Chapter 5

ANTI-DUMPING MEASURES

OVERVIEW OF RULES

“Dumping” is defined as a situation in which the export price of a product is lower than its selling price in the exporting country. A discount sale, in the sense of ordinary trade, is not dumping. Where it is demonstrated that the dumped imports are causing injury to the competing industry in the importing country within the meaning of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Anti-Dumping Agreement”), pursuant to and by investigation under that Agreement, the importing country can impose anti-dumping measures to provide relief to domestic industries injured by imports.¹

The country’s imposition of an anti-dumping duty is determined by the dumping margin—the difference between the export price and the domestic selling price in the exporting country. By adding the dumping margin to the export price, the dumped price can be rendered a “fair” trade price. When it is

¹ “Injury” includes three cases: material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry.
impossible to obtain a comparable domestic price because there are no or low volume sales in the ordinary course of trade in the domestic market, either export prices to third countries or a “constructed value” are used in price comparison. A “constructed value” is the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Similarly, when the export price is found to be unreliable, the price at which the product is first resold to independent buyers, or another price according to a reasonable basis determined by the authorities may be used in price comparison.

Because anti-dumping measures are an exception to the rule of MFN treatment, the utmost care must be taken in invoking them. However, unlike safeguard measures, which are also instruments for the protection of domestic industries, the implementation of anti-dumping measures does not require the government to provide offsetting concessions as compensation or consent to countermeasures taken by the trading partner. This has increasingly led to the abuse of anti-dumping measures. For example, anti-dumping investigations are often commenced based on insufficient evidence, and anti-dumping duties may be retained long after the conditions for their levy have been eliminated. In light of this situation, one of the focal points of the Uruguay Round negotiations was to establish disciplines to rein in the abuse of anti-dumping measures as tools for protectionism and import restriction. Although considerable progress was seen during negotiations, many countries still express much concern over this abuse.

LEGAL FRAMEWORK

International Rules

The international anti-dumping rules are provided by (a) GATT Article VI and (b) the Anti-Dumping Agreement under the WTO. As a result of the Uruguay Round negotiations, the Tokyo Round Anti-dumping Code was revised to become the new Anti-Dumping Agreement. Amendment of the Code was called for because the procedures for investigating prices and costs in order to measure the injury to domestic industry and calculate dumping margins were extremely technical and complex. The Tokyo Round Anti-dumping Code also
lacked sufficient detail to deal with the complexities of current international transactions. The Code’s lack of detail resulted in a dearth of effective disciplines and exacerbated the tendency to abuse the anti-dumping provisions.

The WTO holds two meetings of the Anti-Dumping Committee (AD Committee) each year to provide a forum for discussion of anti-dumping measures. Among the business of the AD Committee is the review of anti-dumping implementation laws among countries for conformity to the Agreement, the hearing of reports on anti-dumping measures, and the study of issues in anti-dumping policies and practice. The AD Committee is directly subordinate to the Council for Trade in Goods and reports to it each year on the implementation and administration of the AD Agreement.

The AD Committee has also organized on an ad hoc basis two forums for discussions of specific points of contention. The first is the meeting of the Informal Group on Anti-Circumvention. This was an issue that was referred to the AD Committee for further study because no conclusions could be reached on it during the Uruguay Round negotiations (see 1(5) below). The second is the meeting of the Ad Hoc Group on Implementation, which discusses ways to harmonize national discretion in the agreement where the interpretation is or could be vague. Having separate forums to discuss specific issues of concern has enabled the WTO to deal with anti-dumping problems on an ongoing basis.

Countries have been amending their domestic anti-dumping implementation legislation to bring it into conformity with the new AD Agreement. In Japan, for instance, this took the form of amendments to Article 9 (Article 8 at present) of the Customs Tariff Law and other relevant regulations. However, it is still uncertain whether new national legislation in WTO Member countries will be administered in conformity with the new Agreement. The AD Committee is charged with reviewing national legislation, and countries are required both to notify the relevant laws to the Committee and to respond to questions from other countries about their systems. If there are any problems found, countries are obliged to bring their national laws in line with the Agreement. Japan must use these kinds of forums to ensure that the domestic laws of other countries are written and applied in conformity with the AD Agreement. Should legislation or discretion contravene the Agreement, Japan should report it immediately to the AD Committee and other GATT/WTO forums to seek appropriate remedies. Therefore, if an anti-dumping measure is suspected of violating the GATT and/or Anti-Dumping Agreement, Japan should seek resolution through the GATT/WTO in dealing with the increased abuse of
anti-dumping measures by certain countries. If resolution cannot be reached through bilateral consultations, the abuses should be referred to WTO panels.

