the parties' call to formulate general standards of review, and ruled instead that it would be more appropriate to examine and decide arguments and legal issues as they arise in relation to specific matters in dispute.[126] The Panel also rejected the U.S. argument that Sweden be precluded from adducing new evidence. There was, however, no specific ruling on this point.

Recent antidumping cases also raise the question of the appropriate standard of review. *Dictum* in *United States - Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico* apparently suggested a *de novo* review that would

123. *Id.*
124. *Id.* at para. 3.9.
125. *Id.* at para. 3.12.
126. *Id.* at para. 5.3.

enable Panels to reweigh evidence.[127] In contrast, the Panel in *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the U.S.*, preferred a limited review of a systemic nature.[128] The Panel stated that its task was to examine "whether the factual basis of the findings articulated in the determination was discernible from the text of the determination and reasonably supported those findings."[129]

C. ASPECTS OF THE QUESTION OF STANDARD OF REVIEW AND OTHER PROCEDURAL ISSUES:

The following points are evident in the U.S. articulation of the question of standard of review in the *Stainless Steel* Case.

1. Scope is Limited to the Administrative Record

In most domestic jurisdictions, a reviewing court generally confines its review to the record compiled by the administrative agency.[130] This review-on-the-record principle seems not wholly settled at the GATT level. It could be a contentious issue given that the parties at the national and GATT proceedings are different.[131] This issue is related to the question of exhaustion of arguments which is discussed below. Since Panels are reviewing the determinations of an investigating authority, it is not unreasonable that they be expected to confine their review to the record developed by the agency. It goes without saying, however, that the Panel should not confine itself to the record if there are credible allegations that the agency refused to include certain relevant information in the record. In GATT antidumping proceedings, parties usually agree with regard to the fullness of the record, but disagree on the legal consequences and interpretation.

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127. *See* GATT Dispute Resolution Panel, *United States—Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, GATT Doc. ADP/82, para. 5.11 (1992) [hereinafter *Mexican Cement*].

128. *See* GATT Dispute Resolution Panel, *Korea—Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, GATT Doc. ADP/92, para. 228 (1993).

129. *Id.* at para. 227.

130. East Chilliwack Fruit Growers Co-op v. U.S., 665 F. Supp. 499, 504 (CIT 1987) (holding that the CIT's review of an action is restricted to the administrative record).

131. The text of Article 17.5(b) of the 1994 AD Code, however, seems to imply a review-on-the-record principle because it requires the Panel to examine the matter "based upon the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." 1994 AD Code, *supra* note 6, at art. 17.5(b).

2. Deference to National Authorities

It is plausible to say that Panel review of a long and complex fact-gathering and evaluating proceeding should not amount to a re-evaluation of the evidence. The fact that the GATT allows the national authorities to be in charge of the initial determinations demands that Panels show some deference to the judgment of those authorities. The degree of deference depends on the standard of review adopted by the reviewing body, which may differ depending on whether factual or legal conclusions are being reviewed. The "arbitrariness" and "abuse of discretion" standards allow for greater deference than the "substantial evidence" standard.

The argument for deference is very strong in the context of factual review because, to some extent, Panels' fact-finding capabilities are limited. The process for determining the level of deference to be accorded an agency's findings is devoid of any mathematical precision. In *Stainless Steel*, the United States argued that a Panel should defer to national authorities once it determines that an authority was neither deliberately prejudicial nor seriously negligent in the conduct of the investigations.[132] This seems identical to the "abuse of discretion" standard, which would leave domestic agencies with a plenitude of unsupervised discretion, to the detriment of complainants. Because suspicions of protectionism are common in antidumping disputes, a very high level of deference is not appropriate. It will only serve to benefit those nations whose domestic standards of review are very lax.

Deference in the context of legal interpretations presents a more difficult question under the GATT. Some writers are of the view that questions of law should be reviewed *de novo*.[133] They reason that, unlike national tribunals, GATT Panels review determinations for conformity with GATT law, not for conformity with the national law applied in the action.[134] National courts often ignore GATT-based arguments in their review. Thus, on the question of deference to legal findings, it can be argued that there is nothing to defer to since the Panel level marks the first consideration of GATT law *vis-a-vis* the facts.[135] National au-

132. *Stainless Steel*, supra note 119, at para. 3.11.

133. *See* Palmeter & Spak, *supra* note 12, at 1157.

134. *Id.*

135. *See* James R. Cannon, Jr. & Karen L. Bland, Comment, *GATT Panels Need Restraining Principles*, 24 L. & POL'Y INT'L BUS. 1167, 1173-77 (1993). U.S. courts defer to agency interpretations where there is no explicit statutory

thorities cannot claim to have greater expertise over GATT law than the Panels themselves. Nevertheless, there is merit in arguing that since the GATT contemplates that individual contracting parties will administer the antidumping code, Panels should defer to national agencies' interpretation and practice.[136] The difficult task is to balance this with the goal of uniformity in the system.

