ABSTRACT

The U.S. is one of the biggest markets for Korean exports since the industrialization step of Korea. Therefore, the U.S. trade law and policy have played an important role in the Korean economy and industry. In this point, it is necessary to examine related laws and practices of the U.S. trade policy specifically on the antidumping measures as a major treatment.

The objective of this thesis is to critically analyze some elements of the U.S. Antidumping Law and to find apparent or dormant problems in the practices of the International Trade Commerce and the Department of Commerce. To do so, the antidumping cases or related disputes involving Korean exports are reviewed in terms of WTO provision of Article VI of GATT 1994.

INDEX WORDS: U.S. Antidumping Law, WTO Antidumping Agreement, Dumping margin and injury, U.S. antidumping practices against Korea
U.S. ANTIDUMPING LAW AND PRACTICES AGAINST KOREAN EXPORTS:
FOCUSING ON THE CONFORMITY WITH WTO PROVISIONS

by

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U.S. ANTIDUMPING LAW AND PRACTICES AGAINST KOREAN EXPORTS:
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I. Introduction

Antidumping is one of the most controversial issues in the field of international trade.\(^1\) One major factor in the antidumping regulation debate is the World Trade Organization (hereinafter WTO), which is built upon the structure of the General Agreement on Tariffs and Trade (hereinafter GATT) and includes guidelines for the initiation and execution of antidumping investigations, as well as the imposition of sanctions upon positive findings.\(^2\) Companies and industries in the international market often abuse antidumping measures for protectionist purposes.\(^3\) Since both private companies and government are involved in seeking antidumping measures, enforcing antidumping regulation is complicated. Invoking antidumping laws abusively over foreign exporters to protect domestic industries has become commonplace. In response to these antidumping measures, many developing countries, including Korea, have raised strong objections to the laws as another form of trade barrier.\(^4\)


\(^{4}\) Some countries including Korea contended that the topic of antidumping measure should be included in the WTO New Round negotiation for bringing U.S. provisions into conformity with WTO provisions, against which U.S. argued. See also infra Table 1, at 66.
Since the United States market is one of the largest for Korean exports, U.S. trade policy has played a key role in the development of the Korean economy. In this regard, it is important and necessary to examine the related laws and practices of the U.S. trade policy, especially on the antidumping measures. Considering that the U.S. is the country that defended and encouraged free trade and tried to eliminate trade barriers among countries after World War II, it seems ironic that the United States is also a principal user of antidumping measures,\(^5\) which have contributed to the expansion of another type of trade barrier. Furthermore, although the Uruguay Round Antidumping Agreement in 1994 settled some controversial issues that had existed in the former agreement, many unsettled issues are left to the next round. Consequently, the Agreement is still vulnerable to arbitrary interpretation stemming from U.S. protectionism.

As a result of such arbitrary interpretation, Korean exports especially have suffered. This in turn, has hindered Korea’s economic growth and capability to compete directly with U.S. industries such as steel, electronics, and semiconductors. In other words, after a period of successful exportation of Korean goods to America, the U.S. manifested its protectionism over domestic industries by initiating numerous antidumping actions against Korean companies and industries. These antidumping actions have created major trade issues between the U.S. and Korea.

The objective of this thesis is to analyze critically some elements of the U.S. antidumping law and to find apparent or dormant problems in the practices of the U.S. antidumping measures. To do this, the U.S. Antidumping Law will be reviewed to examine

\(^5\) See infra Table 2, at 67.
whether it was established in accordance with the policies of 1994 Antidumping Agreement and whether there are problems in interpreting and applying the Agreement to real practices.

This paper is divided into four chapters. First, Chapter II briefly defines dumping and explains the background of antidumping measures through presentation of contrary arguments. Chapter II further provides an overview of the WTO by analyzing the major changes of the 1994 Antidumping Agreement in the Uruguay Round in order to explain how the Agreement was equipped with new rules to clarify certain limitations in the former agreement. Chapter III then examines the most controversial section of the U.S. antidumping law, such as “calculation of dumping margin,” “determination of material injury,” and procedural problems. Additionally, Chapter III sets out the general criticism of the U.S. antidumping law and addresses the remaining problems of arbitrary interpretation. Next, Chapter IV provides an overview of U.S. antidumping cases against Korean exports for the last two decades. Further, antidumping cases against Korean exports filed in WTO Dispute Settlement Body are listed and examined so as to reveal the problematic applications and proceedings of the U.S. antidumping law. Finally, this paper concludes by suggesting how some provisions in the Agreement should be amended and repealed to clarify how they should be implemented in the U.S. antidumping law. The conclusion also suggests that Korea should take steps to devise comprehensive countermeasures in both government and private industries to cope better with protectionist U.S. antidumping law.
II. The Background of Antidumping Measures and the System of the WTO

A. The Background of Antidumping Measures

Dumping is generally defined as selling goods in a foreign market at a price lower than that charged in the exporter’s domestic or home market, known as less than the “normal value” of the products. By dumping, exporters from other countries can increase their profits by discriminating among customers, charging different customers different prices for like products. Traditionally, dumping had been recognized as a problematic trade practice and condemned, which consequently allowed the importing country to take certain countermeasures to the dumped goods. In particular, the imposition of antidumping duties in the amount of “dumping margin” is one of the most common countermeasures to dumping.

The difference between the home-market price and the export-market price is called the “dumping margin.” In an attempt to align a product’s price in the export market with its price in the exporter’s domestic market, importing countries impose antidumping duties. The imposition of antidumping duties should be consistent with international trade rules promulgated by the WTO if actual sales have been made at less than fair value and if the dumping has caused or

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7 JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 654 (2D ED. 1986).
8 MICHAEL LEIDY, ANTIDUMPING: SOLUTION OR PROBLEM IN THE 1990s, INTERNATIONAL MONETARY FUND WORLD ECONOMIC AND FINANCIAL SURVEYS 54 (1994).
threatened material injury to domestic industry. Antidumping duties are far and away the most frequently used tool or market protection among industrial countries.

The imposition of antidumping duties can be justified by the traditional notion that sales to different people at different prices are unfair.\textsuperscript{9} In modern times, the predatory anti-competitive behaviors of big corporations frequently drive small competitors out of business by offering low prices for products and eventually raising prices for monopoly profits. Therefore, antidumping measures were developed and imposed on dumped goods in order to protect domestic industries from foreign competitors armed with low prices.

As of now, no uniform or unanimous view exists as to whether the effects of dumping are harmful. Hindley argued that neither fairness in competition nor the possibility of predatory dumping provides a satisfactory rationale for current antidumping law’s use of antidumping measures as a means of protection from predatory dumping. Both may justify some action against dumping, but neither can justify the broad scope of the authorization of antidumping by the WTO or the broad scope of national antidumping law.\textsuperscript{10} The practice of predatory pricing is implausible in a market with products produced by many firms at the global level, none of which has a dominant share of global output, which is the case with current international trade markets.

Theories against antidumping measures mainly come from the utilitarian viewpoint. Generally, the consumers of dumped products in an importing country collect great benefits from the low purchase prices. On the contrary, the producers of the like product suffer a loss for the same reason. Thus, the antidumping laws are theoretically and practically designed as a national trade policy to protect domestic producers, which stems from the fact that dumping is grounded

\textsuperscript{9} Milton Friedman, \textit{In Defense of Dumping}, \textsc{Int’l Trade Rep} 4, 935 (1987).

\textsuperscript{10} Brian Hindley, \textsc{Antidumping Industrial Policy: Legalized Protectionism in the WTO and What to Do About It} 22 (1996).
on the premise of unfair price; in other words, a price that is too low. A main problem is that most antidumping measures have nothing to do with unfair competition. In other words, they force producers to sell their products at relatively high prices as a condition of entering the importer’s domestic market, which narrows the range of choices available to consumers and consequently is against their welfare. As several developed countries have frequently used antidumping measures since the 1980s, other trading partners questioned whether antidumping duties were used as a disguised form of protectionism.\textsuperscript{11}

One commentator, Thomas J. Prusa,\textsuperscript{12} has analyzed the costs of antidumping measures that should be paid by every participant of international trade and doubts the effectiveness of the antidumping measures. Prusa points out two main costs of the protection coming from the antidumping measures. First, once antidumping measures have been adopted, countries often have a difficult time restraining the use of them. In recent years, new users–mainly developing countries– have accounted for half of the total cases of the world.\textsuperscript{13} Many of the heaviest antidumping users are countries that did not even have antidumping laws a decade ago. This trend, backed by the recent declining phase of world economy, seems to have proliferated and invokes another type of tariff war. Second, it is reported that on average antidumping duties cause the value of imports to decrease by approximately 30-50\% in rejected and settled cases resulting in a duty imposition.\textsuperscript{14}

\textsuperscript{11} Jackson, Davey & Sykes, Legal Problems of International Economic Relations 672 (1995).


\textsuperscript{13} See Table 2 at 67.

\textsuperscript{14} See supra note 12.
B. Antidumping System of the WTO

1. Antidumping Regime before the Uruguay Round

Article VI of the GATT provides for the right of contracting parties to apply antidumping measures, i.e. measures against importing a product at an export price below its "normal value" (usually the price of the product in the domestic market of the exporting country), if such dumped imports cause injury to a domestic industry in the territory of the importing contracting party.\(^{15}\) During the first two decades of the GATT, antidumping was a minor issue. The GATT came into force in 1948, but the contracting parties did not consider the use of antidumping until 1958.\(^{16}\) As antidumping laws were in use worldwide by 1960, a new set of concerns began to rise. A number of countries in the GATT began to feel that antidumping laws were used in such a way as to raise a new trade barrier, subsequently forming a potential threat to free trade.

As the European countries were reconstructed after World War II and issues about international trade became more important, European countries argued that the antidumping measures of Canada and the U.S. were not operated fairly and that Article VI of the GATT 1948 was not sufficient to cope with the contemporary circumstances regarding the issue of antidumping, which was brought to the negotiating table at the Kennedy Round starting from 1964. However, through several Rounds from the 1960s, the major developed countries have not


\(^{16}\) The statistics shows that as of May 1958, a total of thirty-seven antidumping decrees in force across all GATT contracting parties, twenty-two of them in South Africa. See Michael J. Finger, Antidumping: How It Works and Who Gets Hurt, 25-26 (1993).
abandoned the protective practices of antidumping measures. In addition, even in the 1980s, because of the rapid growth of international trade accompanied by the emergence of developing countries, including the NIEs,\textsuperscript{17} many exporting countries started to devise exporting methods to evade the protective practices of major developed countries, which were expected to distort the order of international trade and result in a profusion of trade disputes in the near future.\textsuperscript{18} This consideration provided a starting point for the new negotiations in the Uruguay Round.

2. Article VI of the GATT 1994

During the negotiations in the Uruguay Round, the parties focused on several crucial points. The key provisions of the Antidumping Agreement were concerned with defining how, on a practical level, the central principles of Article VI should be applied.\textsuperscript{19} This was mainly because the increasing criticism about antidumping provisions of the GATT 1948 was concentrated not on the core concepts of Article VI of the GATT 1948 but on the practical flaws left in the gray area, which help some countries utilize the provisions in a protective and unfair manner.\textsuperscript{20} In particular, the revised Agreement provides for: (1) greater clarity and more detailed

\textsuperscript{17} NIEs (Newly Industrialized Economies) refer to Korea, Taiwan, Hong Kong, and Singapore.

\textsuperscript{18} This phenomenon gave birth to the fact that bilateral or multilateral negotiations between close parties became apparent and made hard to get successful results from negotiations.

\textsuperscript{19} Specifically, parties to the negotiation about antidumping dealt with: (1) how to establish whether imported goods are being dumped; (2) how to establish whether the dumped imports are causing or threatening to cause injury to the domestic industry; and (3) procedures to be followed in initiating and conducting investigations, collecting information and making determinations, imposing antidumping duties, reviewing determinations, and terminating antidumping duties. See WTO, GUIDE TO THE URUGUAY ROUND AGREEMENTS 81 (1999).

\textsuperscript{20} But in fact, nothing in the Agreements obligates nations or firms to refrain from practices that are construed as dumping, which contrasts with the international obligations concerning subsidies and countervailing duties. Rather, the GATT and code languages do provide for a permitted response to dumping in certain circumstances, which is called an antidumping duty. Some political leaders and diplomats sometimes abuse this difference. See JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 257 (1999).
rules in relation to the method of determining that a product is dumped; (2) the criteria to be taken into account in determining that dumped imports cause injury to domestic industry; (3) the procedures to be followed in initiating and conducting antidumping investigations; and (4) the implementation and duration of antidumping measures.\(^{21}\) Thus, the international commitments concerning dumping are now set forth in the GATT 1994, particularly Article VI, and in the WTO Antidumping Agreement. The Antidumping Agreement sets forth certain substantive requirements that must be fulfilled in order to impose an antidumping measure\(^ {22}\) as well as detailed procedural requirements regarding the conduct of antidumping investigations and the imposition and maintenance of antidumping measures.\(^ {23}\) Failure to meet either the substantive or procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure.\(^ {24}\) In the following subchapters, major changes shown in Article VI of the GATT 1994 and their implications will be categorically explained.

\begin{itemize}
  \item a) Fair Comparison
\end{itemize}

Article 2 of the Agreement contains substantive rules for the determination of dumping. Dumping is calculated on the basis of “fair comparison” between “normal value” and “export price.” It also contains detailed provisions governing the calculation of normal value and

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\(^{21}\) See Explanation of the Antidumping Agreement at http://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm (last visited Jan. 6, 2004).

\(^{22}\) See id.

\(^{23}\) See id.