In the past, there were two viewpoints: first, that panels should have broad discretion, second, that certain standards of review (both objective and impartial) should be set for panel deliberations. The reasoning for the latter view was as follows. Since many cases for resolving disputes were expected to arise due to the newly introduced automaticity in the WTO dispute settlement system, it was considered necessary to specify standards of review for anti-dumping measures. As a result of the Uruguay Round negotiations, the new Anti-Dumping Agreement also introduced new standards of review for factual determinations and legal interpretations by the panel. How the standards of review are applied to procedures for resolving disputes will depend on the specific facts of the future actions and on the panelists themselves. The issue will be re-examined following the application of these standards over the first three years pursuant to a Ministerial decision adopted at Marrakesh\(^2\), but no examination has yet been done.

*Anti-Circumvention Issues*

“Circumvention” generally refers to an attempt by parties subject to anti-dumping duties to avoid paying the duties by “formally” moving outside the range of the anti-dumping duties order while “substantially” engaging in the same commercial activities as before.

The Uruguay Round negotiations defined three kinds of circumvention: importing country circumvention, third country circumvention and “country-hopping”.\(^3\) Disciplines on measures to prevent these practices were also discussed, but conflicting opinions between interested countries prevented any final conclusion from being reached. The Marrakesh Ministerial Declaration

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\(^2\) “The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application”.

\(^3\) Below are the basic kinds of circumvention discussed by most countries:

(a) Falsified customs declarations and other clear illegalities.
(b) Switching to exports of products that have only minor differences with those subject to anti-dumping duties (slightly modified product).
(c) Exporting the parts for products subject to anti-dumping duties to the importing country and assembling them there (importing country circumvention).
(d) Exporting the parts for products subject to anti-dumping duties to a third country and assembling them there (third country circumvention).
(e) Exporting products subject to anti-dumping duties from third countries (“country-hopping”).

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merely states the expectation that uniform rules will be applied as soon as possible, and refers the issue to the AD Committee. In light of the large amounts of time already spent negotiating the issue without success, the AD Committee began its discussions by looking at approaches that could be used to seek a resolution. This has resulted in an agreement on the framework for future considerations (procedures and agenda). There have also been substantial, unofficial discussions on what constitutes circumvention, which is the first item on the agenda.\(^4\)

The basic conflict over anti-circumvention is between the United States, the European Union, and other countries that already have anti-circumvention rules and that wish to legitimize them, and a large number of other countries, led by Japan, who are wary of introducing these measures because they could restrict even legitimate investment activities, potentially contracting and distorting both trade and investment. There are sharp differences of opinion on this issue, and no agreement is in sight.

Resolving this conflict will require striking a balance between the current AD Agreement and any future anti-circumvention measures. Doing this will require taking into account the benefits brought by the globalization of corporate activities and the basic principles and goals of the WTO Agreement. This will in turn require an analysis of specific cases that illustrate how trade is conducted to seek measures that do not impair legitimate trade and investment while still strengthening the disciplines of the current AD Agreement.

On the other hand, the fact remains that there are, at the current time, no uniform rules on anti-circumvention in the WTO Agreement. Should countries that have domestic laws on anti-circumvention take measures that depart from GATT Article VI or the AD Agreement, they will need to be dealt with rigorously within the GATT/WTO context.

**Recent Trends**

Traditionally, most anti-dumping measures have been taken by the United States, the European Union, Canada and Australia. This in part reflects the fact

\(^4\) Unofficial Circumvention Meeting of the AD Committee (recent development)
Members have yet to reach a conclusion on the definition of “circumvention”. Discussions began on the next topic, “What is being done by Members confronted with what they consider to be circumvention” in May 2000 in parallel to the first topic. It is important that discussions and studies seek to strengthen the disciplines of the current AD Agreement so that anti-circumvention measures are not allowed to impair legitimate trade and
that developed countries have been quicker to put anti-dumping regimes in place. However, in recent years some developing countries have also begun to invoke anti-dumping measures, for example, Brazil, Korea, South Africa and India. (See Figure 5-1.)

It is important to monitor members invoking anti-dumping measures to ensure that their procedures and methods comply with the AD Agreement.

