CHAPTER 3
DEVELOPMENT OF ANTIDUMPING LAW

This chapter provides knowledge of the evolution of antidumping law and its historical context which are necessary for the study of major requirements of antidumping laws. It also discusses major issues of antidumping legislation. A specific study of antidumping law in Thailand will be presented in the next chapter.

3.1 The Development of Antidumping Agreement

Canada was the first country to introduce antidumping law in 1904. The law was motivated by the goal of finding an alternative to higher across the board tariff increases[1]. Later, New Zealand enacted its first antidumping law in 1905, followed by Australia in 1906 when the law concerning dumped import was enacted under the Act of the Preservation of Australian Industries and for the repression of Destructive Monopolies, No 9 of 1906. In the United States, the first law was incorporated in section 800-1 of the Revenue Act of 1916 in response to the alleged threat of predatory dumping.[2] The objective of these conventional antidumping laws in the early stage was mainly against "predatory dumping".

In 1947, the United Nations Economic and Social Council (Ecosoc) held international conference on trade and employment in order to establish International Trade Organization (ITO). The United States during the negotiation proposed a draft article on dumping as part of ITO establishment. The draft article based on the United States Antidumping Act of 1921 was put in Article 17 of the final draft ITO charter drawn up in Havana in March 1948.[3] However, the ITO charter was never approved. The antidumping provisions were transformed, with some modifications, into GATT

---

[1] John J. Barcelo, "A History of GATT Unfair Trade Remedy Law-Confusion of Purposes," World Economy 14: 314.

[2] Rainer M. Bierwagen, GATT Article 6 and the Protectionist Bias in Antidumping Laws (Deventor: Kluwer Law and Taxation, 1990), p.113-116.

[3] Richard Dale, Antidumping Law in a Liberal Trade Order (London: Mcmillan, 1980), p.1-7.

Article VI which was drawn up in October 1947.

Under the GATT Article VI (1947), the products are recognized as being dumped when being introduced into the commerce of another country at less than the normal value of the products and it is to be condemned if it causes or threatens material injury to an established industry or materially retards the establishment of a domestic industry.[4]

However, GATT (1947) did not explicitly state the exact definition of dumping in the context of the Antidumping Code. It only asserted that dumping occurred when products of one country were introduced into the commerce of another country at less than the normal value of the products.[5]

As far as It is concerned, the definition of material injury was not given in the GATT Article VI (1947) but was only stated in Article VI (a) that no antidumping shall be levied on the import if it determined that the effect of the dumping caused a material injury to a domestic industry or materially retarded the establishment of a domestic industry.[6]

In 1960s, there was a shift in general attitudes to the dumping problems due to an increase in antidumping enforcement. Trade negotiators began to see national antidumping actions instead of dumping itself as a main threat to free trade. There were three problems involved at that time[7]: (1) lack of injury test in the Canadian law, (2) weak test of the substantive antidumping concepts (e.g. material injury, industry, and causation), and (3) administrative procedural delays, uncertainties, and arbitrariness.[8]

---

[4] General Agreement on Trade and Tariffs (GATT) (1947) Article VI.

[5] General Agreement on Trade and Tariffs (GATT) (1947) Article VI, para 1.

[6] Surakiat Satianthai, International Economic Law : Public Control of International Trade (Bangkok: Chulalongkorn University, 1988) (in Thai), p.72.

[7] There are many concerns on European, Canadian and the United States Law. European countries particularly associated the risk of delays and harassing procedures with the United States' system; whereas the United States complained about the potential for arbitrariness in the more discretionary, less rule governed character of the European law. See John J. Barcelo, "A History of GATT Unfair Trade Remedy Law-Confusion of Purposes," World Economy 14 : 317.

[8] John J. Barcelo, op.cit., footnote 1, p.317.

Hence, the Antidumping Code of 1967 was drafted during the Kennedy Round of multilateral trade negotiations (1964-1967) as an interpretation of the Article VI of GATT.[9] The Antidumping Code of 1967 was aimed to set certain definitions and established standards for the procedures that nations use to impose the antidumping duties; however, this code applied only to those countries that accepted it. When new countries enter the GATT, they would not automatically be obligated by the code.[10]

Under the Antidumping Code of 1967, the determination of dumping basically had no differences from GATT Article VI (1947); however, more cases were added in the definition[11] and the definition for the like product was also provided .

