

Selling goods in a foreign market law international essay

Law



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CHAPTER 1 The difference between home-market price and the export-market price is called the " dumping margin" (Michael Leidy, Antidumping: Solution Or Problem in the 1990s, International Monetary Fund World Economic and Financial surveys 54, 1994). In an attempt to align a product's price in the export market with its price in the exporter's home market, importing nations impose antidumping duties. In the case actual sales have been made less than fair value and the dumping has caused or threatened material injury to domestic industry, the importing country can apply antidumping duties which have to be consistent with international trade rules set by the WTO. WTO's regulation on antidumping Antidumping Regime before the Uruguay Round Article VI of the GATT provides for the right of contracting parties to apply antidumping measures if such dumped imports cause injury to a domestic industry in the territory of the importing party (Introduction to Antidumping in the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm). 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 (Michael J. Finger, Antidumping: How it works and who gets hurt, pg. 25-26, 1993). 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 to raise trade barriers which may cause a threat to free trade. After the World War II, European countries argued that the antidumping measures of Canada and the US were not operated fairly and the Article VI of the GATT 1948 was not sufficient to cope with the circumstances regarding the issue of antidumping. That Article

did not fulfill the requirements of not only developed countries but also the developing ones, including the Newly Industrialized Economies (NIEs). That problem led to a starting point for the new negotiations in the Uruguay Round. 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 (WTO, Guide to the Uruguay Round Agreement 81, 1991). This was mainly because the increasing criticism about antidumping provisions of the GATT 1948 was concentrated not on the core concepts of the Article itself, but on the practical flaws left in the gray area, which help some countries utilize the provisions in a protective and unfair manner (John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 1999). In particular, the revised Agreement provides for: greater clarity and more detailed rules in relation to the method of determining that a product is dumped; the criteria to be taken into account in determining that dumped imports cause injury to domestic industry; the procedures to be followed in initiating and conducting antidumping investigations; and the implementation and duration of antidumping measures (http://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm Explanation of the Antidumping Agreement). The international commitments concerning dumping are stated in the GATT 1994, Article VI and in the WTO Antidumping Agreement. Fair comparison 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 "constructed export price", and the elements of fair comparison that must be made. For instance, The Uruguay Round noted that the conversion and exchange rate problems were considered as one of the most significant problems in calculating normal value and export price. To overcome that difficulty, the 1994 Agreement requires setting a specific exchange rate, clarifying the point of time accepted to reduce the possibility of autonomous practices. Moreover, a problem of determining the home market price may arise when the exporter is from a non-market economy. 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.

Objective examination basis In performing the price comparison and dumping determination, a clear and objective criterion was introduced in the 1994 Agreement. Under the strong requests by exporting countries and expectation to reduce the gray areas where importing countries can determine calculating method, the method to calculate normal value of the like product in the exporting country is clearly stated in the Agreement (Article 2. 2). 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. To determine injury, an objective examination based on positive evidence of the volume and price effects of dumped imports and consequent impact of dumped imports on the

domestic industry have to be shown. Besides, Article 3 also states specific rules regarding factors which are considered in making determinations of material injury (Article 3. 5). Transparency in proceedings and full opportunity to defend

A principal objective of the procedural requirement 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, the 1994 Agreement stated a strict condition for filing. The Agreement requires that no investigation may start until the authorities approve that the industry at a discrete level supports the application (Article 5. 4). This amendment 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. Public notice to respondent is required, so the respondent will have proper preparation for the investigating process (Article 5. 5). US regulation on Antidumping

For over a long time, a lot of US industries have applied the US Antidumping Act 1921 so as to restrict the development of low priced imported products in US market. As a member of the WTO, the US Antidumping Law has to abide by the requirements of WTO's Agreement on antidumping. As a result of the recent Uruguay Round, the US Anti-dumping Law has to make some significant changes to adapt it to be suitable for the WTO's Agreement. As following, an overview of US Anti-dumping procedure and its amendments would be stated out clearly. Overview of Antidumping proceedings

Dumping is usually described as international price discrimination. The US Anti-dumping Law is aimed at preventing price discrimination and below-cost pricing in US market. The Department of

Commerce (also known as the DOC) and the US International Trade Commission (ITC) are responsible for carrying out investigation in Anti-dumping proceedings. An antidumping duty is imposed if the Department of Commerce (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 (ITC) " determines that an industry in the United States is materially injured, or is threatened with 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" (Title 19 US Code, article 731, 1997). The first requirement of imposing antidumping duty in the US is that the International Trade Administration (ITA) under the DOC determines that the subject merchandise is being, or is likely to be, sold in the US at less than fair value (1994 Antidumping Agreement article 2. 1). The basis of calculating " less than fair value" is the comparison between two prices, which are " normal value" and " export price or constructed export price" (Uruguay Round Agreement on Antidumping, 1994). 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 leads to a high normal value. The constructed value is the sum of the costs of materials; fabrication costs; the " actual amounts" for selling and administrative expenses; profits; and the