“constructed export price,” and the elements of fair comparison that must be made. For example, the Uruguay Round noted the conversion and exchange rate problem as one of the most significant problems in calculating the normal value and export price. As a practical matter, a distortion is likely to occur when calculating the price of exports according to the exchange rate at the time of investigation. In the former agreements, there were vague provisions regarding the conversion, which resulted in poor practices. However, in the 1994 Agreement, setting a specific exchange rate in the 1994 Agreement that required clarifying the point of time accepted would significantly reduce the possibility of autonomous practices.

In addition, a special problem with determining the home market price may arise when the exporter is from a non-market economy. In fact, a vague provision in the 1994 Agreement refers to this issue by affirming the continuing validity of a note to Article VI, and many countries applying antidumping measures have invoked this provision as the basis for using special methodologies to determine the normal value of imports from non-market economies. This issue remains as one that should be reconsidered in the next Round.

b) Objective examination basis

In performing the price comparison and dumping determination, a clear and objective criterion was newly introduced in the 1994 Agreement. Thus, a decisive quantity for calculating the normal value of the like product in the exporting country is clearly introduced in the

25 The note says that “in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State ... a strict comparison with domestic prices ... may not always be appropriate.”
Agreement\textsuperscript{26} while no such criterion is present in the former agreements. That change came from strong requests by exporting countries and is expected to reduce the gray areas where importing countries can subjectively determine such a decisive quantity.

Specifically, Article 3 of the Agreement contains rules regarding the determination of material injury caused by dumped imports. Material injury is defined as material injury itself, threat of material injury, or material retardation of the establishment of a domestic industry. The basic requirement for determining injury states that there be an objective examination based on positive evidence of the volume and price effects of dumped imports and the consequent impact of dumped imports on the domestic industry. Article 3 also contains specific rules regarding factors to be considered in making determinations of material injury while specifying that none or several of the factors, which must be considered, is determinative.\textsuperscript{27}

c) Transparency in proceedings and full opportunity to defend

A principal objective of the procedural requirements of the Agreement is to ensure transparency of proceedings, a full opportunity for parties to defend their interests, and adequate explanations by investigating authorities of their determinations.

First, in contrast to the former Agreement, the 1994 Agreement introduced a strict condition for filing. The Agreement requires that no investigation may start until the authorities

\textsuperscript{26} The Article 2.2 stipulates that “Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value of such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member…”

\textsuperscript{27} In a determination, The Article 3.5 requires, in establishing the causal link between dumped imports and material injury, known factors other than dumped imports, which may be causing injury, must be examined, and that injury caused by these factors must not be attributed to dumped imports.
approve that the industry at a discrete level supports the application.\textsuperscript{28} This change, if strictly implemented, will reduce the number of filings to a reasonable level based on objective proof, which will benefit countries that has frequently been filed against dumping. In addition, the Agreement requires public notice to the respondent,\textsuperscript{29} which will help the respondent properly prepare for the investigation process in the given period of time.

\textsuperscript{28} The Article 5.4 stipulates that “The application shall be considered to have been made by or on behalf of the domestic industry if it is supported by those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product... However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 percent of total production of the like product by the domestic industry”...

\textsuperscript{29} The Article 5.5 stipulates that “…after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.”
III. U.S. Antidumping Law and Evaluation

A. History of the U.S. Antidumping Law

Early U.S. antidumping regulations were, in substance, extensions of antitrust law. The first U.S. antidumping act, the Antidumping Act of 1916 drew upon some concepts from antitrust legislation, including requiring proof of predatory intent and relying on criminal penalties and treble civil damages as enforcement tools.\(^{30}\) The requirement for proving predatory intent proved unworkable. Given that the dumpers were in other countries largely beyond the reach of U.S. law, establishing predatory intent was virtually impossible. Further, predatory intent was found to be an inappropriate standard. Injurious dumping occurs in many circumstances that do not qualify as predatory dumping as the term is understood in the context of antitrust laws, but which nonetheless demand remedy.\(^{31}\)

The shortcomings of the 1916 law led Congress to adopt a new law in 1921. The Antidumping Act of 1921 was more closely modeled on the Canadian act; it established antidumping laws as separate from antitrust laws and laid the foundation for antidumping laws in the U.S. today. The 1921 Act amended the antidumping law in three important ways: (1) antidumping duties based on the extent of dumping replaced civil damages as the enforcement


\(^{31}\) See P. Victor, United States Antidumping Rules, 10 St. Mary’s L.J. 217, 218-20 (1978)
tool; (2) administration of the act was made an administrative matter rather than a judicial one, with the U.S. Treasury Department (which included the Customs Service) replacing the U.S. courts as the chief decision maker; and (3) the standard for injury was broadened and no longer required a demonstration of predatory intent. This third major change was probably the most important because it broadened the focus of antidumping laws beyond the narrowly defined category of predatory behavior that is the exclusive focus of antitrust laws.\(^{32}\) In the following several years, through the passage of the Fordney-McCumber Tariff Act of 1922 and the Tariff Act of 1930, U.S. antidumping laws were further refined to allow the Treasury Department to make determinations of dumping and injury and to impose duties. Judicial review was limited to matters of law, relieving the courts of administrative decisions.\(^{33}\)

During the 1930s, the United States negotiated a number of bilateral agreements under the reciprocal trade agreements program, which acknowledged the problem of dumping and endorsed the operation of antidumping laws. This precedent was followed when the GATT came into existence in 1949, leading to the creation of Article VI of the GATT, which explicitly endorsed the operation of antidumping laws:

“Dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, 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.”\(^{34}\)


\(^{33}\) Id.

\(^{34}\) GATT Article VI para. 1. (1947).
The GATT took the approach of allowing existing national antidumping statutes to police dumping instead of leaving the matter to be policed directly by the GATT. During the 1960s when the use of antidumping laws increased internationally, a number of countries associated with the GATT started to think that antidumping laws had a tendency to be used to protect domestic industries resulting in a new barrier to free trade.

In the Kennedy Round of the GATT (1962-1967), a new antidumping code was negotiated. This code focused on more clearly defining the appropriate procedures for the application of antidumping laws. In 1979, as part of the Tokyo Round GATT agreement, the application of antidumping laws was further defined. The refinements focused on three issues: (1) defining appropriate rules for LTFV determinations of dumping, (2) detailing rules on material injury, and (3) carefully defining administrative procedures for the application of antidumping duties.\(^{35}\) In conjunction with these changes just noted, the United States made another important administrative change in its application of antidumping laws in 1979. Congress removed responsibility for enforcement of antidumping laws from the Treasury Department and transferred the authority to the Commerce Department’s International Trade Administration due to a widespread feeling in the private sector and Congress that the Treasury Department was not predisposed to enforce U.S. antidumping laws aggressively.\(^{36}\)

In the Uruguay Round (1986-1994), the global system undertook by far the most extensive rewriting of the GATT – now the World Trade Organization (WTO) – rules against dumping.

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dumping. The Uruguay Round transformed the GATT rules on antidumping from general guidelines to what is now essentially a fully detailed international system to control dumping. It is not accurate to say that the world trading system is truly compatible with antidumping laws. In particular, there is criticism that antidumping laws are a “GATT-legal means to destroy the GATT system.” Other scholars have noted that the trading system has never condemned dumping per se, only dumping that causes injury.

B. Substantive Rules

The Antidumping Agreement set forth certain substantive requirements that must be fulfilled in order to impose antidumping measures, as well as detailed procedural requirements regarding the conduct of antidumping investigations and the imposition and maintenance in place of antidumping measures. Failure to meet either the substantive or procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure.

An antidumping duty is imposed, if the Department of Commerce (hereinafter DOC) “determines that a class or kind of foreign product is being, or is likely to be, sold in the United States at less than its fair value,” and if the International Trade Commission (hereinafter ITC) “determines that an industry in the United States is materially injured, or is threatened with

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37 Prusa, supra note 6 at 20.
38 Finger, supra note 14 at 10.
material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that product or by reason of sales of that product for importation.”  

The basic overall pattern of antidumping regulation is that dumping requires a certain comparison of export price with “normal price.” For responding duties to be permitted, “material injury” or threat occurring to the competing domestic industry in the importing country must also be found. If, and only if, these two conditions are found to exist (dumping and injury), then the importing country may apply antidumping duties. That country, however, is obligated to ensure that its procedures and provisional remedies for antidumping are consistent with a number of international rules in the GATT and the 1994 Antidumping Agreement. Once authorities determine that dumping and material injury exist, the importing country imposes an antidumping duty order. The antidumping duty is subject to review in order to decide on the need for the continued imposition of the duty.

1. Determination of Dumping

The first requirement of imposing an antidumping duty in the U.S. is that the International Trade Administration (hereinafter ITA) under the DOC determines that the subject merchandise is being, or is likely to be, sold in the United States at less than fair value. The

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42 Id.

43 The term “subject merchandise” replaces the term “class or kind of merchandise” Uruguay Round Agreements
basis of calculating “less than fair value” is the comparison between two prices, which are normal value and export price, or constructed export price. The DOC imposes antidumping duty on the subject product under investigation in the amount by which normal value exceeds the export price, or constructed price, which is called the dumping margin. Antidumping duties are imposed to offset any price difference and thus to eliminate the impact of any dumping on U.S. domestic producers.

a) Normal value and export price

The normal value of the subject product is determined according to the price at which the product is first sold, or offered for sale, in the domestic market of the producer. In cases where the normal value cannot be determined due to the unavailability of a basis for comparison, then it may be determined on the basis of sales to a third country or on constructed value. The calculation of a constructed value is generally complicated and frequently

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44 The term “fair value” refers to home market value of the subject merchandise. The Department of commerce normally examines not less than 60 percent of the dollar volume of U.S. imports. 19 C.F.R. 353.42(b) (1995). Under the 1994 Antidumping Agreement, dumping is defined as offering a product for sale in export markets at less than “normal value” The 1994 Antidumping Agreement art. 2.1.

45 The term “normal value” was referred to as the term “foreign market value” under prior law. URAA § 233(a)(1) (1994).

46 The term “export price” is substituted for the term “purchase price” and term “constructed export price.” URAA § 233(a)(2) (1994).

47 If the merchandise is not sold or offered for sale in the exporting country or if the quantity sold in the home market is too small to provide an adequate basis for comparison.
leads to a high normal value. The constructed value is the sum of the costs of materials; fabrication costs; the “actual amounts” for selling, general, and administrative expenses; profits; and the cost of containers, coverings, and packing. Once normal value is calculated in one of the ways mentioned above, various adjustments are performed to make the sales in the two markets comparable such as altering packing costs, including transportation of the merchandise, the amount of any taxes imposed and added to the price of the product, differences in quantities, physical characteristics, circumstances of sale, or level of trade.

After the normal value of the subject product is determined, the U.S. price of the merchandise should be established. It can be either the export price, which is the price at which


49 Tariff Act § 773 (e), 19 U.S.C. 1677b (e) (1995). In cases where actual data are not available, the following methods can be used: (1) the actual amounts incurred and realized by the specific exporter of producer in connection with the production and sale of merchandise that is in the same general category of products as the subject merchandise; (2) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review in connection with the production and sale of a foreign like product in the ordinary course of trade; or (3) the amounts incurred and realized for SGA expenses and for profits, based on any other reasonable method. Tariff Act § 773 (e)(2)(B), 19 U.S.C. 1677b (e)(2)(B) (1995).


51 Prior to 1995, the taxes imposed on the foreign like product were added to U.S. price. 19 U.S.C. § 1677a (d)(1) (1988). Under the new provision, the Department of Commerce is required to remove any taxes from the home market price and to eliminate the addition of taxes to U.S. price. It is intended to ensure that dumping assessments be “tax-neutral.” Message from The President of the United States Transmitting the Uruguay Round Trade agreements, Texts of Agreements’ Implementing Bill, Statement of Administrative Action and Required Supporting Statements (hereinafter Message from the President), H. Doc. 103-106, 103d Cong. 2d. Sess., Vol. I, at 157. See Certain Cut-To-Length Carbon Steel Plate From Finland (Final), 61 Fed. Reg. 2792, 2793 (Jan. 1996).


the subject product is first sold or agreed to be sold to an unaffiliated purchaser in the United States, or the constructed export price in cases where the export price is unreliable because of a relationship or agreement between the parties involved. There are several factors that affect the export price and the constructed export price such as costs to place the product to U.S. increasing the price, and costs to bring the product from the exporting country to the U.S. reducing the price.

b) Constructed export price

There are several shortcomings found in calculating the normal value and the export price that constitute the basis of calculating “dumping margin,” especially with respect to the calculation of “the constructed export price.” The revised U.S. antidumping law based on the 1994 Antidumping Agreement regarding the calculation of the dumping margin establishes the deduction of U.S. profit from constructed export price, which will consequently reduce the U.S.

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56 Cost of all containers, coverings, and all other costs or duties imposed on the subject merchandise by reason of its exportation to the United States, Tariff Act § 772 (c)(1), 1677a (c)(1) (1995).

57 Expenses for moving the subject product, any export tax, duty, other charges imposed by the exporting country on the exportation of the product to the United States or United States import duties, The constructed export price will be additionally reduced by; (1) commissions for selling the subject merchandise in the United States; (2) any expenses which result from, and bear a direct relationship to selling activities in the United States; (3) any selling expenses which the seller pays on behalf of the purchaser; (4) any indirect selling expenses; (5) any expenses resulting from further manufacture or assembly after importation into the United States; and (6) the profit allocated to the expenses described in (1) to (5) See Sharp Corp. v. United States, 852 F. Supp. 1072 (Ct. Int’l Trade 1994).

58 Profit here arises not only from further manufacturing but also from selling and distribution activities performed in the United States. The revised law provides special rule for calculating a deduction for the United States profit. Tariff Act § 772 (f), 19 U.S.C. 1677a (f) (1995). See Message from The President, supra note 49, at 656 to 1128 (hereinafter SAA).
price resulting in greater dumping margin. The deduction of profit only from the constructed export price may potentially conflict with the fair comparison requirement in the Agreement.