There has also been an increase in the number of anti-dumping measures taken by developing countries against the US, the EU and other active users of anti-dumping provisions. We must carefully monitor this increase in anti-dumping litigation.
## Figure 5-1

Number of Anti-Dumping Investigations, by Country

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Source: WTO semi-annual report.
Figure 5-2  
Number of Anti-Dumping Duties against Japanese Products

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Figures valid as of the end of December 2000.  
Note: Number includes price undertakings.

ECONOMIC IMPLICATIONS

Anti-dumping measures are considered special measures within the GATT/WTO framework. They enable selective imposition of duties, and therefore carry the danger of being used as discriminatory trade policies. With respect to tariff rate, multiple rounds of trade negotiations have reduced average tariff rates on industrial goods in the United States, the EU, Canada, Japan and other leading countries below 5 percent. One of the backlash from this has shown that an average rate of anti-dumping duties are in the 30-40 percent range in the US, the EU, and Canada. (Anti-dumping tariffs will differ depending on the case and the companies involved.) For this reason, once an anti-dumping measure is invoked, amount of trade of the item in question drops dramatically and in some cases ceases altogether (trade chilling effect). The impact on defendants and relevant industries is enormous.

The Influence of the Initiating Investigations

The mere initiation of an anti-dumping investigation will have a vast impact on exporters. When an anti-dumping investigation is initiated, the potential surfaces for anti-dumping duties to be imposed at some point in the future. This results in products becoming far less attractive to importers.
Initiation of an anti-dumping investigation also places significant burdens on the companies being investigated. They must answer numerous questions from the authorities in a short period of time, spending enormous amounts of labour, time and money to defend themselves. The legal costs involved are particularly high. For example, in one case involving high-volume exports to the United States, the legal fees alone were $1 million a year. Such burdens obviously have the potential to impair ordinary business activities. Thus, regardless of their findings, the mere initiation of an anti-dumping investigation is in itself a large threat to companies.

This reasoning supports the contention that investigations should only be initiated after evidence is sufficiently considered. Any decision to go ahead with an investigation must be made with the utmost care. We would also note that there are many cases in which companies simply relinquish all or part of their right to answer questions from the authorities because of the enormous burdens involved. In such cases, the rule of “facts available” (sometimes called “best information available”) applies. In “facts available” proceedings, the authorities make calculations from whatever information they have been able to gather if the company investigated has not furnished answers or is unable to prove its contentions.

“Facts available” handling is explicitly allowed by the Agreement, and should naturally apply in cases in which the company was able to respond but did not for its own reasons. But as we have noted, there are also cases in which companies are forced to relinquish their right to respond because the questions are so detailed and probing that the burden of response is too great. The paradox is obvious. Authorities, in their excessive zeal to collect detailed information and run rigorous investigations, end up having to use “facts available” procedures instead. Such procedures are also, we would note, in contravention of Article 6.13 of the AD Agreement, which states, “The authorities shall take due account of any difficulties experienced by interested parties in supplying information requested, and shall provide any assistance practicable”. From this standpoint, United States law provides that where the administering authority relies on anti-dumping complaint, the authority must corroborate the information in the petition from other information. We should watch carefully how the United States administers this provision.
Anti-dumping measures also harm companies attempting to apply normal commercial strategies and practices. This effect is illustrated in situations of “forward pricing” in advanced technology products and “business cycle” pricing in industries with high fixed costs. These two cases are explained below together with the new Anti-Dumping Agreement provisions designed to ameliorate these problems.

Forward pricing is a strategy designed to reduce costs by increasing sales volumes early in a product’s life cycle. At the start-up phase of high-tech products, prices are set at a level below the per-unit cost on the assumption that there will be a sharp reduction in such costs in the near future as production volumes increase. This practice not only enables rapid market acceptance of a product, it also allows companies to secure stable profits in a short period of time. In these high-tech industries, massive expenses may be spent to develop new products, but the increase in cumulative production volumes substantially improves production efficiency, and these productivity gains result in significant cost reductions. It is therefore common for these industries to set prices well below initial costs (See Figure 5-3.).