The determination of injury in the Antidumping Code of 1967 had been altered from the GATT Article VI (1947) which made the implementation of antidumping harder when compared to the previous stage.[12] Article 3 (a) of the Antidumping Code of 1967 provided that a determination of injury should be made only when the dumped imports were "demonstrably the principal cause" of material injury to a domestic industry or material retardation of the establishment of domestic industry. The GATT also provided that in reaching their decision the authorities shall weigh the effect of the dumping and all other factors taken together which may be adversely affecting the industry.

The definition of material injury was, however, still not given in this Code. But Article 3 (b) of Antidumping Code 1967 provided that the determination of injury shall be based on examination of all factors such as market share, profits, price, export performance, employment, volume of dumped and other imports, utilization of capacity of domestic industry and productivity and restrictive trade practices. In other words, the issues of causation had been first addressed in Antidumping Code 1967 by

---

[9] Richard Dale, op.cit., footnote 3, p.15.

[10] John H. Jackson, World Trade and the Law of GATT (Indianapolis: The Bobbs Merrill, 1969), p.410.

[11] GATT (1967) Article VI 2(a) - 2(f)

[12] Surakiart, op.cit., footnote 6, p. 76.

the mentioned examination. Moreover, the definition of the term "domestic industry" was also first given in the Antidumping Code of 1967 [13]

Later, during the Tokyo Round multilateral trade negotiations, GATT contracting parties negotiated the Antidumping Code of 1979, which aimed to provide significant procedural and administrative changes against protectionist in the administration of antidumping laws.[14] The code was also amended to conform to the newly-negotiated Subsidies Code and implementing legislation, which were introduced by the United States and the European Community in 1979.

The criteria for the determination of injury had been changed to conform to the definition of injury negotiated in the context of the Agreement on Subsidies and Countervailing Measures.[15] The revised code no longer provides that dumped imports must be demonstrably the principal cause of injury.[16] It discarded former injury concept together with principal cause requirement.[17] Under the revised Code, the determination of injury involved an examination of the volume of the dumped imports and their effect on prices and an examination of the impact of the imports on the domestic producers. That the dumped imports causes injury must be proven. Moreover, injury caused by other factors is not placed to the dumped imports.

---

[13] GATT (1967) Article VI Art. 3 para (a).

[14] The 1979 Code had a number of significant alternations. First, the injury test was arguably weakened since the causation standard was reduced. Second, the criteria for assessing what amount to injurious effects on domestic industry were made more explicit. Third, the rules on price undertakings were expanded. Fourth, the provisions of dispute settlement were added and finally there was a new Article (Article 13) inserted concerning developing countries. See Secretary Commerce of UNTAD, Assessment of the Result of the Multilateral Trade Negotiation (New York: UNCTAD, 1982) p.18-19.

[15] Secretary Commerce of UNCTAD, Assessment of the Result of the Multilateral Trade Negotiation (New York: UNCTAD, 1982) p.18-19.

[16] Under the 1979 code, the determination of injury is placed in a much weaker position, as it would no longer be of much relevance to demonstrate that injury could be caused by a host of other factors, the complaint simply has to show that some injuries can be attributed to dumped imports. See Secretary Commerce of UNTAD, Assessment of the Result of the Multilateral Trade Negotiation (New York: UNCTAD, 1982) p.18-19.

[17] Under the 1967 code, contracting parties seeking to levy antidumping duty could be called upon to show that the dumped imports had caused injury, and that all the other factors which could also be contributing to the injury were not taken together as the single factor of dumping. See Secretary Commerce of UNTAD, Assessment of the Result of the Multilateral Trade Negotiation (New York: UNCTAD, 1982) p.18-19.