Another issue regarding the constructed export price offset is that all expenses, including indirect selling expenses, incurred in the United States were deducted from the constructed export price when the U.S. price is calculated. Also, the deduction of indirect selling expenses in the home market is allowed; however, the deduction is limited to the amount of the expenses deducted from the U.S. price,\(^{59}\) which makes this process totally unfair where the expenses incurred in the home market are greater than those incurred in the United States.

Further, the constructed export price offset is permitted only when normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price and when the data available do not provide an appropriate basis for calculating a normal adjustment.\(^{60}\) Thus, where the sales are at the same level of trade, deduction for indirect selling expenses will be made to normal value. As a result, this new provision appears to restrict certain adjustment, which previously would have been allowed, to the normal value. Considering all these circumstances, the new provision concerning constructed export price offset also seems inconsistent with Article 2.4 of the 1994 Antidumping Agreement providing for a fair comparison between the export price and the normal value.

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\(^{59}\) See Certain Carbon Steel Butt-Weld Pipe Fittings From Thailand (Final), 60 Fed. Reg. 10552, 10554 (Feb. 1995); Consumer Products, Div. SCM Corp. v. Silver Reed America, Inc., 753 F.2d 1033 (Fed. Cir. 1985). In this case, the court upheld the ESP offset cap, reasoning that “In determining whether a regulation is reasonable, we must give considerable deference to the expertise of agency, i.e., the masters of the subject.” Id. at 1039. Since this case, the Department of Commerce has continued to apply the ESP offset cap.

\(^{60}\) Tariff Act § 773 (a)(7)(B), 19 U.S.C. 1677b (a)(7)(B) (1995). This provision is to confirm with Article 2.4 of the 1994 Antidumping Agreement which provides “If … price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted…”
c) Start-up Costs Adjustments

The 1994 Antidumping Agreement provides a new requirement that costs shall be adjusted appropriately for circumstances in which costs are affected by start-up operations, and that the adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account.61 In accordance with the provision, the United States has added a new provision regarding start-up costs to the Tariff Act.62 The new provision is more detailed than that of the Agreement, given that it sets forth the specific occasions where the DOC may make an adjustment. Specifically, the DOC may make adjustments where (1) a company is using new production facilities63 or producing a new product64 that requires substantial additional investment; and (2) production levels are limited by technical factors associated with the initial phase of commercial production.65

61 This provision is the product of a compromise “between those favoring a provision reflecting business reality … and the U.S. negotiators’ reluctance to rely completely on company projections.” Alan Holmer et al., Enacted and Rejected Amendments to the Antidumping Law: In implementation or Contradiction of the Antidumping Agreement ?, 29 INT’L LAW 483, 497 (1995).


63 It includes the substantially complete rebuilding of existing production machinery. See SAA, supra note 49, at 166.

64 It involves the complete change of the product. As an example, the SAA states that “a new model year automobile with incremental changes would not be considered a new product, but a completely redesigned model with a new structure would be so considered. Similarly, a 16 megabyte Dynamic Random Access Memory (DRAM) chip, for example, would be considered a new product if the latest version of the product had been a 4 megabyte chip. However, an improved version of a 16 megabyte chip would not be considered a new product.” Id.

65 In determining whether commercial production levels have been achieved, the Department of Commerce will consider factors unrelated to start-up operations that may affect the volume of production processed, such as demand, seasonality, or business cycles. Tariff Act § 773 (f)(1)(C)(i), 19 U.S.C. § 1677b (f)(1)(C)(i) (1995).
Determining the duration of the start-up period is crucial in many cases. In order to determine the level of commercial production as a standard for establishing the start-up period, the DOC will consider various “factors unrelated to start-up operations that may have affected the volume of production processed, such as demand, seasonality, or business cycles,”\textsuperscript{66} which make the process unfair. Also, in cases where the start-up period extends beyond the period of investigation or administrative review, the DOC must use “the most recent cost of production data that it reasonably can obtain, analyze, and verify without delaying the timely completion of the investigation or review,”\textsuperscript{67} which is inconsistent with the Agreement.\textsuperscript{68}

2. Determination of Injury

Besides the determination of dumping from ITA, the second requirement must be satisfied in order to impose dumping duty to the product under investigation. The ITC must determine whether an industry in the United States has been materially injured, threatened with material injury, or whether the establishment of the industry has been retarded due to the imported sales of the dumped product.\textsuperscript{69} The ITC makes a negative preliminary determination only when (1) the record as a whole contains clear and convincing evidence that there is no

\textsuperscript{66} See SAA, supra note 49, at 167.


\textsuperscript{68} Article 2.2.1.1 of the 1994 Antidumping Agreement.

\textsuperscript{69} Tariff Act § 731, 19 U.S.C. § 1673 (1995). Most cases are decided on the first ground and a determination of material injury based on the second ground has been controversial.
material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation. At the final stage, the ITC determines whether there has been a material injury to the domestic industry and whether that injury has been caused by the dumped imports or sales.

Material injury is defined as “harm which is not inconsequential, immaterial, or unimportant” under the U.S. antidumping law revision to the Agreement. According to the law, the ITC must consider several factors in determining material injury. Those factors include the volume of imports, the effect on prices for domestic like products, and the impact of imports on domestic industry, but only in the context of production operations within the United States. In applying the third criterion, the new U.S. law included the magnitude of the margin of dumping as an additional economic factor making it a mandatory process. However, it does not seem to change the outcomes of injury determination since the Commissioners of the ITC are free to weigh all relevant economic factors, including the magnitude of the dumping margin in their injury analysis.

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70 See American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986). This case is considered to be one of the most significant court decisions concerning injury determinations in antidumping actions. In this case, the court rejected the Court of International Trade’s interpretation of reasonable indication to mean mere possibility of material injury. Id. at 1994. In the case Polyvinyl Alcohol from China, Japan, Korea, and Taiwan, this legal standard was applied, Inv. Nos. 731-TA-726-729 (Preliminary), at 13 – 14, USITC Pub. 2883 (April 1995).


72 Id. at § 771 (7) (B). Article 3.1 of the 1994 Antidumping Agreement contains a similar provision: “A determination of injury…shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products,…and (b) the consequent impact of these imports on domestic producers of such products.”

73 Commissioners are required to consider the magnitude of the dumping margin in making a preliminary determination under section 735 (b), a changed circumstances review under section 751 (b) (2), and a sunset review under section 751 (c). Tariff Act § 771 (35)(c), 19 U.S.C. 1677 (35)(c) (1995).
The definition of “domestic industry” plays an important role in determining dumping, since it involves “interested parties” and regional industries that potentially initiate antidumping action. The term “domestic industry” is generally defined as “the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.”

After the 1994 Antidumping Agreement, the United States made a few changes to conform to the terms of the Agreement and added provisions in the areas of the magnitude of dumping margins and captive production, changing rules regarding cumulation, de minimis dumping margin, and negligible imports.

a) Cumulation

Cumulation refers to the practice of cumulating imports in determining material injury. The ITC assesses the volume of effect of imports from two or more countries of like products under investigation if those imports “compete with each other” and with the like products of the

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75 See Chaparral Steel Co. v. United States, 698 F. Supp. 254 (Ct. Int’l Trade 1988); American Grape Growers Alliance v. United States, 615 F. Supp. 603 (Ct. Int’l Trade 1985). In determining whether imports compete with each other and with the domestic like product, the ITC has generally considered the following factors:

“(1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality-related questions; (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product; (3) the existence of common or
domestic industry in the United States market.”

According to this, the volume of imports from two or more countries was considered cumulatively even if that from one country alone were de minimis. However, the 1988 Trade Act provided an exception for cumulation involving negligible imports with no discernible adverse impact on the domestic injury. Further conditions for cumulation were provided in the 1994 Antidumping Agreement, which established that imports of a product from more than one country simultaneously subject to antidumping investigations may be cumulatively assessed only if the investigating authorities determine that (1) the margin of dumping from each country is more than de minimis and that the volume of imports from each country is not negligible, and (2) a cumulative assessment is “appropriate in light of the conditions of competition between imported products and the like domestic products.”

See also Circular Welded Non-Alloy Steel Pipe From Romania and South Africa, Inv. Nos. 731-TA-732 and 733 (Preliminary), USITC Pub. 2899 (June 1995); Certain Cast-Iron Pipe Fittings From Brazil, the Republic of Korea, and Taiwan, Inv. Nos. 731-TA-278 through 280 (Final), USITC Pub. 1845, at 8 (May 1986).

The mandatory cumulation provision “makes it more likely that the Commission will find injury by reason of subsidized or dumped products from the countries accounting for low import penetration … A U.S. company will now more seriously consider filing a companion petition on the same imports from other countries as well, even if they account for absolutely or relatively small volumes.” Judith Bello & Alan Holmer, The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions, 19 INT’L LAW. 639, 661 (1985).


Neither GATT nor the 1979 Antidumping Code expressly dealt with the issue of cumulation. However, both the United States and the European Community Practiced such measures. The practices of cumulative injury assessment were the subject of much discussion, but not resolved in the 1980s. Thus, the United States strove for the express recognition of cumulative analysis in the 1994 Antidumping Agreement.

The 1994 Antidumping Agreement, art.3.3.
In order for the ITC to cumulate imports from two or more countries, the antidumping petitions should be filed on the same day, or investigations self-initiated by the DOC on the same day. This greatly restricts the domestic industry’s ability to expand antidumping investigations to imports from other countries that are not involved with the initial petition. To reduce the impact on domestic industry, the new law permits petitioners to withdraw a petition and refile it within three months so that they may make simultaneous petitions, but restricts it to only once\(^\text{81}\) to prevent the abuse of the new provision.

b) Negligibility and *De Minimis*

The 1994 Antidumping Agreement requires that the antidumping investigation must be terminated if the volume of imported products under the investigation is found to be negligible. Dumped products are considered negligible if the imports from a country account for less than three percent of the total imports\(^\text{82}\) during the most recent twelve-month period preceding the filing of the petition. However, there are two exceptions to this rule. Dumped products are not considered negligible even though they account for less than two percent: (1) when imports that individually account for less than three percent, but collectively account for more than seven

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\(^{82}\) Under the Dunkel text, the negligibility standard was one percent of market-share on an individual basis and two point five percent of market-share on a collective basis. However, the United States played a leading role to shift from a market-share standard to an import-share standard in the final Agreement, resulting in benefiting the U.S. import-competing industries, such as integrated steel industry. *See also* STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986 – 1992 1592 (1993).
percent of total imports into the United States;\textsuperscript{83} (2) if the ITC determines that there is a potential that imports from a subject country will imminently account for more than three percent, or that the aggregated volume of imports from subject countries will exceed seven percent of total imports.\textsuperscript{84}

The 1994 Antidumping Agreement provides that “an investigation shall be terminated promptly upon determining that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.”\textsuperscript{85} Under the new provisions, where the margin of dumping is determined to be \textit{de minimis}, that is, less than two percent \textit{ad valorem}, the DOC should terminate any further investigation. Since the previous \textit{de minimis} level was one half of one percent, more cases with relatively low dumping margins probably will be terminated before further investigations proceed. However, this higher \textit{de minimis} standard applies only to investigations and not to reviews of orders or agreements.\textsuperscript{86} It directly conflicts with the Antidumping Agreement that clarifies that the new provisions apply not only to investigations initiated on or after the date of entry into force but also to reviews of existing measures which are conducted after the date of entry into force.\textsuperscript{87} This implementation is therefore likely to be a controversial issue in the WTO.

\textsuperscript{85} The 1994 Antidumping Agreement, art. 5.8.
\textsuperscript{86} \textit{See} Statement of Administrative Action, Agreement on Implementation of Article VI.
\textsuperscript{87} The 1994 Antidumping Agreement, art. 18.3.
c) Causation

Although the product is being sold at less than fair value and the domestic industry has been materially injured, the ITC must prove that the material injury has occurred by reason of the imports or sales at less than fair value in order to impose an antidumping duty. Therefore, it is critical for the ITC to determine the causal link between the imports and the injury of domestic industry. In applying “by reason of” standard, the ITC usually considers the volume of imports, the effect of imports on prices in the United States for like products, the impact of imports on domestic producers of like products, and other relevant economic factors. Thus, as in a material injury determination, evidence of price underselling, price depression and suppression, and lost sales strongly suggest a causal link between material injury and dumped imports.\(^{88}\)

The causation determination gets complicated when the material injury has also been caused by factors other than the dumped imports such as decline in demand, service or quality problems, change in the consumption patterns, and so forth. With respect to this determination, Article 3.5 of the 1994 Antidumping Agreement provides that “it must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Agreement.”\(^{89}\) However, the ITC is not required to determine whether imports are “the principal,\(^{88}\) See Certain Red Raspberries From Canada, 731-TA-196 (Final), USITC Pub. 1707 (June 1985).

\(^{89}\) This is virtually the same standard stipulated in Article 3.4 of the 1979 Antidumping Code, except for the inclusion of some new languages: i.e., it provided that “It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code… the injury caused by other factors must not be attributed to the dumped imports.” In contrast to the 1979 Antidumping Code, the 1967 Antidumping Code prescribed that the dumped imports should be the “principal cause” of injury. Also, the authorities were required to weigh the effect of the dumping.
a substantial or a significant cause of material injury."\textsuperscript{90} Rather, it is sufficient evidence that imports are “a cause of material injury” due to the lack of specific implementation of the U.S. law. Thus, if the imports contribute “even minimally to the condition of the domestic industry,” the causation standard is satisfied.\textsuperscript{91}

C. Procedural Requirements

1. Initiation of Antidumping Measures

The 1994 Antidumping Agreement provides the standards for the initiation of antidumping investigation and numerical criteria to define “a major proportion” of the domestic industry that is able to initiate an antidumping investigation as provided in the previous law.\textsuperscript{92} According to Article 5.4, an investigation shall not be initiated unless investigating authorities have determined that the application has been made by or on behalf of the domestic industry. Moreover, a provision clearly delineates how to determine “a major proportion” of domestic industry, which is defined as “those domestic producers whose collective output constitutes more than fifty percent of the total production of like products produced by that portion of the

\textsuperscript{90} S. Rep. No. 249, 96\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. at 47 (1979).