When an anti-dumping investigation of a forward-priced product takes place early in the product cycle, short-term average costs will still exceed domestic prices. Domestic sales will accordingly be deemed to be “below cost” and unusable for purposes of calculating anti-dumping duties. When domestic sales are unusable, the Anti-Dumping Agreement allows the use of a “constructed value” of the exported good in the dumping margin calculation. The theoretical “constructed value” in such cases will be composed of the unusually high short-term average costs plus amounts for administrative costs and profits. This “constructed value” is then compared to the actual export price, resulting in a high dumping margin.

On the other hand, concerning the cost reduction on a long-term basis in the future, it is natural that the prospect of cost reduction offered by the defendant in the investigation should not be adopted without examination. Thus it is necessary to examine whether a reasonable method can be implemented that will address this concern.

This forward-pricing problem has been partially addressed in the Anti-Dumping Agreement. The Agreement incorporates a provision calling for adjustments to properly allocate costs during the start-up period for new products. The provision calls for adjusting costs based on costs at the end of the start-up period or, if that period is beyond the period of investigation, the most
recent costs that can be taken into account when determining whether products are being sold below cost. We will need to monitor closely whether countries will accurately administer these anti-dumping procedures and make proper adjustments for start-up costs.

Figure 5-3
Illustration of Forward Pricing

In capital-intensive materials industries, such as steel, companies frequently set prices in view of the full business cycle, which results in wide swings in their ratio of fixed costs to unit production because of changes in production volumes. Since prices are also affected by the relative strength of demand and supply in the market, it is difficult to raise prices during a recession. Because of this, normal practice is to set prices under the assumption that fixed costs will be recovered over the long term. In the past, the United States has not taken into account the possibility of long-term cost recovery when dealing with
intermediates like steel. It calculated-fixed per unit costs based only on production volumes during the one-year period investigated, and because of this practice, often determined that products were being sold below cost. This practice has been criticized since 1974 for ignoring production and business cycles, and US courts themselves have rendered verdicts critical of the use of data covering only the short period under investigation. The current US practice appears to be to collect cost data for a 12-month period. The European Union engages in similar practices.

While more specific provisions regarding business cycle pricing were discussed during the Uruguay Round negotiations, only general standards for recognizing below-cost sales were included in the Anti-Dumping Agreement. These new standards restrict the recognition of below-cost sales only to situations in which such sales occur within an extended period of time, in substantial quantities, and occur at prices, which do not provide for recovery of all costs within a reasonable time. Based on these new standards, therefore, normal business cycle pricing practices such as these should be fully taken into consideration.

**Effects on Technology Transfers (Unfair Expansion of the Product Scope Subject to Anti-Dumping Duties)**

Anti-dumping duties are imposed on “like products” found by investigators to be dumped on domestic markets (GATT Article VI). However, depending on how the scope of “like products” is defined, there could be cases in which anti-dumping duties are imposed on products that are in fact different from the product subject to investigation. We are particularly concerned about vague wording in the definition of the range of products subject to dumping investigations. Care must be taken with regard to products that could or will be developed in the future so that the definition cannot be expanded beyond those products “currently” causing injury (according to the parties filing the complaint).

There are cases where the definition has been expanded to apply to future generation products not even existing at the time of the original investigation. Given the nature of the products in the cases mentioned above and the wide differences between the original and current versions of the products, authorities ought to investigate whether or not the new products, in view of the differences in technology used and markets targeted, are having a detrimental impact on the
domestic markets initially investigated. There are obvious problems in expanding the application of existing anti-dumping measures without doing so. We have strong expectations for more appropriate administration in this regard.

If the scope of investigation target is unfairly expanded by reason of “like products”, it should an adverse influence on new product development, consumer choice and, ultimately, technological advancement. This is particularly the case in high-tech industries, like electronics. Suffice it to note here that all such cases demonstrate the potential impediment to technological progress that comes from facile expansions of the coverage of “like products” in anti-dumping proceedings.

Retarding Globalization of Production

As the economy becomes more global in scope, companies are transferring their production overseas to their export markets or to developing countries where costs are lower. However, when such transfers take place for products that are subject to anti-dumping levies, they are often assumed to be attempts at circumvention. Anti-circumvention measures that inadequately distinguish between production shifting for legitimate commercial reasons and for circumvention purposes risk not only distorting trade but also shrinking investment.