Finally, the definition of domestic industry had altered.[18] Morcover, Article 15 was also introduced to provide three steps in the settlement of disputes and establishment of panels to resolve disputes.[19]

When the GATT Uruguay Round was held in 1986, a plan to revise Antidumping code was not set as a high priority. The Antidumping Agreement had increasingly become very contentious, for some wanted to reduce discretion of the governments in interpreting the code. On January 1, 1995, the new Antidumping Agreement went into effect upon the establishment of WTO. The Agreement contains many improvements over the Tokyo Round Antidumping Code. The Agreement clarified methods used in calculating dumping margins and investigation procedures by making the following changes:[20]

- New criteria for determining sales below cost,[21]
- Adjustment mechanism for start-up costs,[22]
- The acceptance of cost calculation based on accepted accounting principles in the exporting country[23],
- New criteria for setting profit rate in constructed value, and
- The principle that comparisons of domestic and export prices must be made on a weighted average to weighted average basis or individual transaction to individual transaction basis[24].
- Termination of investigations upon a determination of de minimis dumping margins at less than 2 per cent of the export price or negligible import volumes if it is less than 3 per cent of total import volumes. If the

---

[18] GATT (1967) Article VI.

[19] Secretary of Commerce UNTAD, op.cit., footnote 14, p.20.

[20] Ministry of Trade and Industry (MITI), The Report on the WTO Consistency of Trade Policies (1998), p.93-94.

[21] Antidumping Agreement 1994, Article 2.2.1.

[22] Antidumping Agreement 1994, Article 2.2.1.1.

[23] Antidumping Agreement 1994, Article 2.2.1.1.

[24] Antidumping Agreement 1994, Article 2.4.2.

aggregate volume of imports from all negligible countries exceeds 7 per cent, negligibility will not apply.[25]

- Introduction to a sunset clause: antidumping duties will be automatically terminated no later than five years from their imposition.[26]
- New disciplines on cumulative assessment of injury.[27]

3.2 Agreement on Implementation of Article VI of GATT 1994

Major issues involving the determination of dumping and injury under the Agreement on Implementation of Article VI of GATT 1994 are summarized as follows:

3.2.1 Determination of Dumping

The regulation provides that a product will be considered being dumped if the export price of the product exported from one country to another is less than the comparable price for the like product when destined for consumption in the exporting country in the ordinary of trade.[28] The determination of dumping basically requires a comparison between export price and normal value of the same or like products.

3.2.1.1 Export Price

In the report adopted on May 13, 1959 on Antidumping and Countervailing Duties, a group of experts noted that the export price was the price when the like product left the exporting country. In other words, it was the ex-factory price on sales for export.[29] However, the Antidumping Agreement 1994 does not provide a clear

---

[25] Antidumping Agreement 1994, Article 5.8.

[26] Antidumping Agreement 1994, Article 11.3.

[27] Antidumping Agreement 1994, Article 3.3.

[28] Antidumping Agreement 1994, Article 2.

[29] GATT, 1961 Report, at 7: GATT, 8th Supp. BISD 146 (1960) cited by John H. Jackson

definition of export price. It only stated that a comparison between the export price and normal value should be made at the ex-factory level.[30]

With regard to the national antidumping laws, the export price is defined as the price paid or payable for the product sold for export from exporting country to the Community under EU Antidumping Law. Meanwhile, the U.S. Antidumping Law of 1995 defines export price as the prices at which the merchandise is sold, or agreed to be sold, for exportation to the first unaffiliated purchaser after certain adjustments are made to "starting prices"[31]. In conclusion, both jurisdictions calculate the export price based on the price paid or payable by the importer.[32]

In some cases, the export price is unreliable or unavailable and it is difficult to establish the export price. Therefore, the calculation of the export price may based on the price at which the imported products are first resold to an independent buyer.

In other cases, products are not imported directly from the country of origin but from intermediate country instead. The authorities may determine the price on such basis. Export price may be a price in the country of origin, if the products are merely transshipped through the country of export, or such products are not produced in the country of export or there is not comparable price for them in the country of export.[33]

To construct the export price, Antidumping Code of 1994 states that costs, including duties and taxes incurred between importation and resale, and profits should be taken into account.[34] In general, different jurisdictions apply different methods of

---

[30] Antidumping Agreement 1994, Article 2.4.

[31] Starting prices are net of any price adjustment that is reasonably attributable to the subject merchandise.

[32] Edwin A. Vermulst, The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become a Problem in International Trade , in Antidumping Law and Practice, ed. John H. Jackson and Edwin Vermulst (Ann Arbor: Michigan Press, 1989), p.450.

[33] Antidumping Agreement 1994, Article 2.5.

[34] Antidumping Agreement 1994, Article 2.4.

finding what constitutes costs and reasonable profits. However, there are always problems about the proper deduction of cost and reasonable profits.[35]

3.2.1.2 Normal Value

Basically, Antidumping Code of 1994 sets out three ways to measure normal value of the exported goods.