\textsuperscript{92} Article 4.1 of the Code provided that “… the term domestic industry shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products…”
domestic industry expressing either support for or opposition to the application."93 In any event, however, domestic producers expressly supporting the application must account for at least twenty-five percent of total production of the like product produced by the domestic industry.94

In conformity with the agreement, the new U.S. law requires the DOC to determine whether the petition has been filed by or on behalf of the industry. According to the law, a petition is considered to be filed by or on behalf of the industry if

“(1) domestic producers or workers who support the petition account for at least 25 percent of total production of the domestic like product, and (2) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.”95

If the domestic producers who support the petition do not account for half of total domestic production, in order to determine whether the industry supports the petition, the DOC should conduct a poll or rely on other information. 96 Thus, by increasing the burden of proof on a petitioner, the new requirements under both the Agreement, and the new U.S. antidumping law are expected to prevent frivolous petitions.

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93 The 1994 Antidumping Agreement, art 5.4.
94 Id.
2. Use of Facts Available

Before the 1994 Antidumping Agreement, in determining antidumping cases, the DOC relied heavily upon the responses of questionnaires from the foreign producers of the products under investigation. If the foreign producers refuse or are unable to provide detailed information necessary in conducting the investigation in a timely manner and in the form required, the DOC is required to make a decision on the basis of “facts available” according to the Tariff Act, which means that the DOC, though it may draw information from the verified submissions of other foreign producers, or from sources other than the petition, usually uses the information gathered from the petitioner that is likely to contain adverse information to the foreign producers. Therefore, it is critical for foreign producers to cooperate with investigations according to the strict statutory deadlines. However, they have experienced great difficulty satisfying the DOC’s standard, especially small companies that are unable to complete the lengthy questionnaire due to the lack of time, money, and the language barrier.

97 The DOC normally examines at least 60 percent of the dollar value or volume of the merchandise from the affected exporting country in the investigation. 19 C.F.R. 353.42(b)(1) (1994).


99 Regulations of the Department of Commerce provide that “the best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties.” 19 C.F.R. § 353.37(b) (1995).


101 As to the questionnaire problem facing to the foreign respondents, T. Murray describes that “It arrives in the form of a questionnaire, some 100 pages long, in English, requesting specific accounting data on individual sales in the home market…All this information must be identified, retrieved, recorded, and then transmitted to the
Several stipulations were added to the 1994 Antidumping Agreement about this procedure. The Agreement includes an Annex, which provides guidelines for using “facts available” to ensure that the investigating authorities are not able to make arbitrary or capricious decisions based on information submitted by foreign producers. When the investigated party acted to the best of their ability, the investigating authorities should not disregard their information and also should provide the investigated party with the reasons and explanations in case the information is not accepted. In addition, the investigated party should be given at least thirty days to respond to the questionnaire and the thirty days of extension whenever applicable.

In conformity with the Agreement, the 1994 Tariff Act established more detailed requirements on the procedure; the investigating authority should rely on “facts otherwise available” when the investigated party withholds requested information or fails to provide information in a timely fashion, significantly impedes a proceeding, or provides such information which can not be verified by the DOC. Also, if the investigated party fails to respond because it does not act to the best of its ability, the DOC and the ITC can use an adverse inference from the “facts available” gathered from the petition, from previous determinations concerning the product, or from any other information placed on the record.

102 The Agreement, art. 6 of Annex II.

Although the 1994 Tariff Act adopted requirements which complied with the Agreement, some issues presented in the Agreement were not provided for within the Tariff Act. For example, how to deal with the submission of information that is not complete or in the required format but is usable and verifiable, is not clear. Also, the 1994 Tariff Act does not mention the extension of the response period in order for the investigated party to provide further explanation in case the submitted information is unacceptable.

3. Sunset Review

Under prior law, there were instances of antidumping measures which were maintained for a decade or more, but the reason for those measures no longer existed. Therefore, a sunset provision was presented to clarify Article 9.1 of the Code, which provided that “an antidumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.” The Agreement establishes a sunset period of five years, maintaining that “antidumping orders must be terminated on a date not later than five years from imposition unless the authorities determine that the expiration of the duty would be likely to lead to continuation or recurrence of dumping and injury,” and “the duty may remain in force pending

104 In the United States 61 of 268 cases which were in force in mid-1993 were imposed antidumping duties before 1984, some of them dated back to even the 1960s. See M. Leidy, Antidumping: Unfair Trade or Unfair Remedy? 32 FIN AND DEV 27 (1995).

105 Among the major antidumping users, Australia, Canada, and the European Community had adopted sunset provisions of 5 years prior to 1995. Stewart, supra note 80, at 1609.
the outcome of such a review that shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.”

In implementing the provision in the U.S. law, it has been incorporated into Section 751(c) of the Tariff Act. Under the new law, the DOC and the ITC must conduct a review five years after the issuance of an antidumping order to determine whether revocation of the order “would be likely to lead to continuation or recurrence of dumping and of material injury.” The new law, unlike the Agreement, gives detailed standards for determining likelihood of continuation or recurrence of dumping or material injury.

In determining the likelihood of dumping, the DOC must analyze the relationship between dumping margins and subsequent reviews, and the volume of imports of the subject product for the period before and after the issuance of the antidumping order. Further, the DOC should also consider other factors such as price, cost, market, or economic factors it deems relevant. With respect to the likelihood of material injury, the new law requires the ITC to determine whether revocation of an order would be likely to result in continuation or recurrence of material injury within a reasonably foreseeable time by conducting a likelihood of material injury analysis with consideration of various factors.

106 The 1994 Antidumping Agreement, art. 11.4.


110 Unlike the causation standards, “under the likely standard, the commission will engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo: the revocation or termination of a proceeding and the elimination of its restraining effects of a proceeding and the elimination of its restraining effects on volumes and prices of imports” See SAA, supra note 49, at 213-4.
Despite the existence of detailed standards for determination specified in the Act, the new sunset requirements will not significantly affect U.S. practices regarding revocation procedures due to the extent of discretion that the DOC and the ITC have in interpreting factors and determining the adverse impact of the imports on the domestic industry.\textsuperscript{112} Therefore, in actual practice, interested foreign parties will not be able to obtain termination of antidumping orders easily.

\section*{D. Evaluation of U.S. Antidumping System}

Generally speaking, amendments of the U.S. provisions on antidumping measures have been geared to the obligations of the WTO Antidumping Agreement. Although the 1994 Antidumping Agreement minimizes many of the methodological biases in dumping margin calculations by establishing provisions concerning fair comparison,\textsuperscript{113} adjustment for the constructed price\textsuperscript{114} and currency conversion.\textsuperscript{115} However, the interpretation of some of the

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\textsuperscript{111} The ITC takes into account the following factors: (1) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the issuance of an order. Thus, if pre-order conditions are likely to recur, it may determine that material injury is likely to continue or recur, (2) whether there has been any improvement in the state of the domestic industry that is related to the order, (3) whether the domestic industry is vulnerable to material injury if the order is revoked, and (4) duty absorption. The ITC is also required to consider the likely volume of imports of the subject merchandise, the likely impact of imports of the subject merchandise on the industry if the order were revoked. Tariff Act § 752 (a)(1).


\textsuperscript{113} Tariff Act § 777A (c)(2) (1995).

\textsuperscript{114} Tariff Act § 773 (e) (1995).

terminologies, procedural inadequacy, and the DOC’s and ITC’s great discretion has been
criticized.\textsuperscript{116}

The calculation of dumping margin is one area highly vulnerable to criticism. Even
though the new U.S. law requires the fair comparison between a weighted average of normal
values and a weighted average of export prices or constructed export prices, it also allows
comparison between average normal value and individual export prices or constructed prices in
case there are significant differences between them. The question then arises as to why this kind
of pricing practice is not allowed for foreign exporters, but it is completely permissible for U.S.
producers to have difference prices. It seems clear that this unfair use of averaging comes from a
protectionist position for domestic producers by penalizing foreign exporters practicing the same
business routine.

The Agreement provides that the DOC may rely on an “inference adverse to the
interest of the respondent” if it finds that the investigated party does not act “to the best of its
ability” in response to the request.\textsuperscript{117} This means that the “facts available” are likely to be biased
against the investigated party on the basis of information presented by the petitioner. One reason
why this is often the case with antidumping investigation is that it is very difficult for the
investigated party to respond to the DOC with appropriate data in a timely manner. For example,
when the DOC normally requires the actual product-specific records of the exporter and will not
accept estimate, accruals, or budgeted amounts,\textsuperscript{118} the investigated party should recalculate

\textsuperscript{116} Chung, supra note 37, at 527.
\textsuperscript{118} Corr, supra note 1, at 81.
product costs due to different accounting systems between the two countries. Similarly, the use of the “best information available” when the constructed price is calculated is also likely to be based upon ungrounded adverse information against the investigated party on the same ground as “facts available.”

The fundamental purpose of the provision on the review system of the 1994 Antidumping Agreement is to restrict the enforcement of antidumping duty for the shortest period of time. Antidumping duty is recognized to be (1) subject to review for the necessity of its continuation and (2) terminated in five years from its initial imposition unless its continuation is proved by review to be necessary to prevent the continuation or recurrence of dumping and injury. In the process determining the possibility of “continuation or recurrence” of dumping and injury, the authority naturally will make a highly discretionary decision, which cannot be objective or fair. In fact, the antidumping duty will be revoked when there has been no dumping for at least three consecutive years, and it is “not likely” that the dumping will occur in the future. However, the provision does not give the detailed criteria for the “not likely” phrase, which again leads to a highly discretionary decision.

In addition to the shortcomings of U.S antidumping law and its implementation mentioned above, U.S antidumping cases against Korean exporters, which contain innate

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120 The 1994 Antidumping Agreement, art. 11.1.

121 Id. art. 11.2, 11.3.

problems of the authority’s arbitrary interpretation and a wide range of discretion on antidumping measures, will be introduced in the next chapter.
IV. Review of U.S. Antidumping Practices against Korea

A. General View on U.S. Antidumping Practices

The United States has initiated numerous antidumping actions against Korean companies and industries. A number of Korean industries have been subject to antidumping procedure for allegedly selling their products in the United States at prices that are too low. Antidumping actions have been initiated against those Korean industries producing automotive batteries, ball bearings, brass sheet and strip, cast-iron pipe fittings, cold-


124 An investigation began on May 8, 1985, by General Battery International Corporation of Puerto Rico to determine whether certain twelve-volt lead-acid type automotive storage batteries from Korea were being sold, or were likely to be sold, in the United States market at less than fair value. The ITC unanimously determined that "there was no reasonable indication that an industry in the United States was materially injured; or threatened with material injury; or that the establishment of an industry in the United States was materially retarded by reason of imports from the Republic of Korea." Preliminary determination. See twelve-Volt Lead-Acid Type Automotive Storage Batteries from the Republic of Korea, USITC Pub. 1710, Inv. No. 731-TA-261 (June 1985). 50 Fed. Reg. 20302 (1985).

125 This investigation was instigated as a result of a petition filed by the Torrington Company of Torrington, Connecticut on February 13, 1991, to determine whether Korean ball bearing imports were being sold in the United States for less than fair value. The Torrington Company alleged that the Korean dumping margins ranged between 7.41% and 149.78%. The ITC determined that there was no reasonable indication of dumping. Preliminary determinations found that no material harm resulted to the United States by the imports from the listed nations. See Ball Bearings, Mounted or Unmounted, and Parts Thereof, from Argentina, Austria, Brazil, Canada, Hong Kong, Hungary, Mexico, the People's Republic of China, Poland, the Republic of Korea, Spain, Taiwan, Turkey and Yugoslavia, USITC Pub. 2374, Inv. Nos. 701-TA-307 and 731TA-498-511 (Apr. 1991). 56 Fed. Reg. 10237 (1991).

126 This investigation was initiated as the result of a petition filed March 10, 1986, by American Brass, Bridgeport Brass Company, Chase Brass and Copper Company, Hussey Metals Division, the Miller Company, Olin Corporation--Brass Group, and Revere Copper Products, Inc., all domestic manufacturers of brass sheet and strip, and by three unions: the International Union--Allied Industrial Workers of America (AFL-CIO); Mechanics Educational Society of America (Local 56); and United Steelworkers of America (AFL/CIO-CLC). The petition was filed on behalf of the domestic industry in the United States that casts, rolls and finishes brass sheet and strip. The ITC found that brass sheet and strip from Korea were being, or were likely to be, sold in the United States at less than fair value, and found the weighted-average dumping margin to be 7.17%. In arriving at this determination, the ITC made fair value comparisons based on sales of the class or kind of merchandise shipped to the United States for

This investigation began from petitions filed July 31, 1985, by the Cast-Iron Pipe Fittings Committee, which is composed of Stanley G. Flagg & Co., Inc., ITT-Grinnell Corp., Stockham Valves & Fittings Co., U-Brand Corp., and Ward Foundry Division of Clevepak Corp. The petitions charged that Korean companies were selling their malleable cast-iron pipe fittings in the United States at less than fair value. The preliminary investigation found a reasonable indication that an industry in the United States was materially injured due to the importation of the merchandise in question. The ITC's final determination found dumping margins ranging from less than 1% to 93.42% percent, with a weighted-average margin of 12.48%. Final determination. See Certain Cast-Iron Pipe Fittings from Brazil, the Republic of Korea, and Taiwan, USITC Pub. 1845, Inv. Nos. 731-TA-278 through 280 (May 1986). 51 Fed. Reg. 10900-901 (1986).