Conclusion

As this discussion indicates, the economic effects of abusive anti-dumping measures can be substantial in terms of trade volume and critical to a wide range of business activities. Unfortunately, importing countries can easily resort to such practices because they can be accomplished under the guise of measures sanctioned by the GATT/WTO and the Anti-Dumping Agreement. For these reasons, use of anti-dumping measures as a means of restricting imports has increased substantially in recent years. It should also be noted that often the most serious victims of abusive anti-dumping measures are the consumers and user industries in the importing country.
JAPAN’S ANTI-DUMPING ACTIONS

Relevant to the AD Agreement, Article 8 of the Customs Tariff Law, the Cabinet Order on Anti-Dumping Duties and the Guidelines on Procedures for Countervailing and Anti-dumping Duties are Japan’s law and regulations. Up to 1991, only three anti-dumping cases had been filed in Japan, none of which led to an investigation. Japan initiated its first official anti-dumping investigation in October 1991, concerning ferro-silicon-manganese imported from China, South Africa, and Norway. In January 1993, a final determination to impose anti-dumping duties on Chinese exporters was made after a positive finding of dumping and injury and a causal relationship between them (two of the Chinese exporters agreed to a price undertaking with the Japanese government). In January 1998, this measure was terminated pursuant to the sunset clause.

In December 1993, a dumping complaint was filed on imports of certain cotton yarns from Pakistan. The investigation began in February 1994, and after a year and a half of impartial and rigorous investigation, it was found that dumped imports had in fact caused material injury to the domestic industry. An anti-dumping duty was therefore imposed in August 1995. This measure was terminated in July 2000 pursuant to the sunset clause.

In February 2001, a dumping complaint was filed on import of the part of certain polyester staple fibre from Korea and Taiwan. Should there be other dumping complaints received in the future, Japan should investigate them according to international rules in a transparent, impartial, and rigorous manner.

ANTI-DUMPING CASES
IN THE WTO DISPUTE SETTLEMENT PROCESS

Since the WTO was established, there have been a total of 33 consultations requested under the disputes settlement procedures regarding antidumping measures. (Three of these cases were brought by Japan.) In 11 cases panels have been established, and four reports had been adopted. Five cases were appealed to the Appellate Body and three reports of Appellate Body had been adopted (as of the end of February 2001; see Figure 5-5).
Below we classify these cases into three types (the cases in which Japan was the party to the dispute, the cases in which Japan participated in as a third party and other cases).
CASES IN WHICH JAPAN PARTICIPATED AS A LITIGANT

**US Antidumping Act of 1916 (DS162)**

The Revenue Act of 1916 (referred to as the “Antidumping Act of 1916” hereinafter) is US legislation dating from 1916 and imposing fines and imprisonment on parties engaged in dumping imports and sales with the intent to harm domestic US industry. The law also allows parties harmed by dumping to seek triple compensation for injury incurred.

In November 1998, US steel maker Wheeling Pittsburgh filed a suit with the Federal District Court of Ohio under the Antidumping Act of 1916 seeking civil compensation for injury and a halt to imports from nine foreign companies, including three Japanese, alleging dumping activities with the intent to harm the US steel industry and Wheeling Pittsburgh itself.

In February 1999, Japan requested bilateral consultations with United States under the WTO dispute settlement procedures. The law in question provided criminal penalties and fines as relief for dumping, rather than the anti-dumping duties allowed by the GATT, and the procedures used to initiate the investigation did not conform with the AD Agreement. In July 1999, it was decided to establish a panel, which distributed its report to all members in May 2000. Similarly, the EU also requested bilateral consultations with the US in June 1998 because of perceived WTO Agreement violations. A panel for the case was established in February 1999, and its report was distributed to all members in March 2000.

The reports of both panels upheld virtually the entire arguments made by Japan and the EU. They advised the United States to bring the Antidumping Act of 1916 into conformance with the WTO agreement, and suggested that one way of doing so would be to abolish the act.

The United States was dissatisfied with the panel reports and brought both the Japan and the EU cases to the Appellate Body in May 2000. The Appellate Body upheld the panel findings for both cases, and in August 2000 distributed a report to all members advising the US to bring the anti-dumping Act of 1916 into conformance with the WTO Agreement. This report was adopted in
September. The deadline for implementation about panel recommendation was not decided owing to failure of consultation held by Japan, the EU and the United States, and it was decided by the arbitrator from DSB. In the arbitration report, the deadline was set as for ten months, after the Appellate Body report was adopted. The government of the United States is now studying how to implement the panel and Appellate Body recommendation. Japan and the EU have asked it to abolish the 1916 statute.