cost of containers, coverings, and packing (Tariff Act – article 773, Title 19 US Code, 1995). 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 US domestic producers. To conduct an investigation, at first, an US industry, which produces goods similar with the dumped product, has to fill out a petition with the DOC and ITC simultaneously. Based on collected information from the US industry, the ITC has to determine whether the US industry has been materially injured or threaten with material injury by dumped goods or not. If no reasonable indication exists, the case will be terminated entirely. If the ITC's injury determination is affirmative, the DOC starts to carry out its investigation. In this investigation, foreign producers are required to fill out questionnaires, giving detailed information on selling and pricing goods practices in US and foreign markets. If the DOC thinks that sales are less than cost of production, foreign producers may also give information in the cost of production questionnaires. Then, the DOC will determine dumping margin based on sales of comparable products in relevant markets during a specific period, calculate a preliminary weighted-dumping margin for each respondent and publishes these in a preliminary determination. If respondent refuses to cooperate or responds inadequately, the DOC will use the " best information available" (BIA) to determine the dumping margin for that specific exporter. After that, if the DOC issues an affirmative preliminary determination of dumping, the investigation is carried on. Besides, the US Customs Service is

directed to "suspend liquidation" of all subsequent imports of the product in question, collect a cash deposit or bond equal to the preliminary margin. If the DOC issues a negative preliminary determination, the investigation still continues but the Customs will not suspend liquidation of subsequent shipments. Before making a final determination, the DOC will conduct verifications at the foreign producers' facilities to examine company records, making sure that information provided by these companies to the DOC is accurate and transparent. If the DOC's final determination is negative, the Anti-dumping proceedings are terminated. Otherwise, if there is an affirmative final determination, within a prescribed statutory time, the ITC will make a final determination of whether the domestic market is materially injured or threatened with material injury by the dumped imports. In the event that the ITC's final determination is negative, the investigation is also terminated. However, if the ITC's final determination is affirmative, an Anti-dumping order will be issued imposing Anti-dumping duties equal to the amount of the dumping margin. At this point, the US Customs Service will collect cash deposits only in the amount of the anti-dumping margin. Figure 1: Sequence of events in Anti-dumping investigations

About administrative reviews, 1 year after publishing the anti-dumping order or during each subsequent year, any exporter of the goods which is subject to that order can request the DOC to conduct a review of the previous year's imports. The administrative annual review is aimed at calculating, assessing the exact amount by which the foreign market value exceeded the U. S. price of each importation during that year and recalculating the estimated duty rate for deposits on future entries of the goods. An administrative review generally

must be completed within 1 year with the same manner as the DOC's anti-dumping investigation. DOC issues a questionnaire which is similar to that used in the original investigation and will determine preliminary and final antidumping margins. Besides, an importer can receive a refund plus interest if the estimated duty deposit was too high or pay additional sum plus interest if the estimated duty previously paid was too low. The amendments to the US Anti-dumping Law

After the 1994 Antidumping Agreement, the United States did make some changes to adapt and fulfill requirements of being a member of the WTO. These changes have affected many sub-parts relating to Anti-dumping proceedings. Amendments affecting Anti-dumping investigations

a, Adequacy of the petition In conformity with the Agreement, the new US 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" (Tariff Act, article 702-703, 1995)

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 survey or rely on other source of information (Tariff Act, article 702, 1995).

b, De Minimis Dumping Margins 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" (1994 Antidumping Agreement, article 5. 8). Under the new provisions, where the margin of dumping is determined to be " minimis", that is, less than 2 percent " ad valorem", the DOC should terminate any further investigation. Since the previous " de minimis" level was 0. 5 percent, more cases with relatively low dumping margins probably will be terminated before further investigation proceed. However, this higher " de minimis" standard applies only to investigations and not to reviews of orders or agreements (Statement of Administrative Action, Agreement on Implementation of Article VI). c, Critical circumstances According to the US Anti-dumping Law, critical circumstances exist if the DOC identifies that before the suspension of liquidation, a massive amount of goods has been imported within a relatively short period. Furthermore, in the case that a history of dumping exists or the importer knew or should have known that the exporter was selling goods at dumped prices, it is also considered that critical circumstance exists. If the DOC determines that critical circumstance exists, the ITC is required to determine whether the surge of imports prior to the suspension of liquidation is likely to seriously undermine the remedial effect of the order. The amendments in duties of the ITC also direct them to evaluate some factors including the timing and the volume of the imports; a rapid increase in inventories of the imports; and any other circumstances indicating that the remedial effect of the antidumping order will be seriously undermined before the ITC makes its final critical circumstances determination. d, Determination of all others rate According to the prior US Anti-dumping Law, the DOC would assign and

set an "all others" rate for duty deposit purposes on companies which were not individually investigated and did not receive a company specific rate. To specify, the DOC determined an all others rate by including margins determined on the basis of best information available (BIA) and excluding margins that were de minimis, or zero. With amendments, the DOC would exclude from the calculation of the all others rate all BIA margins, as well as the de minimis or zero margins. Amendments affecting Administrative Reviewsa, Time limits for completing Administrative ReviewsThere was no time limit for the completion of administrative reviews in the prior US Anti-dumping Law. In the new statute, the DOC is required to complete an administrative review within one year after its initiation and can extend this period up to 545 days. b, New shipper Administrative reviewsUnder the US Anti-dumping Law, anti-dumping duty orders apply on a country-wide basis and include goods from new shippers that were not involved in the original investigation and prior administrative reviews. With amendments, the DOC is directed to initiate and conduct accelerated administrative reviews of new shippers if it is requested. These reviews must be completed within 270 days unless the case is extraordinarily complicated. c, 5 year "Sunset" reviewsThe Agreement establishes a sunset period of five years, maintaining that "antidumping orders must be terminated on a date not later than 5 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 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" (1994