3. Exhaustion of Remedies

The implication of the exhaustion rule is that complaining governments should be precluded from adducing, before the Panel, any evidence that was not raised by their exporters during the domestic proceedings. This also could be two-dimensional, involving exhaustion of legal issues and exhaustion of factual arguments. The United States voiced this contention in *Stainless Steel*, by objecting to the admissibility of certain claims and arguments by Sweden which the Swedish exporters had not presented during the domestic proceedings.[137] The United States raised a similar objection in *Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon,*[138] by arguing that the failure of Norway or private Norwegian respondents to raise certain claims before the investigating authorities and "exhaust administrative remedies" precluded Norway from raising them before the panel.[139] Anyone trained in the common law rules of appellate procedure might favor the U.S. contention, but GATT Panels are neither U.S. appellate courts nor common law Panels. It is not surprising, therefore, that the GATT Panel overruled the U.S. objection. The Panel stated as follows:

> [A]n examination by the panel of Norway's claims concerning initiation of the anti-dumping investigation and the comparison of average normal value with individual export prices was not precluded by the failure of the Norwegian government or Norwegian respondents to raise these issues before the investigating authorities.[140]

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language to the contrary and where the agency has made a reasonable interpretation. *Id.*

136. *Id.*

137. *Stainless Steel, supra* note 119, at para. 3.9.

138. GATT Dispute Resolustion Panel, *United States — Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway,* GATT Doc. ADP/87, para. 331 (1992) (panel report adopted Apr. 1, 1994).

139. *Id.*

140. *Id.* at para. 351. In addition, the *Mexican Cement* case Panel agreed that "even if the issues relating to initiation and cumulation had not been raised during the domestic administrative proceedings, these issues could be considered by the panel." *Mexican Cement, supra* note 127, at para. 5.11. By contrast, in the *Stainless Steel* case the Panel appeared to create a requirement

There is no express requirement in GATT law for exhausting remedies available in the domestic arena or for exhausting every argument that could be raised later.[141] Precluding governments from raising arguments not raised at the domestic proceedings could produce hardship. The private respondents in the domestic proceedings may, for a variety of reasons, be unable to adduce certain evidence or raise certain claims. Such inability may not apply to the respondents' government when the latter takes the dispute to the GATT. The complaining government should not suffer unduly because of problems incurred during the domestic proceedings. Allowing new claims to be raised at the Panel proceedings will not unduly prejudice the respondent government because they will have ample time to reply.

In the case of non-compliance with the Code's provisions concerning the presentation and proper evaluation of evidence during the investigation, the argument on exhaustion of remedies should not be entertained. Therefore, a Panel should seek to know whether the exporter(s) had real opportunity to raise the arguments in question before the domestic proceedings and may disallow new claims if it finds that the exporters had such opportunity. In *Stainless Steel*, the Panel noted that Sweden had not contended that its exporters were not "given ample opportunity to present all evidence that they consider useful in respect of the antidumping investigation in question."[142] According to the Panel, where there is no such allegation of non-compliance, the Panel should only verify whether, in evaluating factual evidence, an investigating authority had erred manifestly on an essential element or had acted in a clearly abusive manner.[143]

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that the complaining government show that its exporters were denied ample opportunity to present certain evidence or arguments before such new evidence is allowed before the Panel. *Stainless Steel*, *supra* note 119, at para. 5.3.

141. *See* Palmeter & Spak, *supra* note 12, at 1158-59. Palmeter and Spak argue that the issue of exhaustion of remedies is misplaced because the applicable law at GATT-level review is different from that applied at the domestic level. *Id.* at 1158. The question remains whether there is any radical difference in substance, and whether a requirement to exhaust remedies and arguments can be implied from the provisions of Article 17.5(b) of the 1994 AD Code.

142. Such opportunity is required under Article 6.1 of the 1994 Antidumping Code. 1994 AD Code, *supra* note 6, at art. 6.1.

143. *Stainless Steel*, *supra* note 119, at para. 3.11.

V. POST-URUGUAY ROUND: ANALYSIS OF THE STANDARD OF REVIEW IN ARTICLE 17.6 OF THE 1994 AD CODE

Pre-Uruguay Round GATT law had no express provisions on the standard of review for antidumping cases before Panels.[144] Much depended on the whims of the Panelists. Toward the end of the Uruguay Round, this procedural issue assumed unprecedented importance. The United States, backed by the European Union, prevailed over other parties and finally had some provisions on standard of review included in the AD Code. The United States would rather have the standards spelled out than rely on the whims and shifting attitudes of the Panelists.