In March 2000, Goss Graphic Systems, Inc., a US manufacturer of printing machines, filed a suit against Japanese and the EU companies under the Antidumping Act of 1916. This suit has continued to be litigated even after the adoption of the Appellate Body report (and is still being litigated as of this writing in February 2001). The existence of this law by itself has a detrimental impact on corporate activities. Japan has requested that the government of the United States take early remedial action, and will continue to monitor its response.

US Anti-dumping Measures Against Japanese Hot-rolled Steel Sheets (DS184)

Japan has requested consultations with the United States pursuant to the WTO dispute settlement procedures regarding the United States’ imposition of anti-dumping measures on hot-rolled carbon-quality steel product (hot-rolled steel) imported from Japan. The Japanese challenge has several aspects that include dumping margin calculation methodology, determination of “critical circumstances” (calling for retroactive dumping duties imposition), determination of injury and causal link, and unfair investigation procedures. All of which Japan considers the United States violates of the GATT and the AD Agreement.

Japan and the United States consulted in January 2000, but failed to settle the dispute. This led to the establishment of a Panel in March 2000. Brazil, Canada, Chile, the European Communities and the Republic of Korea reserved their rights to participate in the panel proceeding as third parties. In February 2001, the Panel report has been circulated to all WTO Members. The Panel report will be adopted unless appeal.

The Panel recommends the United States to bring these measures into conformity with the AD Agreement for the following reasons:
• The Panel agrees with Japanese claims the application of “facts available” by the United States Department of Commerce (DOC) in the case of three investigated respondents was inconsistent with Article 6.8 and Annex II of the AD Agreement.

• In order to establish the rate for all others (dumping margin for exporters and producers not individually investigated), DOC used each respondent's dumping margin—each of which was based on partial facts available as above mentioned—to calculate an inflated rate for all others. The Panel ruled the calculation of the all others rate was inconsistent with the Article 9.4 of the AD Agreement. Also, the United States law governing the calculation of the all others rate is, on its face, inconsistent with Article 9.4 of the AD Agreement. The Panel consequently concludes that the United States acted inconsistently with Article 18.4 of the AD Agreement and Article XIV:4 of the Marrakesh Agreement in maintaining that provision after the entry into force of the AD Agreement.

• DOC excluded certain home market sales to affiliated parties from the normal value calculation, thereby systematically inflating the dumping margins in the hot-rolled steel case either because low-priced home market sales were ignored and sometimes replaced by sales to unaffiliated downstream purchasers, i.e. higher priced sales. The Panel concluded the United States act inconsistently with Article 2.1 of the AD Agreement.

The Panel concludes the United States did not act inconsistently with its obligations under the AD Agreement for the following reasons:

• DOC’s preliminary critical circumstances determination was made before the preliminary dumping determination and based on mere allegations contained in the petition. Also, the preliminary critical circumstances determination was based on preliminary finding by the United States International Trade Commission (ITC) of threat of injury not current material injury. Japan argues DOC’s preliminary critical circumstances determination violates in several aspects. First, Article 10.6 requires that a preliminary finding of critical circumstances be based on evidence of current injury, not a mere threat of injury as had been found by ITC in its preliminary determination. Second, DOC’s critical circumstances finding was not supported by “sufficient evidence” as required by Article 10.7. Third, the evidentiary
standards governing preliminary critical circumstances findings, on their face, fail to meet the “sufficient evidence” standard of Article 10.7. The Panel dismisses the Japanese arguments.

- Concerning the determination of injury to the United States domestic industry, Japan alleges the “captive production” provision of the United States law, on its face and as applied by ITC, is inconsistent with the requirements of Articles 3 and 4 of the AD Agreement. The provision mandates, under certain specified circumstances, to focus primarily on the merchant market, not industry as a whole, in determining market share and factors affecting financial performance. The Panel concludes that neither the provision itself nor the manner in which it was applied in the hot-rolled steel case was inconsistent with the AD Agreement’s requirement.

- Japan argues that ITC injury and causation analysis is inconsistent with the AD Agreement by failing to conduct an objective examination. Japan claims the ITC focused on data for only two years of the normal three-year period of investigation. The Panel found ITC properly conducted injury and causation analysis with the requirement of the AD Agreement.