First, normal value is the comparable price in the ordinary course of trade for the like product when it is destined for consumption in the exporting countries. The criterion here is to find the comparable price in the ordinary course of trade for the like product.[36]

Second, in the absence of sales of the like product in the ordinary course of trade in the domestic market or because of the particular market situation or the low volume of sales in the domestic market,[37] the normal value shall be determined by a comparable price of the like product when exported to an appropriate third country

Third, the normal value shall be determined by the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[38]

The report adopted on May 13, 1959 contains a discussion on which criteria of the normal value should be used. The group agreed that the second and third criteria could be used only when no domestic price existed. Moreover, these are to be used only after the first criterion fails to establish normal value. However, the report does not clearly state which criteria, the second or the third, should be applied first. The Second criterion would make it easier to collect the necessary information. The third

---

[35] Edwin A. Vermulst, The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become a Problem in International Trade , in Antidumping Law and Practice, ed. John H. Jackson and Edwin Vermulst (Ann Arbor: Michigan Press, 1989), p.451.

[36] Antidumping Agreement 1994, Article 2.1.

[37] Antidumping Agreement 1994, Article 2.2.

[38] Ibid.

criterion is sometimes preferable because it is more reasonable than the second criterion. The use of the second criterion could also produce misleading results. [39]

To determine normal value, EU and the the U.S. mainly examine (1) whether sales are in the ordinary course of trade and (2) whether prices are paid or payable for an independent buyer in the exporting country. [40]

Where there is home market sales

The normal value usually refers to comparable price in the ordinary course of trade when the product is destined for consumption in the exporting country. The specific requirements in determining normal value are discussed as follows:

Five Percent Rule

The Antidumping Code of 1994 clarifies that the aggregate quantity of sales which constitutes at least 5 per cent or more of the like product to the importing country will be considered sufficient for the determination of normal value. However, a lower ratio should also be acceptable when domestic sales at lower ratios can be taken for a proper comparison.[41]

Ordinary Course of Trade

The Antidumping Code of 1994 does not identify a specific definition for ordinary course of trade. It only states that products made below per unit costs of production plus administrative, selling and general costs and the sales of such products which are made within an extended period of time are considered out of ordinary course of trade category. [42]

---

[39] Contracting Parties to the General Agreement on Tariffs and Trade, Analytical Index; Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement (Geneva, 1984), p.

[40] Normal value is based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. See E.C. Antidumping Regulations. See Contracting Parties to the General Agreement on Tariffs and Trade, Analytical Index; Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement (Geneva, 1984).

[41] Antidumping Agreement 1994, Article 2 footnote 2.

[42] Antidumping Agreement 1994, Article 2.2.1.

With regard to the U.S. and E.U. Antidumping Code, sales will be considered as not having been made in the ordinary cost of trade because they are sold at prices below the cost of production or to an affiliated party.

Like Product (produit similaire)

The meaning of like product has been the subject of controversy for a long time in many cases. Article 2.6 interprets the definition of the like product as a product which is identical in all respects to the product under consideration, or another product which although not alike in all respects has characteristics closely resembling those of the product.[43]

In practice, the European Union has put an emphasis on physical likeliness in order to determine the like product. On the other hand, the United States has put an emphasis on uses as a factor or functional similarity in order to determine whether products are alike.[44] However, the like product definition on the basis of functional similarity seems broader than physical likeliness basis[45] and does not conform with the present GATT definition of the like product. However, the functional similarity test would be reasonable if a basis of cross elasticity of demand tests could be offered.[46]

---

[43] Antidumping Agreement 1994, Article 2.7.

[44] Edwin A. Vermulst, The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become a Problem in International Trade , in Antidumping Law and Practice, ed. John H. Jackson and Edwin Vermulst (Ann Arbor: Michigan Press, 1989), p.453.

[45] For example, in Certain Flat-Rolled Carbon Steel products from Brazil, the Commission defined cut-to-length and coiled hot-rolled steel plates as a single like product because two forms of plate were generally commercial interchangable. See Edwin A. Vermulst, The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become a Problem in International Trade , in Antidumping Law and Practice, ed. John H. Jackson and Edwin Vermulst (Ann Arbor: Michigan Press, 1989), p.453.