This countervailing duty investigation followed a petition filed on June 18, 1984, by the United States Steel Corporation on behalf of the carbon steel structural shapes and cold-rolled carbon steel flat-rolled products (shapes and sheet) industries. The petition charged that certain benefits, which constituted subsidies within the meaning of the countervailing duty laws, were being provided to manufacturers, producers or exporters in Korea of (1) cold-rolled carbon steel flat-rolled products and (2) carbon steel structural shapes. The ITC found a 3.6% subsidy to exist for the first category of products. The subsidy for the second category of product was 0.37%, which was held to be de minimis, and therefore not subject to a penalty. According to the ITC, the following Korean programs were conferring subsidies: (i) short-term export financing under the export financing regulations; (ii) tax incentives for exporters; (iii) special depreciation; (iv) government equity infusions; (v) reductions in port charges; (vi) tariff reductions on plants and equipment. Final determination. See Certain Cold-Rolled Carbon Steel Products from the Republic of Korea, USITC Pub. 1634, Inv. No. 701-TA-218 (Jan. 1985). 49 Fed. Reg. 47284 (1984).

This investigation was initiated on November 26, 1986, by the International Association of Machinists and Aerospace Workers; the International Brotherhood of Electrical Workers; the International Union of Electronic, Electrical, Technical, Salaried & Machine Workers, AFL-CIO-CLC; the United Steelworkers of America, AFL-CIO; and the Industrial Union Department, AFL-CIO. These unions represent four of the five producers of color picture tubes in the United States. The ITC determined that imports from Korea were being sold in the United States market for 1.91% less than fair value. Final determination. See Color Picture Tubes from Canada, Japan, the Republic of Korea, and Singapore, USITC Pub. 2046, Inv. Nos. 731-TA-367 to 370 (Dec. 1987). 52 Fed. Reg. 44186 (1987).

This investigation was instigated by Micron Technology, Inc. of Boise, Idaho in April 1992. The petition requested the investigation of Goldstar Electron Co., Hyundai Electronic Industries and Samsung Electronics Co. for selling dynamic random access memory semiconductors of one megabit and above (DRAMs) for less than the cost of production. The range of dumping margins assessed, based on a comparison of U.S. prices to constructed value alleged by Micron, was for Hyundai: 94.29% - 170.89% (one meg) and 278.83% - 282.51% (four meg); for Goldstar: 132.11% - 165.29% (one meg) and 273.25% (four meg); for Samsung: 0.62% - 3.83% (one meg) and 93.18% - 97.39% (four meg). In arriving at these dumping margins, one hundred price comparisons were made between U.S. prices and Korean prices. In forty-seven cases, the Korean price was lower than the U.S. price ranging between 0.1% and 28%. In forty-eight cases, the Korean price was higher than the domestic product price ranging from between 0.3% and 69.2%. In five cases, the prices of the two products were identical. In its final investigation, the ITC found no evidence of dumping. Preliminary determination. See DRAMS of One Megabit and Above from the Republic of Korea, USITC Pub. 2519, Inv. No. 731-TA-556 (June 1992); Final determination. See DRAMS of One Megabit and Above from the Republic of Korea, USITC Pub. 2629, Inv. No. 731-TA-556 (May 1993). 57 Fed. Reg. 21231 (1992).
This investigation was initiated by Armco Steel Co., L.P.; Bethlehem Steel Corp.; Geneva Steel; Gulf States Steel, Inc. of Alabama; Inland Steel Industries, Inc.; Laclede Steel Co., Inc.; Lukens Steel Co.; National Steel Corp.; Sharon Steel Corp.; USX Corp./U.S. Steel Group; and WCI Steel, Inc. against several steel companies in Korea and steel companies in more than a dozen other countries for alleged countervailing duty and antidumping violations. In Korea's case, items under the antidumping investigation involved certain hotrolled carbon steel flat products; certain cold-rolled carbon steel flat products; certain corrosion-resistant carbon steel flat products; and certain cut-to-length carbon steel plate. The countervailing duty investigation involved certain equity infusions into POSCO (one of the Korean companies accused of being subsidized) in 1981, and from 1986 to 1988. In addition, the investigation resulted in government land transfers to POSCO for the Pohang facility (one of POSCO's plant facilities). In the case of the Korean companies, alleged dumping margins at the preliminary investigation ranged from 5.53% to 152.84%. The subsidy rate was alleged to be 11.74%. Preliminary determination. See Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, USITC Pub. 2549, Inv. Nos. 701-TA-319 to 354 and 731-TA-573 to 620 (Aug. 1992); Final determination. See Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom vol. I, USITC Pub. 2664, Inv. Nos. 701-TA-319 to 332, 334, 336-342, 344, 347-353 and 731-TA-573 to 579, 581-592, 594-597, 599-609, 612-619 (Aug. 1993). 57 Fed. Reg. 32971 (1992).

This barrage of investigations virtually closed portions of the U.S. steel market to certain kinds of foreign steel for a significant period of time. As a result, a number of U.S. steel producers were placed in the awkward position of having to increase the amount of semi-finished steel they imported in order to fill their own orders for finished steel. The ITC's final ruling stated that steel imports did not injure the U.S. industry in over half of the seventy-four cases that were investigated. As a result of this ruling, steel prices are expected to drop. Dana Milbank, U.S. Steel Industry's New Strength May Soon Weaken, WALL ST. J., June 3, 1993.

This investigation commenced on May 17, 1989, in response to a petition filed by Yuasa-Exide Battery Corp. of Reading, Pennsylvania to determine whether an industry in the United States was materially injured, or was threatened with material injury, or the establishment of an industry in the United States was materially retarded by twelve-volt motorcycle batteries imported from Korea. The target of the investigation was Korea Storage Battery Co., Ltd. The ITC unanimously found that the charges were groundless. Preliminary determination. See 12-Volt Motorcycle Batteries from the Republic of Korea, USITC Pub. 2203, Inv. No. 731-TA-434 (July 1989). 54 Fed. Reg. 23296-297 (1989).

This investigation began as the result of a petition filed on September 19, 1989, by Hercules, Inc. of Wilmington, Delaware. The petitioner alleged that imports of industrial nitrocellulose from Korea were being, or were likely to be, sold in the United States at less than fair value. The ITC determined that there was a reasonable indication that an industry in the United States was materially injured as a result of these imports. It determined the weighted average dumping margins to be 66.0%. Preliminary determination. See Industrial Nitrocellulose from Brazil, Japan, the People's Republic of China, the Republic of Korea, United Kingdom, West Germany, and Yugoslavia, USITC Pub. 2231, Inv. Nos. 731-TA-439 to 445 (Nov. 1989); Final determination. See Industrial Nitrocellulose from Brazil, Japan, the People's Republic of China, the Republic of Korea, the United Kingdom, and West Germany, USITC Pub. 2295, Inv. Nos. 731-TA-439 to 444 (June 1990). 55 Fed. Reg. 21054, 21056 (1990).
piles,\textsuperscript{136} photo albums,\textsuperscript{137} polyethylene terephthalate film, sheet and strip,\textsuperscript{138} stainless steel butt-weld pipe fittings,\textsuperscript{139} steel pipes and tubes,\textsuperscript{140} sweaters,\textsuperscript{141} telephone systems and


\textsuperscript{137} This investigation was instigated in January 1985 by Esselte Pendaflex, Inc., The Holson Co., Kleer-Vu Plastics Corp. and SPM Manufacturing on behalf of the U.S. photo albums and photo album filler pages industry. The investigation was brought against Korean manufacturers for allegedly selling their products in the United States for less than fair value. Preliminary dumping margins ranged from 26\% to 83\%. Preliminary determination. See Photo Albums and Photo Album Filler Pages from Hong Kong and the Republic of Korea, USITC Pub. 1660, Inv. Nos. 731-TA-240 to 241 (Mar. 1985). 50 Fed. Reg. 5327 (1985).

\textsuperscript{138} This investigation was initiated in response to a petition filed on April 27, 1990, by E.I. du Pont de Nemours & Co., Wilmington, Delaware; Hoechst Celanese Corp., Charlotte, North Carolina; and ICI Americas, Inc., Wilmington, Delaware. These companies alleged that Korean imports of PET film, sheet and strip were being sold in the United States at less than fair value. The ITC determined that an industry in the United States was materially injured as a result of the Korean imports and computed the weighted average dumping margins to be between 3.88\% and 5.38\%. Preliminary determination. See Polyethylene Terephthalate Film, Sheet, and Strip from Japan, the Republic of Korea and Taiwan, USITC Pub. 2292, Inv. Nos. 731-TA-458 to 460 (June 1990); Final determination. See also Polyethylene Terephthalate Film, Sheet, and Strip from Japan and the Republic of Korea, USITC Pub. 2383, Inv. Nos. 731-TA-458 to 459 (May 1991). 56 Fed. Reg. 16305, 16317 (1991).

\textsuperscript{139} This investigation began as the result of a petition filed on May 20, 1992, by the Flowline Division of Markovitz Enterprises, Inc. of New Castle, Pennsylvania. The petitioner alleged that certain stainless steel butt-weld pipe fittings from Korea and Taiwan were being, or were likely to be, sold in the United States for less than fair value. The ITC determined unanimously that there was a reasonable indication that an industry in the United States was materially injured by reason of imports from Korea. Preliminary determination. See Certain Stainless Steel Butt-Weld Pipe Fittings from Korea and Taiwan, USITC Pub. 2534, Inv. Nos. 731-TA-563 to 564 (July 1992). 57 Fed. Reg. 26645 (1992).

\textsuperscript{140} This investigation was instituted on September 24, 1991, by counsel for Allied Tube & Conduit Corp., Harvey, Illinois; American Tube Co., Phoenix, Arizona; Bull Moose Tube Co., Gerald, Missouri; Century Tube Corp., Pine Bluff, Arkansas; Sawhill Tubular Division of Cyclops Corp., Sharon, Pennsylvania; Laclede Steel Co., St. Louis, Missouri; Maruichi American Corp., Santa Fe Springs, California; Sharon Tube Co., Sharon, Pennsylvania; Western Tube & Conduit Corp., Long Beach, California; and Wheatland Tube Co., Collingswood, New Jersey. The petition alleged that circular welded non-alloy steel pipe from Korea and other countries was being, or was likely to be, sold in the United States for less than fair value. The petitioners estimated the United States price based on two methods: (1) export price quotes obtained from two Korean producers of standard pipe, and (2) the customs value of standard pipe imported into the United States from Korea during the second quarter of 1991. The petitioners estimated fair value based on actual transaction prices for welded standard pipe in Korea as reported in the Korean publication Comprehensive Commodity Price Information (June, 1991), which listed the average FOB (freight on board) transaction price for standard pipe during May, 1991. Based on these comparisons, they alleged antidumping margins ranging from 1.81\% to 25.04\%. The ITC found that there was a reasonable indication of material injury resulting from Korean imports that were sold at less than fair value, and assessed dumping margins ranging from 4.91\% to 11.63\%. In 25 of 55 possible quarterly price comparisons, the Korean companies sold pipe at prices that were between 0.3\% and 19.5\% less than those of domestic products. In the other 30 cases, the Korean companies
subassemblies, tubular goods, and welded stainless steel pipes. Even after enactment of the new U.S. antidumping act in 1994, Korean industries are still the major targets of U.S. antidumping measures.

sold their pipe at higher than domestic prices, at margins ranging from 0.6% to 15.3%.

It should be noted that this was not the first investigation involving circular, welded, non-alloy steel pipes and tubes. The ITC previously conducted ten antidumping investigations and six countervailing duty investigations involving these products. Many of these investigations were terminated before final antidumping and/or countervailing-duty orders were issued. Some orders were revoked after the subject country entered into a voluntary restraint arrangement with the United States. Preliminary determination. See Certain Circular, Welded, Non-Alloy Steel Pipes and Tubes from Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela, USITC Pub. 2454, Inv. Nos. 701-TA-311 and 731-TA-532 to 537 (Nov. 1991); Final determination. See also Certain Circular, Welded, Non-Alloy Steel Pipes and Tubes from Brazil, the Republic of Korea, Mexico, Romania, Taiwan, and Venezuela, USITC Pub. 2564, Inv. Nos. 731-TA-532 to 537 (Oct. 1992). 57 Fed. Reg. 42942, 42953 (1992).

This investigation was initiated by a petition filed on September 22, 1989, by counsel on behalf of the National Knitwear and Sportswear Association, New York, New York. The petitioner alleged that Korean sweaters made of manmade fiber were, or were likely to be, sold in the United States for less than fair value. The ITC determined the weighted average dumping margins to be between 0.73% and 3.17%. The ITC's holding that an industry in the United States was materially injured was appealed to the Court of International Trade, which remanded the matter for further determinations. Upon remand, the ITC determined that no industry in the United States was materially injured, or threatened with material injury, by reason of the imported Korean sweaters. Final determination. See Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan, USITC Pub. 2312, Inv. Nos. 731TA-448 to 450 (Sept. 1990); Final determination. See Sweaters Wholly or in Chief Weight of Manmade Fibers from Hong Kong, the Republic of Korea, and Taiwan: Views on Remand, USITC Pub. 2577, Inv. Nos. 731-TA-448 to 450 (Nov. 1992). 57 Fed. Reg. 47352 (1992).