The standard of review is set forth in Article 17.6 of the AD Code which provides as follows:

> In examining the matter in paragraph 5:
> i) 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;
> ii) 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.[145]

A. REVIEW OF FACTS

The provision on the review of facts requires Panels to defer to the evaluation of facts made by the national authority if it finds such evaluation unbiased and objective and the factual establishment proper.[146] The paragraph does not contain enough guidance. It does not specify how deeply a Panel can probe the appropriateness and objectivity of an authority's evaluation. Given the "mischief" sought to be cured by stipulating a standard of review, it is certain that a second evaluation of the facts by Panels is not intended. However, it seems that Panels may do more than merely look at the facts to determine the objectivity of the authorities.

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144. *See supra* Part IV.B.
145. 1994 AD Code, *supra* note 6, at art. 17.6..
146. *Id.*

It is not clear who bears the burden of persuasion. Should the complaining government bear the burden of showing that the establishment of facts was not proper and/or their evaluation biased and subjective? This can be a very heavy burden.[147] Since antidumping rules constitute an exception under GATT, the burden of showing objectivity and lack of bias should be borne by the government that imposed the duties.

It is not easy to determine whether the standard contained in Article 17.6(i) embraces the "substantial evidence test" or the "arbitrariness test." The first arm of paragraph 6(i), which requires Panels to determine whether the factual establishment is proper, would imply at least the arbitrariness standard, but the second arm with the phrase "unbiased and objective" is potentially a looser standard.[148] Proof of bias and subjectivity will be particularly difficult in those aspects of antidumping determinations that involve questions of judgment. For example, both injury determination and causation involve some elements of judgment on which reasonable people can differ. Many conclusions of the national authorities may find an escape route here. Panels should overturn an authority's conclusion, however, if it finds the authority's investigation to be so restricted in scope, so shallow in execution or so half-hearted as to constitute a pretext or sham.

B. REVIEW OF LAW

The phrase "permissible interpretation" governs Panel review of questions of law. An antidumping measure by a national authority shall be found to be in conformity with the Agreement if it rests on one of many permissible interpretations of the relevant provision. It is immaterial that the Panel would have preferred an alternative interpretation. Given the continued vagueness of the AD Code, many provisions will readily support more than one permissible interpretation. The potential for multiple interpretations could undermine the uniformity of GATT law. Experience has shown how each of the principal users of antidumping measures had in the past exploited the vagueness of some provisions to serve their respective self purposes. If Panels cannot impose a uniform interpretation, the re-

147. *See* Waer & Vermulst, *supra* note 80, at 9 (observing that Panels may choose to place the burden on the complaining party to show "bias and subjectivity" in the evaluation of the facts, which could result in a heavy burden of proof).

148. *Id.* at 8.

sult will be what some writers have called a "Tower of Legal Babel."[149] The language of paragraph 6(ii) would prevent Panels from substituting their own interpretation even when they feel that the larger purposes of the GATT would be better served.

Another problem is that the distinction between law and fact is malleable.[150] Very often, "questions of fact shade into the spectrum of conclusions and vice versa".[151] Where the line of distinction is drawn depends on the posture of the reviewing body.[152] A Panel determined to escape the narrow confines of a deferential standard of review can characterize a question of fact as one of law.[153]

Panels are required to interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. The Vienna Convention on the Law of Treaties codifies the rules of interpretation of treaties.[154] According to the Convention, a treaty should be interpreted according to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[155] Where the text of agreement is silent, interpretation of a treaty should consider the treaty's negotiating history, preparatory work, any subsequent practical construction adopted by the parties and the subsequent conduct of the parties. Thus, subsequent practice of Members in the application of their antidumping laws will be entitled to weight by the Panels when there is need to resolve ambiguities.

C. ROLE OF THE APPELLATE BODY

The provision for the establishment of a standing Appellate Body constitutes a major novelty in the new Dispute Settlement Understanding. This Body shall entertain only questions of law arising from decisions of Panels.[156] It shall undertake only a systemic review of the issues presented on appeal.[157] It can up-

149. *See* Palmeter & Spak, *supra* note 12, at 1158.
150. *See* Stuart, *supra* note 106, at 760-63.
151. *Id.* at 762.
152. *Id.*
153. *Id.* at 760-63.
154. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/conf. 39/27, *reprinted in* 8 I.L.M. 679, art. 31 (1969) (entered into force Jan. 27, 1980).
155. *Id.* at 691, art. 31.
156. *See* UR RESULTS, *supra* note 2, at art. 17.6.
157. *Id.* at art. 17.