[46] For example, Californian grape growers can bring cases against French and Italian wine exporters, in like manner, Florida orange growers to Brazilian frozen concentrated orange juice. See Bruce M. Stern, "Economically Meaningful Markets:An Alternative Approach to Defining Like Product and Domestic Industry under the Trade Agreement Act of 1979," Virginia Law Review 73 (1987) : 1473.

Where there is no sale of the like products in home market

When there are no sales of the like product in the ordinary course of trade, such sales do not permit a proper comparison. The margin of dumping will be determined by a comparison with a comparable price of the like product when exported to an appropriate third country or with the cost of production in the country of origin plus a reasonable amount of administrative, selling and general costs and profits.

Third Country Exports Price

The comparable price of the like product when exported to an appropriate third country has rarely been used by EU commission[47] The main reason seems to be that export prices to the third countries are unacceptable because the sale price in the third countries may be dumped as well. In contrast, for the United States, the third country export price basis is a preferred basis because of a preference for the controversial requirement in minimum profit in constructed normal value case.[48]

Constructed Normal Value

When sales do not exist or are at below cost prices, the calculation of normal value cannot be calculated based on a foreign producer's sale in its home market or third country markets. Therefore, normal value shall be based on constructed value. Three major components of the constructed normal value are the cost of production, SGA, and profits.[49]

According to the Second Report of Group of Experts adopted on May 27, 1960[50], they agreed that whatever particular method was used to determine both

---

[47] Michael Davenport, "Antidumping Measures under Review," Intereconomics (Novermber 1990) : 267.

[48] Edwin A. Vermulst, The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become a Problem in International Trade , in Antidumping Law and Practice, ed. John H. Jackson and Edwin Vermulst (Ann Arbor: Michigan Press, 1989), p.444.

[49] Antidumping Agreement 1994, Article 2.2.1.1.

[50] Antidumping and Countervailing Duties, Second Report adopted on 27 May 1960 (L/114), GATT, B.I.S.D., 9th Supp., 194 at 196 (1960).

production and sales costs, the aim should always be to arrive at normal value which was comparable with the export price. However, the use of constructed value has always been a source of great contention about the methods of calculating normal value. SGA, and profits, and sales below cost have always been the main sources of argument.

Administrative, selling and general costs and profits: In most cases, an adjustment for a reasonable margin for selling, general and administrative cost (SGA) and for profit is troublesome. Under prior law, the United States imposed arbitrary minimum amount of SGA and profit. The U.S. Commerce was required to apply a minimum of 10 per cent for SGA expense and 8 percent for profit, even if a foreign producer's actual costs and profit were lower. Similarly, it pointed out that the EU[51] had imputed very high profit rates in certain cases[52]. However, the use of arbitrary minimum amount of SGA and profit by national antidumping authorities in computing constructed domestic sale price is currently no longer possible under the Antidumping Agreement 1994. Article 2.2.2 of Antidumping Agreement 1994 requires that SGA and profit shall be based on actual data of the exporter or producer under investigation.[53]However, Antidumping Agreement 1994 only imposes a standard of rationale in the use of SGA.

Besides the legal point of view, the economic theory suggests that in a period of slack demand, rational producers will reduce prices to as low as marginal costs. Therefore, the close to zero SGA and profits may be found.

Sales below cost of production: Sales below cost of production are disregarded in calculating normal value if they are made (1) within the extended period of time[54] (2) in substantial quantities[55], and (3) at prices which do not provide for the recovery of all costs.

---

[51] For current method of calculating SGA see Article 2(6) of E.C. Antidumping Code.

[52] Profit margins imputed have varied between 3 – 13 per cent on case by case basis.

[53] Antidumping Agreement 1994, Article2.1.1.1

[54] The extended period of time should be normally one year or no less than six months.

[55] Sales below per unit costs represents not less than 20 per cent of the volume sold sold in transactions under consideration for the determination of normal value.

The exclusion of below cost sales from normal value tends to raise normal value and increase the likelihood of finding dumping margins.[56]Problem arises when cost of production is calculated in an arbitrary manner and does not reflect economic reality. Jurisdictions have adopted a very expansive definition of cost. Moreover, the legal basis for excluding sales below fully allocated cost is questionable.[57] From the economic point of view, selling below average cost in the short run may be rational.[58] Firms behaving in a rational manner are willing to reduce prices to the level of marginal costs in short term periods of slack demand. Therefore, under cost calculation standard, rational firms in every country can be found dumping their products.