This investigation responded to a petition filed on December 28, 1988, by American Telephone & Telegraph Co. of Parsippany, New Jersey and Comdial Corp. of Charlottesville, Virginia. It alleged that certain telephone systems and subassemblies were being sold in the United States for less than fair value. The ITC's preliminary determination found that there was a reasonable indication that an industry in the United States was materially injured by reason of imports. The ITC's final determination found dumping margins ranging from 13.4% to 14.75%. This investigation responded to a petition filed on December 28, 1988, by American Telephone & Telegraph Co. of Parsippany, New Jersey and Comdial Corp. of Charlottesville, Virginia. It alleged that certain telephone systems and subassemblies were being sold in the United States for less than fair value. The ITC's preliminary determination found that there was a reasonable indication that an industry in the United States was materially injured by reason of imports. The ITC's final determination found dumping margins ranging from 13.4% to 14.75%. Final determination. See Certain Telephone Systems and Subassemblies thereof from Korea, USITC Pub. 2254, Inv. No. 731-TA-427 (Jan. 1990). 54 Fed. Reg. 33783 (1989).

This investigation was instigated by Lone Star Steel Company of Dallas, Texas, CF&I Steel Corporation of Pueblo, Colorado; LTV Steel Company of Cleveland, Ohio; and the United States Steel Corporation of Pittsburgh, Pennsylvania, in June, 1984. The investigation was brought against five Korean producers of oil country tubular goods and five Korean trading companies that exported the goods to the United States as well as to companies located in Brazil and Spain. The petitioners alleged that these companies received export subsidies from the governments of Korea, Brazil and Spain. The investigation found the Brazilian and Spanish companies to be guilty, but did not find the Korean companies guilty of any violations. Final determination. See Oil Country Tubular Goods from Brazil, Korea, and Spain, USITC Pub. 1633, Inv. Nos. 701-TA-215 to 217 (Jan. 1985). 49 Fed. Reg. 46776 (1984).

This investigation was initiated by a petition filed November 18, 1991, by Avesta Sandvik Tube, Inc., Bristol
Metals, Damascus Tubular Products, Trent Tube Division of Crucible Materials Corp., and the United Steelworkers of America. The petition alleged that welded ASTM A-312 austenitic stainless steel pipe was being, or was likely to be, sold in the United States at less than fair value. The ITC found the Korean companies guilty of dumping at margins of up to 30% in its preliminary investigation. The final investigation also found the Korean companies guilty of dumping and assigned weighted-average dumping margins of between 2.55% and 7.75%. Preliminary determination. See Certain Welded Stainless Steel Pipes from the Republic of Korea and Taiwan, USITC Pub. 2474, Inv. Nos. 731-TA-540 to 541 (Jan. 1992); Final determination. See also Certain Welded Stainless Steel Pipes from the Republic of Korea and Taiwan, USITC Pub. 2585, Inv. Nos. 731-TA-540 to 541 (Dec. 1992). 57 Fed. Reg. 53693 (1992).

Summary of Major Cases Filed Since 1995:

(1) Expandable Polystyrene Resins, certain (DOC Case Number: A-580-843)
Filing Date: December 20, 1999
Final Result: DOC Final Negative Determination, Case terminated
In this case, dumping margin in the preliminary determination were over de minimis level, or, 5.14% for Shinho (1.80% for Cheil, which was below de minimis) but in the final determination, dumping margin was reduced to 0.83% for Shinho and 0.82% for Cheil, which resulted in negative determination of dumping and termination of investigation. 65 Fed. Reg. 69284 (November 16, 2000).

(2) Structural Steel Beams (DOC Case Number: A-580-841)
Filing Date: August 3 1999
Final Result: Duty Imposition
Based on a petition by the above companies, the DOC entered into investigation of steel beams from two Korean companies. In the preliminary determination, dumping margins were 14.95% for Inchon and 47.55% for Kangwon. But, in the final determination, the margins were increased to 25.51% for Inchon and 49.73% for Kangwon. After the amending process requested by participants of both sides, the final dumping margin were settled at 25.31% for Inchon and 49.01% for Kangwon. 64 Fed. Reg. 50502 (August 18, 2000).

(3) Polyester Staple Fiber, Certain (DOC Case Number: A-580-839)
Petitioner: E.I. Dupont de Nemours and Co., Arteva Specialities S.a.r.l, d/b/a KoSa, Wellman Inc. and Intercontinental Polymers, Inc. Respondent: Samyang Corporation (Samyang), Sam Young Synthetics Co. (Samyoung),and Geum Poong Corporation (Geumpoong)
Filing Date: April 2, 1999
Final Result: Duty imposition
In this case, among the three respondents, Samyang was exempted from the imposition of duty because of the no dumping margin determination at the final determination (0.14%). But in case of Samyang and Geumpoong, dumping margins were 6.33% and 26.39%, respectively at the preliminary determination, and 7.96% and 14.10%, at the final determination, which resulted in imposition of duty. 66 Fed. Reg. 30411 (June 6, 2001).

(4) Cut-To-Length Carbon-Quality Steel Plate (DOC Case Number: A-580-836)
Petitioner: Bethlehem Steel Corporation, Gulf States Steel, Inc., IPSCO Steel Inc., Tuscaloosa Steel Corporation, United Steelworkers of America, and the U.S. SteelGroup Respondent: Dongkuk Steel Mill Co. Ltd (Dongkuk), Pohang Iron & Steel Co., Ltd (POSCO)
Filing Date: February 16 1999
Final Result: Duty Imposition
In this case, Dongkuk could see the change of dumping margin between the preliminary and final determination with 6.15% and 2.98%. Another respondent, POSCO, with de minimis level of 0.05% at the both determinations,
The iron and steel industry is one of the most controversial fields between U.S and Korea in terms of antidumping disputes. In response to trade pressures from foreign steel was found innocent. 66 Fed. Reg. 10269 (February 14, 2001).

(5) Stainless Steel Sheet and Strip in Coils (DOC Case Number: A-580-834)
Filing Date: July 13 1998
Final Result: Duty Imposition
POSCO, apart from the other respondents, could see dramatic change of dumping margin because of the amendment at the preliminary investigation. At the preliminary determination, dumping margin of POSCO was calculated as 12.35%. But after POSCO alleged that the DOC erred by (1) failing to apply a weighted-average exchange rate in calculating normal value; (2) inadvertently excluding all of POSCO's sales to customers that had been affiliated only during a portion of the POI; and (3) failing to include deductions for inland freight transplant to warehouse and the warehousing expenses in calculating normal value, the dumping margin was changed to 3.92%. But, at the final determination, this figure greatly increased to 12.12% as a final dumping margin. Taihan was found guilty with a high dumping margin of 58.79% and Inchon, with 0%, was exempted from duty. 66 Fed. Reg. 59568 (November 29, 2001).

(6) Stainless Steel Plate in Coils (DOC Case Number: A-580-831)
Respondent: Pohang Iron and Steel Company (POSCO) and Sammi Steel Company, Ltd.(Sammi)
Filing Date: April 28 1998
Final Result: Duty Imposition
In this case, the dumping margin was 2.77% for each respondent respectively at the preliminary determination, but at the final determination, it increased to 16.26% with dumping affirmative determination. 66 Fed. Reg. 45279 (August 28, 2001).

(7) Stainless Steel Wire Rod (DOC Case Number: A-580-829)
Petitioner: AL Tech Specialty Steel Corp., Carpenter Technology Corp., Republic Engineered Steels, Talley Metals Technology, Inc., and United Steelworkers of America Respondent: Changwon Specialty Steel Co., Ltd. (Changwon), Dongbang Special Steel Co., Ltd. (Dongbang), Pohang Iron and Steel Co., Ltd. (POSCO), and Sammi Stree ICo., Ltd. (Sammi).
Filing Date: August 26 1997
Final Result: Duty Imposition
Among 4 respondents, Sammi’s dumping margin was prominently high with 28.44% at both determinations. Other respondents were also found guilty; Dongbang with 5.96% and 3.18%; Changwon with 6.09% and 3.18%; POSCO with 6.09% and 3.18% respectively at the two determinations. 63 Fed. Reg. 49331 (September 15, 1998).

(8) Collated Roofing Nails (DOC Case Number: A-580-827)
Filing Date: December 20 1996
Final Result: DOC Final Negative Determination, Case terminated
This case was terminated in the early stage because the DOC couldn’t find injurious dumping margin. Their result of calculation was like this: 0% of dumping margin. 63 Fed. Reg. 40391 (July 29, 1998).
companies, the U.S. steel industry has sought the protection of U.S. antidumping laws. Since 1980, the U.S. steel industry has consistently petitioned the Department of Commerce to initiate antidumping investigations, and a number of antidumping orders are currently in effect on steel products. In fact, the U.S. steel industry has done more than simply seek the legal protection; it has played an important role in shaping U.S. antidumping laws and policies. Since the 1974 Trade Reform Act, the influence of the U.S. steel interests has affected the antidumping provisions of the Trade Agreement Act of 1979, the Trade and Tariff Act of 1984, and the Omnibus Trade and Competitiveness Act of 1988, as well as in the Uruguay Round and the Uruguay Round Agreements Acts. The lobbying efforts of the U.S. steel interests have increased these trends. In conjunction with steel labor unions, it has actively campaigned for influence in Washington.

Fifty-eight antidumping cases related to Korean exports occurred from 1980 to 1999. After the introduction of WTO antidumping provision in 1994, the U.S. government entered into the antidumping investigations of fourteen cases against Korea. On the basis of filing date, the number of cases filed reached a high of ten cases in 1992 and hit a low of zero in 1987. Recent statistics show that Korea is one of the countries most frequently filed against by the U.S. The volume of cases is likely to be inversely related with the strength of the economy because it is


148 Id. at 221.

149 See Table 4 at 68.
easier for the domestic companies to prove material injury during the recession period.\textsuperscript{150} Of the fifty-eight cases considered, twenty-nine, or half of them, resulted in antidumping duties being imposed. In the remaining twenty-four cases, or 41.4\% of the total, the petition was either rejected or dismissed by the U.S. authorities or withdrawn by the petitioner and additional five cases are still pending in the resolution process.\textsuperscript{151} The rate of cases against Korean exports with antidumping duties imposed is higher than the overall rate of 44.3\%.\textsuperscript{152}

Specifically, besides the twenty-nine cases with imposed duties, the antidumping petitions that failed have occurred for several reasons. The most common reason for the failure is that the ITC or the DOC finds no evidence of injury or dumping. During the period, the ITC rejected a total of thirteen cases, eight at the preliminary injury determination and five at the final injury determination. The DOC rejected an additional five cases because of the absence of dumping above the \textit{de minimis} level. Six cases were categorized into withdrawn cases or dismissed cases by the U.S. authorities, which mainly resulted from the authorities’ determination that there was not much of a chance for success and not enough follow-up information from petitioners.\textsuperscript{153}

\textsuperscript{150} Samsung Economic Research Institute, \textit{Recent Changes in the International Trade Environment and Its Implications}, ISSUE PAPER 28 (July 2000).

\textsuperscript{151} See Table 3 at 68.

\textsuperscript{152} According to the Department of Commerce, the overall success rate of antidumping case filed against all countries from US petitioner during 1980-1999 is reported to reach to 44.3\% (349 out of 788). Samsung Economic Research Institute, \textit{supra} note 3, at 30.

B. WTO Dispute Settlement Cases

At the WTO Ministerial Meeting in Doha, Qatar, the Antidumping Agreement was opened up for new negotiations. Critics of these new negotiations charged that they would weaken the U.S. trade law because they were demanded by countries like Japan and Chile, both of which have been outspoken critics of U.S. antidumping laws and practices.\(^{154}\) Moreover, the U.S. antidumping and countervailing duty laws have already been subject of more than fifteen disputes in the WTO, some of which the United States has lost.\(^{155}\)

To address the inconsistencies of the U.S. antidumping law with WTO antidumping rules, out of the cases where the U.S. is a defendant in WTO Dispute Settlement process, two cases are related to Korea and are worth paying attention to this thesis: United States-Antidumping Duty on DRAMS from Korea and United States-Imposition of Antidumping Duties on Imports of Color Television Receivers from Korea.

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The DRAMS case is noteworthy and meaningful to Korea because this case represents Korea’s first use of the WTO’s new dispute settlement system to challenge the trade regulation.