Antidumping Agreement, article 11. 4). Under the law, the DOC and the ITC must conduct a review 5 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" (Tariff Act, article 751). d, Consideration of Duty absorptionDuty absorption typically occurs where the U. S. subsidiary of a foreign producer subject to an antidumping order is the importer of record and deposits and pays the antidumping duties. Under these circumstances, the U. S. subsidiary pays the antidumping duties and absorbs them as a cost of doing business in order to maintain market share, as opposed to passing the duties along to the customer through price increases. If the DOC makes an affirmative finding of duty absorption, it will be more difficult for an importer to revoke or terminate the antidumping order. Then, the ITC will be informed about the DOC's findings of duty absorption and it will affect the ITC's determination in deciding that if an order were revoked, whether injury may continue or reoccur or not. Amendments affecting ITC injury determinationsa, Consideration of the Dumping marginTo determine the impact of the dumped imports on the domestic like products, the ITC is requested to consider the importance of final dumping margin. b, Captive productionCaptive production refers to production of the domestic like product that is not sold in the merchant market, but is processed into a higher valued downstream product by the same producer. Once the captive production provision is applied, the ITC will focus on the merchant market to identify the market share and financial performance of the domestic industry. Moreover, the ITC also determines if the imported goods which are

accused of being dumped are captively consumed by the related party importer in the production of downstream article. If these imported goods do not compete with the domestic like products in the merchant market, the ITC will include these imports in the total import share of the industry's total production, and not in the import penetration ratio. c, Negligible importsIn the case that the volume of dumped imports is negligible, investigations shall be terminated. Imports are considered to be negligible if they occupy less than 3% of total volume of all such products imported into the U. S. in the most recent twelve-month period prior to the filing of the petition. Amendments affecting the Department of Commerce's Anti-dumping determinationsa, Market viability testsThe DOC uses the viability tests to determine whether home market sales are viable for calculating normal value. It is stated that the home market will not be viable for calculating normal value if the exporter's home market sales constitute less than 5% of the volume of the exporter sales of the subject goods in the US. b, Calculating Dumping marginThe DOC is requested to determine dumping margin in an investigation that bases on a comparison between a weighted average of normal values and a weighted average of export prices of comparable product. Calculation of dumping margins based on a US transaction specific basis is also allowed if targeted dumping may be occurring, or where there are very few sales and the goods are identical or very similar or are custom made. c, Definition of Sales made at below Cost of productionIn the previous Anti-dumping law, there was no definition of when DOC should determine that sales below cost of production have occurred in substantial quantities over an extended period of time. However, with

amendments, the term "extended period of time" is defined as being normally 1 year, but not less than 6 months. On one hand, below cost sales will be considered to be in substantial quantities when below cost sales constitute at least 20% of the volume sold in the home or third country market. On the other hand, below cost sales are also considered to be in substantial quantities if the weighted average per unit price of the sales under consideration is less than the weighted average per unit cost of production for such sales. More importantly, only in the case there are no above cost sales in the ordinary course of trade in the foreign market under consideration, the DOC will be permitted to resort to constructed value as a substitute for the falling market value.

d, Start-up costs It is claimed that the DOC may make an adjustment for start-up costs by the foreign producer only where following two conditions are met. The first one is that a company is using new production facilities or producing a new product that requires substantial additional investment. And the second one is that production levels are limited by technical factors associated with the additional phase of commercial production (Tariff Act, article 773, Title 19 US Code, 1995). Significantly, improvements in existing products or facilities will not qualify for a startup adjustment.

e, Anti-circumvention Under the law and the US Department of Commerce's regulations, the DOC has to identify certain factors in anti-circumvention proceedings to determine if the process of assembly or completion in the US or a third country is minor or insignificant. Two factors that the DOC has to identify and consider are listed as following: Minor or insignificant assembly or completion is occurring in the US or a third country The value of the parts imported into the US or a third country from

the country subject to the antidumping order is a significant proportion of the total value of the finished product. The DOC also has to consider these following factors to determine whether the assembly activities are minor or insignificant: The level of investment in the US The level of research and development in the US The nature of the production process in the US The extent of production facilities in the US Whether the value of the processing performed in the US represents a small proportion of the value of the merchandise sold in the US To determine whether it should include parts or components within the scope of an antidumping order, the DOC must consider the following factors: The pattern of trade, including sourcing patterns Whether the manufacturer or exporter of the parts or components is affiliated with the person who assembles or completes the merchandise sold in the US Whether imports into the US or the parts or components produced in the foreign country have increased after the initiation of the antidumping investigation which resulted in the issuance of an antidumping order.