hold, modify or reverse the legal findings and conclusions of a Panel.[158] This is a further step toward judicialization of the GATT. The Appellate Body can bring about a guided crystallization of legal principles through a consistent interpretation of GATT Agreements. Where a Panel holds that a relevant provision of the Code supports more than one permissible interpretation and thus endorses a Member's antidumping measure, the Appellate Body can reverse the Panel if it thinks that said provision does not support multiple interpretations. In this way, the Appellate Body could become the ultimate guardian of the consistent and uniform application of antidumping laws. This will enhance the predictability and acceptability of the dispute settlement system as parties will have a second chance to challenge legal conclusions of Panels. In addition, Panels will be more careful in discharging their functions knowing that their decisions may come under the scrutiny of a higher body. Appellate rulings may acquire precedential value as Panels may begin to refer to previous appellate interpretations in disposing of current disputes, thus paving the way for *stare decisis* in the GATT legal system.

VI. CONCLUSION

An omnipotent GATT Panel with sweeping powers of review may likely render the global trade structure dysfunctional. At the same time, a rubber stamp judicial system will do a great harm to the trade body. The reality of the global trade system in particular, and the international political and legal system in general, demands a pragmatic approach to antidumping cases. Restraint is the key word: it is necessary to preserve institutional legitimacy. Domestically, separation of powers, presumed administrative expertise, and judicial lack of time are some of the justifications given for limited judicial review. Internationally, the best justifications are founded in policy considerations, including the primacy of domesticity.

Standard of review enforces the desired restraint. It preserves the allocation of power between different bodies. In the GATT system, standard of review is intended to draw a balance between the need for international surveillance of antidumping measures and the clamor by member nations to have their sovereignty, as exercised through their various domestic agencies, respected. Although GATT Panels had in the past declined to

158. *Id.* at art. 17.13.

formulate any general standards of review, they had in many cases shown restraint by reviewing the methodologies used by the respondent government rather than re-evaluating the facts of each given case. One of the possible impacts of article 17.6 is that the flexibility of Panels to choose among options will be eroded. If the conclusions of the domestic agency fall within permissible interpretations, the Panel must uphold them even if it thinks that the larger purposes of GATT will be better served by an alternative interpretation. How this provision reflects on future cases will depend on how often Panels hold provisions to support more than one interpretation.

In analyzing Article 17.6, one should bear in mind the political sensitivity of antidumping matters and the fragile nature of the global trade system. Thus, while complaining that the standard contained in Article 17.6 is too lax, one should ask whether a broader standard would be functional. Given the new automatic regime and tougher rules against unilateralism, a broader standard of review in antidumping cases might be unworkable, not because Panels lack the needed expertise to make a detailed review,[159] but because the big powers do not want them to do so. The main users of antidumping measures would still want such measures to serve the systemic need for a pressure valve.

The impact of the 1994 AD Code will, to some extent, depend on how the standard of review plays out in the practical functioning of Panels. It is possible that the GATT's influence in this area may be diminished if Panels construe Article 17.6 too restrictively. Article 17.6 has many escape routes that could, if left unsupervised, be exploited by respondent governments. Much will depend on the integrity of Panels. "It can only be hoped that Panels will be alert to the dangers of using the escape language in Article 17.6 and will stand up to their responsibility of ensuring a consistent, fair and uniform application of the GATT antidumping law."[160] If Panelists meet this responsibility, differences between pre-Uruguay and post-Uruguay Panel review of antidumping determinations of national authorities may not be too radical.

It is important to remind Members that the survival of the trade system depends on their willingness to exercise self restraint in the use of antidumping measures to exclude foreign

159. Consider the fact that a broader standard of review was approved for patent cases where the big powers will be more of complainants than respondents—a double standard? That is the power game.

160. Waer & Vermulst, *supra* note 80, at 9.

competition. Antidumping measures pose a threat to liberal trade, and this threat will grow with the expansion of the "antidumping club."[161] We must avert an antidumping war. While the big powers may have prevailed in limiting the GATT's influence in this area, they should realize that one cannot eat one's cake and still have it. Their exporters will be subject to the consequences of the same lax standard of review. Thus, regarding the position of the Unites States on the question of standard of review, some writers have observed as follows:

> [D]omestic exporters are a constituency, decidedly secondary at this point, but apparently growing in importance. Their interests present the true political problems for government. *Whatever rules the United States agrees to live with on behalf of industries that compete with imports, it must be prepared to live with on behalf of its exporters as well. The United States cannot plausibly demand more deference for its own decisions than it is willing to concede to the decisions of other governments.*[162]

161. The AD Code is compulsory for all Members of the WTO.
162. Palmeter & Spak, *supra* note 12, at 1166 (emphasis added).