1. DRAMS\textsuperscript{156}

\textsuperscript{156} United States – Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabyte or Above from Korea. WT/DS 99/R, Jan 29, 1999. The chronological summary of the case is as follows:

1. April 22, 1992 - Antidumping petition against imports of DRAMS from Korea filed by Micron Technologies, Inc.
3. October 21, 1992 - DOC’s Preliminary Determination on Dumping Margin (Samsung 37.40%, LG 32.41%, Hyundai 5.99%).
4. May 10, 1993 - DOC issued an final positive Antidumping Duty Order and Amended Final Determination for DRAMS from Korea. (Samsung 0.82%, LG 4.97%, Hyundai 11.16%). The Parties appealed the DOC’s Final Determination to the United States Court of International Trade, which remanded the case to the DOC to correct certain errors.
5. August 24, 1995 – DOC’s Redetermination on Remand of the USITC, the DOC found the corrected dumping margin (Samsung 0.22% \textit{de minimis}, LG 4.28%, Hyundai 5.15%).
6. May 6, 1996 – The DOC published a Notice of Opportunity to Request Administrative Review. LG and Hyundai filed a request for an administrative review, and asked to revoke the antidumping duty order.
7. June 25, 1996 – The DOC initiated the third annual review. The DOC initiated a revocation review pursuant to the above request made under 353.25(a)(2) of the DOC regulations.
8. July 24, 1997 – The DOC issued its Final Result and Determination Not To Revoke Order In part, while Hyundai and LG was found again not to have dumped during the period of review (i.e. “No dumping for three consecutive years”).
9. August 14, 1997 – Korea requested consultations with the United States regarding the latter’s antidumping duty on DRAMS from Korea, pursuant to art.4 of the Understanding on rules and Procedures Governing the Settlement of Dispute (DSU).
10. October 9, 1997 – First Consultation Held between Korea and U.S. at Geneva, but no satisfactory mutual solution was reached.
11. November 6, 1997 – Korea requested the establishment of a panel according to art. 6 of DSU, Article XXII:1 of the GATT 1994 and art 17.5 of the Antidumping Agreement.
12. March 19, 1998 – Composition of Panel, the panel meeting with the both parties were held on 18 June and 21 July 1998. The main argument with the United States obligation under article 11.2 of the Antidumping Agreement. The panel turned in its interim report on October 23, 1998, its final report on December 4, 1998. In its final report, the panel stated that; The United States submission did not develop any detailed argument for the justification of the “not likely” criterion prescribed in section 353.25(a)(2)(ii) of DOC Regulation, and the United States submission could be construed to argue that the necessity of the continued imposition of the duty may be somehow more directly warranted by a finding that it is not possible to determine that recurrence of dumping is “not likely.” WT/DS99/R, para. 6.49. As well the panel report concluded that ; (i) Section 353.25(a)(2)(ii) of DOC Regulation is not consistent with article 11.2 of the Antidumping Agreement, WT/DS99/R, para.6.54,para.7.1.(ii) Final Results of Third Review, based on and determined by section 353.25(a)(2)(ii) of DOC Regulation, is thereby also inconsistent with article 11.2 of the Antidumping Agreement. WT/DS99/R, para.7.2.
13. March 19, 1999 – Adoption of the panel report at the DSB.
14. September 2, 1999 – Amendment of the U.S. Regulation and Publication in the Federal Register, the United States amended new section 351.222(b) to delete “not likely” standard and replaced it with a requirement that the Secretary of Commerce consider “whether the continued application of the antidumping duty order is necessary to offset dumping.” 64 Fed. Reg. 51,523. However, the United States refused to revoke the antidumping duty order, stating that the Commerce concluded that “based on the facts before it, a resumption of dumping was likely” and “it was necessary to leave the anti-dumping duty order in place.” WT/DS99/6. Para. 5.9.
and practice of another WTO member. Before this case, Korea was not a frequent user of either the old GATT or new WTO dispute settlement procedure.

In November 1997, Korea, after an unsuccessful prior consultation with the U.S., requested the establishment of a panel. Korea’s main argument was that the DOC’s decision not to revoke the antidumping order was inconsistent with the provisions of the Agreement. Specifically, Korea asserted that the U.S., itself determined for over three consecutive years that the product was not being dumped.\textsuperscript{157} No dumping existed; no dumping means no injury due to dumping and obviously, no causal relationship between the two non-existent conditions. According to Korea’s assertion, the DOC followed its regulations in this case and maintained the antidumping duties after it found three consecutive reviews that no dumping was occurring. Therefore, as applied in this case, the DOC’s regulations\textsuperscript{158} and practices\textsuperscript{159} violated the obligations of the United States under Article VI of the GATT 1994 and Article 11.1 of the Agreement.\textsuperscript{160}


\textsuperscript{158} The DOC’s regulations are also regarded as departing from the requirements of Article 11. Under its regulations the DOC may revoke only if a Respondent meets three requirements, one of which is the “no likelihood/not likely” requirement. In the Third Annual Review, the DOC found that Respondents (Korean companies) had not met the “no likelihood/not likely” requirement, but this finding cannot serve as the basis for refusing to revoke under Article 11. The DOC failed to find that “the continued imposition of the duty is necessary to offset dumping,” as Article 11 requires. Thus, the DOC violated the second sentence of Article 11.

\textsuperscript{159} According to Paragraph 1 of Article 11 of the Agreement, an antidumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. In this case, under this provision, to maintain the anti-dumping duties in this case, the U.S. would have had to establish three elements: (1) that a product was still being dumped and (2) that the dumping was causing (3) injury to the domestic industry.

\textsuperscript{160} Besides, Korea contended that the \textit{de minimis} test should be also based upon new criterion 2% on the review cases including this case.
In addition, Korea claimed that in analyzing the "no likelihood/not likely" criterion for revocation, the U.S. violated its obligations under and the standards set forth in Articles. 2.2, 6.6, and 17.6 of the Agreement. Briefly speaking, U.S. (1) improperly established the facts; (2) evaluated the facts in a biased and non-objective manner; (3) failed to satisfy itself as to the accuracy of data supplied by petitioner by uncritically accepting and relying on petitioners’ data without taking any action to confirm that it was accurate; and (4) disregarded cost data prepared by respondents which were in accordance with generally accepted accounting principles of Korea and accurately reflected costs, thereby violating its obligations. Finally, Korea made a platform for solidarity with other respondent countries by asserting that the U.S. revoked the antidumping duties in similar cases.

According to the Panel report, some provisions and practices that did not conform to the WTO related provisions were pinpointed. First, according to the Panel's findings and rulings, the United States had the burden to establish that the continued imposition of the antidumping duty was necessary. While not using the words "burden of proof," the Panel report, in requiring a "demonstrable basis on which to reliably conclude that the continued imposition of the duty is necessary," clearly imposes the burden on the U.S. administering authority.

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161 The Antidumping Agreement Art. 2.2.1.1 stipulates in relevant part that costs shall normally be calculated on the basis of records kept by the exporter or producer … provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

162 The Antidumping Agreement Art. 6.6 stipulates in relevant part that the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

163 The Antidumping Agreement Art. 17.6 (i) stipulates in relevant part that the panel shall determine whether [i] the authorities’ establishment of the facts was proper and whether [ii] their evaluation of those facts was unbiased and objective.
However, rather than limiting the administering authority's discretion so as to conform to Article 11 of the Agreement, the amended regulation of the U.S. law increased its discretion in disregard of the Panel decision. In doing so, the United States perpetuated the WTO inconsistency of the original standard that the Panel had declared inconsistent with Article 11 of the Agreement. Also, the "standard" of the amended regulation that replaces the not likely criteria - "otherwise necessary to offset dumping"- effectively is not a standard at all. This is inconsistent with the Panel report, which requires the regulation to provide "a demonstrable basis for consistently and reliably determining" that maintaining the antidumping duty remains necessary to offset injurious dumping. Moreover, the amended regulation ignores the Panel's direction that the standard adopted shall ensure that the conclusions reached are based on "a foundation of positive evidence" and that circumstances demand in maintaining the duty.

Furthermore, in applying the altered, yet-still-flawed, standard for revocation, the United States continued to apply the antidumping order to Korean DRAMS without meeting the standard of Article 11 of the Agreement as interpreted by the Panel. The United States did not demonstrate by substantial, positive evidence that the antidumping duty order needs to be maintained in order to offset dumping. The U.S. DOC failed to conduct any new analysis in its re-determination. The unpublished Final Results simply restate the analysis in the DOC’s earlier determination not to revoke the antidumping duty order. Indeed, the Results repeat verbatim much of the text of the original determination. Moreover, the Results are not based on "substantial, positive evidence" that the order is necessary to offset dumping. Like the original results of the third administrative review, they are based merely on conjecture and supposition. Again, by failing to publish the Final Results of Re-determination in the Federal Register, the
United States has failed to fulfill its obligations under Article X:1 of the GATT 1994 and Article 12.3 of the Agreement.

As a result of the standard contained in the amended regulation section 351.222(b) and the actions taken by the United States in the "Final Results of Re-determination in the Third Administrative Review," there is a disagreement between the United States and Korea as to whether the United States has taken measures to comply with the March 19, 1999 recommendations and rulings of the Dispute Settlement Body and whether the measures taken are consistent with the Agreement.
2. Color Television Receivers\textsuperscript{164}

This case, which commenced in July 1997, is in regard to the United States’ imposition of anti-dumping duties on imports of color television receivers (CTVs) from Korea. Korea contended that for the past twelve years the U.S. had maintained an antidumping order for Samsung Electronics Co.’s color TVs despite the absence of dumping and the cessation of exports from Korea, without examining the necessity of continuing to impose such duties. Korea argued that the U.S. actions violated Articles VI.1 and VI.6 (a) of GATT 1994, and Articles 1, 2, 3.1, 3.2, 3.6, 4.1, 5.4, 5.8, 5.10, 11.1 and 11.2 of the Agreement. In November 1997, Korea

\textsuperscript{164} United States – Imposition of Antidumping Duties on Imports of Color Television Receivers from Korea, WT/DS89/7. The chronological summary of the case is as follows:

(1) April 30, 1984 – The United States imposed antidumping duties on Color TVs exported from Korea to the U.S. Since the determination of the order, Samsung Electronics Co., Ltd (Korean TV producer) asked for administrative reviews, and the DOC has determined that Samsung did not sell color TVs in the United States at dumped price from April 1, 1985 to March 31, 1991. Since April 1991, Samsung has stopped exporting color TVs to the U.S. and has made four separate requests for administrative review and revocation based on its history of no dumping and no export. However, the U.S. rejected the review on the ground of lack of current data as a result of “no shipment” from Samsung. WT/DS89/7, page 2.

(2) August 10, 1995 – U.S industries file circumvention dumping via Mexico against Samsung.

(3) June 24, 1996 – The DOC decided to initiate the administrative review Samsung has requested 11 months ago.

(4) July 10, 1997 – Korea requested consultations with the U.S. according to Article 4 of the Understanding on Rules and Procedures and Governing the Settlement of Disputes (DSU), Article XXII:1 of the GATT 1994, and Article 17 of the 1994 Antidumping Agreement with respect to the continuing imposition of antidumping measures on Korean Color Television Receivers. WTDS89/1.

(5) November 7, 1997 – Korea requests the establishment of a Panel in accordance with Article 6 of the DSU, Article XXIII: 2 of GATT 1994 and Articles 17.4 and 17.5 of the Antidumping Agreement, claiming that the U.S. has improperly relied on the initiation and pendency of the anti-circumvention investigation as a basis for refusing to revoke the antidumping duty order on Color TVs with respect to Samsung. WT/DS89/7, p.1,2.

(6) December 19, 1997 – The United States withdrew petition of circumvention dumping, and made a preliminary determination to revoke the antidumping duty order regarding Samsung.

(7) January 15, 1998 – Korea withdrew its request for the establishment of panel with the reservation that it would reintroduce the request if the U.S. final determination differ from the preliminary determination WT/D89/8.

(8) August 27, 1998 – The United States made a final determination to revoke the antidumping duty.

(9) September 15, 1998 – Korea notified the WTO/DSB that it would not seek further consideration on this case. WT/DS89/9.
requested the establishment of a panel. In January 1998, Korea informed the WTO Dispute Settlement Body (hereinafter DSB) that it was withdrawing its request for a panel but reserving its right to reintroduce the request. At the DSB meeting in September 1998, Korea announced that it was definitively withdrawing the request for a panel because the imposition of antidumping duties had now been revoked. This case illustrates that U.S. authorities do not pay much attention to the follow-up measures on settled cases such as reviews, which often results in an extra and unfair burden to the defendant countries. In this case, the appeal to the DSB seemed to help Korea in settling the matter.

Moreover, this case is related to anti-circumvention issues, which arise when an exporter subject to an antidumping duty (1) sends components of the subject product to the importing country for assembly into a finished product that otherwise would be subject to the dumping duty; or (2) sends the component to a non-subject third country for assembly and then re-exportation to the importing country as a product of the third country.\textsuperscript{165} Despite the absence of any allowance for anti-circumvention measures in the Agreement, the United States continued to implement its anti-circumvention provisions.\textsuperscript{166} Continued application of these anti-circumvention provisions almost certainly will result in a WTO challenge on the ground that the intentional silence of the Agreement should be interpreted as a decision not to authorize such actions. Application of antidumping orders to third country products assembled from subject parts could be contested as a violation of the WTO Agreement on Rules of Origin. Korea filed a

\textsuperscript{165} Corr, \textit{supra} note 1, at 245.

\textsuperscript{166} See Japan Protests To WTO Dumping Committee About U.S. Action on NEC Supercomputers, Daily Executive (BNA), at A-4 (Apr. 30, 1997).
WTO petition challenging a U.S. anti-circumvention action concerning televisions assembled in Mexico and Thailand from Korean components, which the United States later revoked.\footnote{The United States initiated several high profile anti-circumvention inquires including one concerning Korean televisions assembled in Thailand and Mexico. The Mexican government complaint that if the United States were to treat televisions assembled in Mexico from Korean parts as Korean televisions subject to an antidumping order, despite the fact that under NAFTA origin rules the televisions are of Mexican origin, the United States would be violating the NAFTA. Color Television Receivers form Korea, 61 Fed. Reg. 1339, 1349 (1996). The Korean government requested WTO dispute resolution. 62 Fed. Reg. 65843 (Dec 16, 1997). The United States rescinded that case shortly after thereafter, 62 Fed. Reg. 68255 (Dec. 31, 1997). It did not indicate whether the Mexican and Korean protests, or the questions regarding WTO consistency, influence the U.S. decision.}

C. Evaluation of the Cases

Through the review of the cases, several apparent and dormant flaws in U.S. antidumping law are found on a practical level. A number of legal issues are particularly complex and remain the object of considerable debates. Without a doubt, the most conceptually and legally difficult issue among these is the determination of the precise meaning of “less than fair value” and “dumping margin.” Such problems are categorized into several items and explained in the following subchapter.