3.2.1.3 Price Comparison and Adjustments

The Agreement provides that the dumping margin is to be established by comparing weighted average of domestic price with weighted average of all comparable export prices or by comparing prices on transaction to transaction basis. Furthermore, adjustment in both price and normal value is required to account for differences in conditions and terms of sale, taxation, level of trade, quantities and physical characteristics. The comparison shall be made at the same level of trade, at ex-factory level and with respect to sales made at nearly the same time.

Historically, the U.S. commerce and EU compared the price of each domestic sale price to a weighted average price for the appropriate product in foreign markets. Later, the Antidumping Agreement 1994 establishes a preference for using either weighted average price or individual prices on both sides of the dumping comparison. Somehow, in the Antidumping Agreement 1994, comparisons between individual export prices and weighted average normal prices are allowed under certain conditions.

---

[56] Peter L. Sultan, "Uruguay Round Accord Alters Investigation and Review Procedures of U.S. Antidumping Law," (http:www.arentfox.com), January 1995.

[57] Edwin A. Vermulst, The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become a Problem in International Trade , in Antidumping Law and Practice, ed. John H. Jackson and Edwin Vermulst (Ann Arbor: Michigan Press, 1989), p.446..

[58] Michael Davenport, op.cit., footnote 47, p.268.

The idea of fair comparison is vague in many national Antidumping Laws. There are some concerns over specific issues about adjustment and price comparison. The major issues are summarized as follows:

Biased Price Comparison: Under the current U.S. price comparison practice, the old method which is used to compare the domestic prices and the export prices involving more than one transaction inflates the dumping margin and gives biased results (Table 3.1).

Table 3.1

An Example of Unfair Price Comparison

	Domestic Price ($)	Export Price ($)	Dumping Margin($)*
Transaction 1	400	400	-150-0
Transaction 2	300	300	-50-0
Transaction 3	200	200	50
Transaction 4	100	100	150
Average Value	250	250	0

Source : The Report on the WTO Consistency of Trade Policies

Note : Dumping margin is obtained by comparing a weighted average of all domestic prices with the export price of each individual transactions.

The U.S. Commerce will find dumping by treating the so-called negative dumping margins as zero when an export price is higher than $250 domestic average value. As shown in Table 3.1, this methodology inflates the dumping margin despite the fact that the margin would be zero if the comparison were made between average prices or on the basic of individual transactions.[59] There was no credit for negative dumping.

$$\text{Dumping margin per cent} = \frac{0+0+50+150}{400+300+200+100} * 100 = 20\%$$

[59] MITI, op.cit., footnote 20, p.103.

Asymetric Price Adjustment: Under the EU practice, when a company employs an affiliated importer in the export market, the EU applies asymmetrical rules to adjust the prices. For the domestic prices, the EU deducts only direct selling expenses while for the export prices the EU deducts direct and indirect selling expense as well as profits. This leads to exaggeration of dumping margin (Figure 3.1). Similarly, the U.S. law adjusts the export price for indirect selling expenses and profit but does not make the same adjustment to the normal value.

3.2.2 Determination of Injury

The existence of dumping is not sufficient for levying antidumping duty. Dumping must also result in material injury to a domestic industry producing a like product.

Establishment of Injury Requirement

The establishment of injury requirement[60] must be fulfilled under the Article VI of GATT 1994, before imposing antidumping duty. The importing country should be sure that dumped goods

1. are causing material injury to a domestic industry; or
2. clearly threaten material injury to a domestic industry; or materially retard the establishment of a domestic industry.

The Antidumping Agreement requires injury determination to be based on positive evidence.[61] This involves the examination of (a) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for the like products, and (b) the impact of these imports on domestic producers.