1. Deduction of Profit from Constructed Export Price

In calculating the constructed export price, deduction of the U.S. profit\footnote{The law actually provides a special rule for calculating a deduction for the U.S. profit and regards this change harmonious with the spirit of the Agreement. \textit{See} Tariff Act § 772(f), 19 U.S.C. 1677 (f) (1995).} only from the constructed export price and not from the normal value is problematic and cannot be harmonious with the fair comparison provision of the Agreement because this method could
result in the decrease of the constructed export price and the increase of the dumping margin.\(^{169}\)

This practice of calculation was found in the case of stainless steel sheet and strip in coils\(^{170}\) and structural steel beams.\(^{171}\) In both cases, the DOC, in calculating constructed export price based on packed prices to unaffiliated customers in the United States, made deductions of selling expenses associated with economic activity occurring in the United States, including direct selling expenses such as credit costs, bank charges, and U.S. commissions and indirect selling expenses.

When calculating the constructed export price, all expenses including indirect selling expenses that are incurred in the U.S. are deducted from the constructed export price. The DOC also deducts the indirect selling expenses in the home market for the fair comparison that is prescribed in the Agreement. However, this amount of deduction is capped at the same amount of the U.S. deduction. Accordingly, there is a high possibility of unfair price comparison when indirect selling expenses in the home market are greater than those in the U.S. market.

In the case of stainless steel sheet and strip in coils,\(^{172}\) the DOC committed this unfair practice at the preliminary determination.\(^{173}\) Since the DOC committed the deduction of inland freight expense in the normal value calculation, regardless of whether it was inadvertent, the dumping margin at the preliminary determination for the respondent was calculated higher than

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170 DOC case number: A-580-834; see supra note 143.

171 DOC case number: A-580-841, *Id*.

172 DOC case number: A-580-834, *Id*.

173 *See id.* and 64 Fed. Reg. 30664 (June 8, 1999).
it was. This was corrected at the final determination by a strong allegation from the respondent. In addition, in the case of expandable polystyrene resins,\textsuperscript{174} according to the DOC, since no documentation could be found from the respondent that indicated the level of short-term borrowing rate occurring during the period of investigation, which was in 1998, it recalculated the respondent's imputed home market credit using a published rate from the June 2000 issue of International Financial Statistics, published by the International Monetary Fund.\textsuperscript{175} Because of the gap between two borrowing rates at different points of time, the calculation could be distorted.\textsuperscript{176}

2. Selection of Major Exporters

As illustrated in the Expandable Polystyrene Resins case,\textsuperscript{177} the U.S. antidumping law describes that where it is not practicable to examine all known producers or exporters of subject merchandise, the DOC is permitted to investigate either (1) a sample of exporters, producers, or types of products that is statistically valid based on the information available at the time of selection, or (2) exporters and producers accounting for the largest volume of the subject merchandise that can be reasonably examined.\textsuperscript{178} Consequently, the DOC examined producer-

\textsuperscript{174} DOC case number A-580-843, \textit{Id.}

\textsuperscript{175} \textit{See id} and 65 Fed. Reg. 69284 (November 16, 2000).

\textsuperscript{176} Specifically, the borrowing interest rate in 1998 was regarded much higher than that in the next several years because of the economic crises of Korea in 1997.

\textsuperscript{177} \textit{See id.}

specific data accounting for the total Period of Investigation from Korea and identified five companies who exported Expandable Polystyrene Resins to the U.S. during the period of investigation. The DOC also added, “Due to constraints on our time and resources, we found it impracticable to examine all five of them. Therefore, because their combined export volume accounted for the vast majority of all exports from Korea, selected Cheil and Shinho as the mandatory respondents.”179

In this case, one dormant problem that should be pointed out is that biased selection of major exporters could occur especially in situations where there are constraints on time and resources, which affects the results in dumping determination. This practice is problematic considering the impact of affirmative determination of dumping margin on the exporting companies, and it also conflicts with the principal objective of ensuring transparency of the proceedings of the Agreement.

3. Determination of the U.S. Price and Normal Value

Dumping is determined when sales of the foreign goods are made at less than fair value (LTFV), which occurs when the goods’ U.S. price is lower than the foreign market price.180 In the Korean DRAMS Case, Micron calculated the U.S. price based on observed price quotes of DRAMS by the U.S. distributors, making deductions for the distributors’ markups and movement

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180 ICC Indus., Inc. v. United States, 812 F.2d 694, 697 (Fed. Cir. 1987).
expenses.  

Normal value can be determined based upon the exporter’s domestic market price, constructed value, or third country prices. Micron demonstrated the domestic market price by using (1) the average exporter’s domestic market prices it obtained from Dataquest and (2) the company-specific exporter’s domestic market price quotes it received from an unidentified company. Micron also calculated the cost of production, i.e., constructed value, of one and four megabit DRAMS for each Korean manufacturer. Micron's calculations included an assumed eight percent profit. Micron argued that because the chips were being sold for less than the calculated cost of production, the exporter’s domestic market sales and third country sales were an inadequate basis for computing the normal value. Micron thus argued that the normal value should be set at cost of production.

There are inherent problems in calculating cost of production; hence, it is not a reliable basis on which the normal value should be set. First, differences in the U.S. and Korean accounting methods cause problems. The Korean accounting system has a great deal of flexibility that companies are allowed to spread costs such as depreciation, research, and development over several years. In comparison, companies must observe strict regulations on the

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182 Sweater Wholly or in Chief Weight of Manmade Fibers From Hong Kong, The Republic of Korea, and Taiwan, USITC pub. 2312, Inv. Nos. 731-TA-556 (June 1992) (Preliminary Review). See supra note 141.

183 Dataquest is a California-based company that provides information services for the computer industry.

184 See supra note 128.

185 Id.


187 Id.
depreciation schedules and other costs claimed in the fiscal year during which the money is actually spent. Consequently, the U.S. accounting rules cannot be applied to calculating Korean costs of production as defined by the DOC because it is likely to raise the costs of production. It is even more dangerous simply to determine which costs apply to which products. Korean manufacturers invested $1.7 billion in new production equipment over the last three years, but some of the equipment is used for research and development and other semiconductor devices as well as for DRAMS. Consequently, the technical rules for calculating costs result in many arbitrary allocations.

4. The Use of Average Foreign Market Value

The use of an average foreign market value to determine whether dumping has occurred is analytically improper because it compares the foreign market value, usually the average foreign price, to an individual U.S. sale price, rather than comparing the average foreign price to the average U.S. price. The DOC can compute a dumping margin if the foreign company sells any units in the U.S. market for less than the average foreign price for the period being investigated. Thus, if the foreign company charges a reasonable range of prices that includes the U.S. price over some relevant period of time, which is usually the case, it is possible that

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189 Id.
about half of the prices will be below the U.S. price and half will be above the U.S. price, resulting in fifty percent of the U.S. sales fitting into dumping.

The Korean DRAMS case is an example of this irrational comparison. One hundred comparisons were made between the prices Korean companies charged and the prices U.S. companies charged. In forty-seven cases, the Korean companies undersold the U.S. companies by between 0.1% and 28.0%. In forty-eight cases, the Korean product had a higher price than the U.S. product by 0.3% to 69.2%. In the other five cases, the prices of the Korean and U.S. chips were same.\textsuperscript{191} Overall, it would appear that the Koreans are not dumping at all but are merely being competitive. In nearly one-half of the cases, the price charged by the Korean firm was actually more than that charged by the U.S. firm.\textsuperscript{192}

The General Accounting Office has criticized the practice of using average prices because of the tendency to increase existing dumping margins or create dumping margins where none previously existed.\textsuperscript{193} The Court of International Trade has stated that this method of price comparison is not reasonably fair.\textsuperscript{194}

\textsuperscript{191} Korean DRAM case, \textit{supra} note 128.

\textsuperscript{192} \textit{Id}.

\textsuperscript{193} \textit{See} Bovard, \textit{supra} note 190.

5. Comparing Prices In Different Markets

If the allegedly dumped product is not sold in the exporter's domestic market, it can be difficult to decide the foreign market price. In such cases, the DOC compares the prices the foreign exporter charges in the United States to those it charges in a third country.¹⁹⁵ For example, several Korean sweater companies were penalized because they sold their sweaters in the U.S. market for slightly less than the price charged in other foreign markets.¹⁹⁶ The DOC determined that the price of the sweaters one Korean company sold in the United States was 1.20% lower than the price of the sweaters sold in Mexico.¹⁹⁷ The price that another company charged in the United States was 1.11% lower than the price charged in Canada. ¹⁹⁸ A third company sold its sweaters for 0.73% less in the United States than in the United Kingdom.¹⁹⁹ The DOC found that all of these companies had violated U.S. antidumping law.²⁰⁰

The DOC ignored several factors in its analysis, however. For example, each shipment of sweaters was a custom order, and there were significant differences in the actual quality of sweaters the Korean companies exported to the three different countries. The DOC, in contrast,

¹⁹⁵ Jackson & Davey, supra note 12, at 654.

¹⁹⁶ USITC Pub. 2312, supra note 141, at B-33.

¹⁹⁷ See id.

¹⁹⁸ See id.

¹⁹⁹ See id.

treated the sweaters as identical. On the basis of this criticism, it is appropriate to consider what standard the DOC should have used in approaching to the different prices of Korean sweaters. Certainly it should have allowed for differences in quality and type, and in addition, it should have considered each shipment as a custom order.
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Table 2. Antidumping Initiations: By Reporting Member  (01/01/95 - 12/31/02)

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<td>16</td>
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<td>8</td>
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<td>243</td>
<td>256</td>
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<td>294</td>
<td>366</td>
<td>309</td>
<td>2284</td>
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Source: WTO Annual Report for 2002-2003
Table 3. U.S antidumping cases against Korean exports

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<td>ITC Preliminary Negative</td>
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<td>8.6</td>
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<td>DOC Final Negative</td>
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<td>Petition Withdrawn</td>
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<tr>
<td>Total</td>
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Table 4. U.S Antidumping Measures Against Exporting Countries (01/01/95 - 06/30/03)

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<th>No</th>
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<th>Cases</th>
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<td>Japan</td>
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<td>Spain</td>
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</tr>
<tr>
<td>3</td>
<td>Chinese Taipei</td>
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</tr>
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<td>19</td>
<td>Canada</td>
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</tr>
<tr>
<td>5</td>
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<td>20</td>
<td>Romania</td>
<td>3</td>
</tr>
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<td>7</td>
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<td>Kazakhstan</td>
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<td>8</td>
<td>Russia</td>
<td>7</td>
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<td>Venezuela</td>
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<td>Belgium</td>
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<td>Israel</td>
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<td>29</td>
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</tr>
<tr>
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<td>Total</td>
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Source: WTO annual report 2003
V. Conclusion

The 1994 Antidumping Agreement has significantly improved the previous antidumping mechanism, providing more detailed and transparent rules, although it has left some issues unsolved. Whether it is successful depends eventually upon how faithfully WTO members apply the Agreement to their national laws and administrative practices. In other words, the future of the Uruguay Round Agreements, including the 1994 Antidumping Agreement, depends largely on the willingness of WTO members to observe the Agreement and how well they cooperate within the framework of the new dispute settlement mechanism, without recourse to any measures other than those authorized by the WTO.

The revised U.S. antidumping law has, by and large, reflected the requirements of the 1994 Antidumping Agreement. However, as discussed in Chapter III, there are a number of potential problems, particularly in the areas that the Agreement does not explicitly deal with or does not provide detailed guidelines. It remains to be seen how the new antidumping law regarding those areas will be applied in actual practice. It seems that the DOC and the ITC will basically follow, as they have in the past, the U.S. foreign trade policy and the intent of Congress expressed in the legislative process of implementing the Uruguay Round Agreements. It must fully adhere to the letter and spirit of the Uruguay Round Agreements in administering trade laws,

201 Professor Jackson and Davey in their 1991 report to the Administrative Conference: Since the Assistant Secretary at the ITA and the Commissioners at the ITC are presidential appointees, confirmed by the Senate,… the concern is that these individuals might tilt their antidumping decisions in favor of domestic industry because of their connection with the political process. See John H. Jackson & William J. Davey, The Administrative Conference of the United States, Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases 30-31 (1991).
including antidumping laws to ultimately best serve U.S. interests as well as those of the rest of WTO members. If the U.S. continues to interpret and apply both the Agreement and the new antidumping law in a protectionist manner, many countries that have suffered from antidumping measures imposed by the U.S. will practice the same protectionist antidumping measures to the U.S. exporters. The U.S., as one of the leading exporting countries, needs to consider itself as a potential victim of the arbitrary exercise of antidumping laws by other countries.202

By reviewing and analyzing some cases involving Korean exports, it is true that the U.S. often constantly uses some trade restrictions and disputable practices, which do not comply with the spirit of WTO provision and ultimately harm to its own welfare. Also, the ambiguity of the provisions regarding its antidumping laws is partly responsible for the unfair practices.

For Korean companies, there is a strong need to be informed of the practices of U.S. investigations described in the past chapters and to appropriately cope with them. First, in the government context, the Korean government should make a collaborative endeavor to point out the flaws of U.S. antidumping law and practice and request to correct them with countries that have the same perspective. To do so, it is necessary to join in the WTO activities. Second, in the company context, a strong supporting institution is necessary because in many cases, many companies, as respondents to antidumping petitions, except several big companies have difficulties participating in the investigation processes that are strictly scheduled by U.S. authorities. Such an institution, whether it is governmentally or privately financed, would likely

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202 A 1987 U.S. Trade Representative study indicates that at least 457 U.S. companies, many of them are by and large, had been subject to foreign antidumping cases. Office of the U.S. Trade Representative, Antidumping Duty Cases Against U.S. Companies, August 7, 1987.
provide constant support to companies regarding trade conflict against other countries before formally responding to the investigations.
BIBLIOGRAPHY