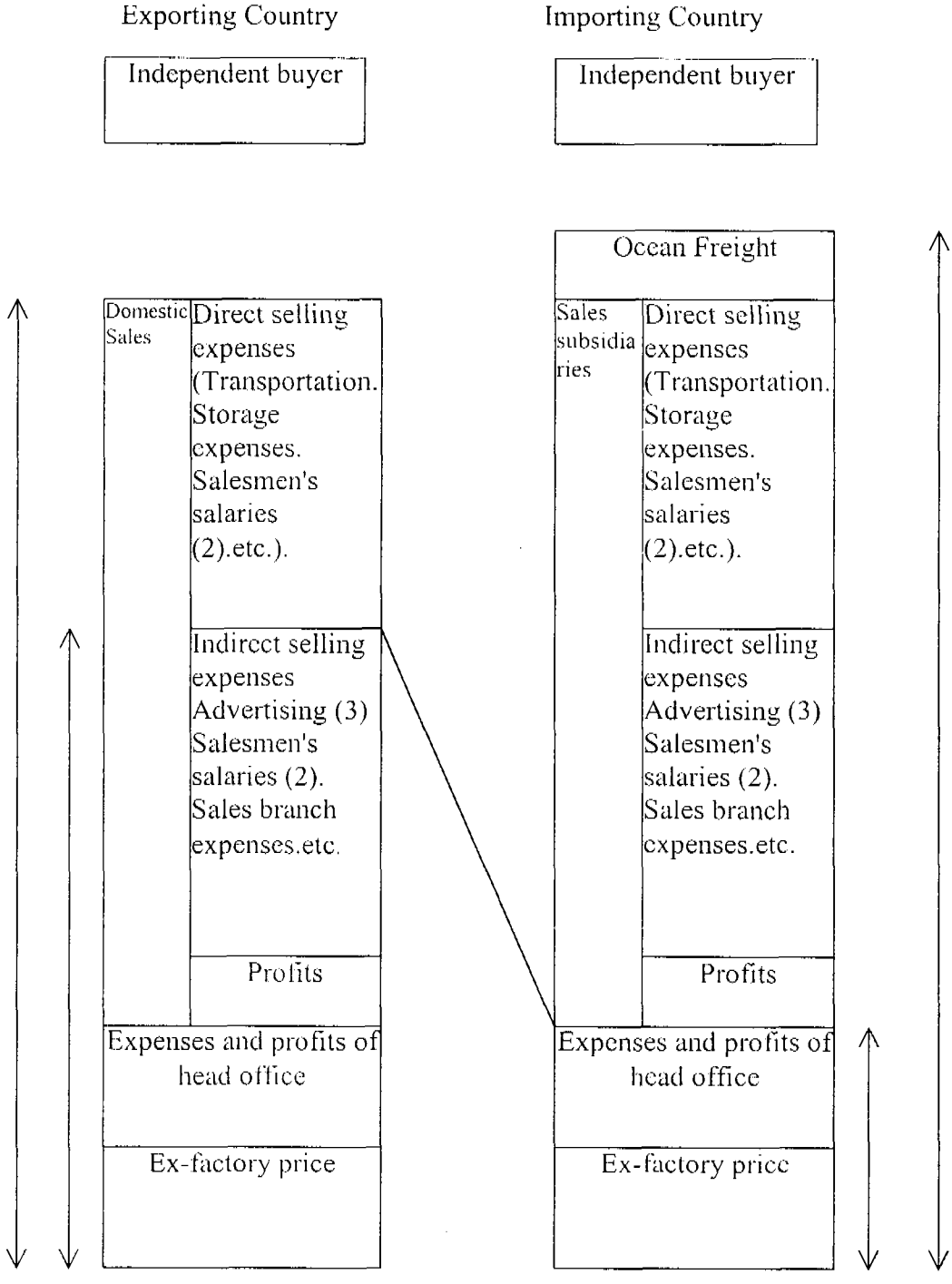
---

[60] Many criticized that the most stringent injury requirement standard was contained in the GATT Antidumpiong Code of 1968. It required that imports had to be demonstrably the principle cause of injury.

[61] Antidumping Code 1994, Article 3.1.

Figure 3.1

Asymmetrical Comparison of Normal Value and Export Price in the EU



(1) Net sales is equal to the price obtained by deducting discounts and rebates from sales price to the independent buyer.
(2) In this case, the amount of salesmen's salaries is allocated to two categories (i.e. 50% to direct selling expenses and 50% to indirect selling expenses)
(3) Ec considers all the advertising expenses as indirect selling expenses.

In examining the impact of dumped imports on the domestic industry, Article 3.4 provides the examination of the impact of dumped imports on the domestic industry. The examination shall include an evaluation of all relevant economic factors and indices affecting the states of industry which are actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity. The examination also includes an evaluation of prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.

Nevertheless, determination of injury in national AD statues is vague[62]. The recent adoption of the Uruguay Round results does not really alter this situation.[63] Even though the new Antidumping Agreement provides more detailed disciplines on the determination of injury, much is left to the discretion of investigating authorities[64]. Even though, EU and the U.S. have amended the related provisions based on the new Antidumping Agreement 1994, it will be necessary to keep monitoring their law.

Cumulations and De Minimis

Article 5.8 requires the termination of antidumping investigation if dumping margin is found to be de minimis[65], which is defined as less than 2 per cent of the export price.

The volume of dumped imports will normally be disregarded if the imports concerned are found to account for less than 3 per cent of imports of the like product, but the volume will not be ignored if the countries which individually account less

---

[62] The U.S. finding of injury will always be a matter of Commission discretion. See Gary N. Horlick, "The U.S. Antidumping System," in Antidumping Law and Practice: A Comparative Study , ed. John H. Jackson and Edwin A.Vermulst (New York: Harvester Wheatsheaf, 1989), p.158.

[63] Pangratis Angelos and Edwin Vermulst, " Injury in Antidumping Proceedings, The need to Look Beyond the Uruguay Round Results," Journal of World Trade 28 (October 1994) : 61.

[64] The ITC considers 18 factors in determining material injury. See Richard Boltuck, Assessing the Effects on the Domestic Industry of Price Dumping, in Policy Implication of Antidumping Measures, ed. P.K.M. Tharakan (New York: North-Holland, 1991),p.114-115.

[65] Under the previous U.S. law, Commerce has treated dumping margin of less than 0.5 per cent as de minimis. Under the amended law, the threshold below which margins are treated as de minimis is raised to two per cent.

than 3 per cent of imports collectively account for more than 7 per cent of imports of the like product.[66]

Cumulation, however, has always been unfair to small exporters whose exports do not caused injury but are cumulated with exports of other exporters.[67] The Current Antidumping Law, however, does not restrict the cumulation just only to dumped imports. The law also takes account of the cumulation of all imports subject to antidumping duty.[68]

Price of Dumped Imports

Article 3 (2) provides that with regard to the effect of the dumped imports on prices, it shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product, or whether the effect of such imports depress prices to a significance degree or prevent price increases.

Threat of Material Injury

According to Article 3.7, in order to determine a threat of materially injury, four factors should be considered in making a determination of the existence of threat of material injury[69] . The consideration is based on following criteria:

- Whether there is a significance rate of increase of dumped imports which indicates that there will be substantially increased importation

---

[66] Under amended EU law, Article5 (7) proceedings shall not be initiated against countries whose imports represent a market share below 1 per cent, unless such countries collectively account for 3 per cent or more of Community consumption.

[67] Raj Krishna, "Antidumping in Law and Practice," (http://www.worldbank/html/ dec /Publications/ Workpapers/WWPS1800series/wps1823/wps1823-abstract.htm.). September 1998.

[68] Robert A. Upstien and Matthew P. Jaffe, Discrepancies Between the GATT 1994: Antidumping Agreement and U.S. Antidumping Law June 1995 (mimographed.).

[69] In the report, adopted on 13 May 1959, of the Group of Experts on Antidumping and Countervailing Duties, The expert grouped stressed that with respect to the case where material injury is threatened by dumped imports, the application of antidumping had to be studied and decided with particular care. See Contracting Parties to the General Agreement on Tariffs and Trade, Analytical Index; Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement (Geneva, 1984).

- Sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports
- Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports
- Inventories of the product being investigated

In the report adopted on May 13, 1959 of the Group of Experts on Antidumping and Countervailing Duties, they stressed that, with respect to the case where material injury is threatened by dumped imports, the application of antidumping had to be studied and decided with caution. The list of factors which are not mention in the Antidumping Code 1994 must also be considered.

Causation

Article 3.5 stipulates that it must be demonstrated that the dumped imports, through the effects of dumping, cause injury. Article 3(5) further states that the demonstration of the causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence. Furthermore, it shall examine factors other than the dumped imports which at the same time injure the domestic industry and such injury caused by other factors must not attribute to the dumped imports. The importance of causation requirement is to reflect a requirement of the Antidumping Agreement 1994 that injury must be affected by dumping.