- Japan claims that the United States violated the obligation of Article X of GATT 1994 to administer its measures in a uniform, impartial and reasonable manner. Since the hot-rolled steel anti-dumping investigation was unlike any other such as accelerating all aspects of the proceedings and revising its policy concerning critical circumstances and other factors. The Panel concludes the United States did not act inconsistently with Article X of GATT 1994 in conducting its anti-dumping investigation.

**CASES IN WHICH JAPAN PARTICIPATED AS A THIRD PARTY**

*EU Anti-dumping Measures Against Indian Cotton Bed Linen (DS141)*

India initiated WTO dispute settlement procedures, alleging violations of the GATT and the AD Agreement in the EU’s anti-dumping investigation and measures for Indian cotton-type bed linen. A panel was subsequently established.

The case involved virtually the entire AD Agreement as rationale for its allegations, including the examination of the anti-dumping application, the decision to initiate anti-dumping investigation, the method of dumping margin
calculation, the method of injury determination, the method of public notice and examination of determinations, and considerations for developing country Members. However, the panel declined India's arguments on almost all points.

It should be noted, nonetheless, that Japan was significantly interested in the EU practice of “zeroing”, which the panel did find to be in violation of the AD Agreement.

In this dispute, Japan, the United States and Egypt participated in the panel proceedings as third parties and submitted their submissions. Japan’s brief argued that “zeroing” should be prohibited because it was an unfair calculation method that effectively ignored non-dumped transactions. Japan's argument was reflected in the panel findings. (The United States submitted an opinion supporting “zeroing”.)

The panel also ruled the EU’s method of injury determination and its considerations for developing county Members to be in violation of the AD Agreement.

The EU appealed the finding of the panel that EU acted inconsistently by “zeroing” the negative dumping margins. The Appellate Body upheld the finding of the Panel.

“Zeroing”

A practice applied by the United States and the EU, in which products under investigation are categorized into several types. If products of one type are found to have export prices that are higher than domestic prices, the difference is considered to be “zero”. This has the effect of artificially raising the dumping margins. (See Figure 5-4.) The Indian cotton-type bed linen case was the first time a panel had found “zeroing” to be inconsistent.
Figure 5-4
Example of Unfair Price Comparisons

<table>
<thead>
<tr>
<th>Domestic Price ($)</th>
<th>Export Price ($)</th>
<th>Dumping Margin ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transaction 1</td>
<td>115</td>
<td>95</td>
</tr>
<tr>
<td>Transaction 2</td>
<td>80</td>
<td>70</td>
</tr>
<tr>
<td>Transaction 3</td>
<td>100</td>
<td>150</td>
</tr>
<tr>
<td>Transaction 4</td>
<td>105</td>
<td>85</td>
</tr>
</tbody>
</table>

Sales volumes are all considered to be “1 unit” to simplify calculations.
*This dumping margin (-50) is calculated as “0”.

Notes: The dumping margin (DM) would be calculated as follows if zeroing were not used:

\[
DM = \frac{20 + 10 - 50 + 20}{95 + 70 + 150 + 85} \times 100 = 0 \%
\]

There would be no dumping margin. However, the use of zeroing results in the creation of an artificial margin.

\[
DM = \frac{20 + 10 + 0 + 20}{95 + 70 + 150 + 85} \times 100 = 12.5 \%
\]

Thailand Anti-dumping Measures Against Polish H-form Steel (DS122)

Poland requested the establishment of a panel because of problems in the methods used by Thailand to calculate dumping margins, determine injury,
initiate investigations, and disclose information in an anti-dumping case against Polish H-form steel. Poland alleged violations of Articles 2, 3, 5, and 6 of the AD Agreement and Article VI of the GATT. The panel was established in November 1999 and distributed its report to Members in September 2000. Thailand has appealed the case.

The panel found Thailand methods to be in conformance with the WTO for the AD Agreement Article 2 and 5 allegations, rejecting Poland’s argument. For the AD Agreement Article 3 issues, the panel upheld Poland’s claim and found Thailand's method of finding injury to be inconsistent with the agreement. The specifics are described below.

Poland took issue with the dumping margin calculation method (AD Agreement Article 2) because Thailand narrowed “the same general category of products” in calculating profits, which caused profit calculations to be overstated. The panel found in favour of Thailand because the AD Agreement does not comment on the method used to determine the “the same general category of products”. Poland also argued that Thailand calculated profits too high because it selected one of the options under Article 2 of the AD Agreement, and Thailand’s authority did not conduct a “reasonability test”. Poland argued that this was in violation of Article 2 of the AD Agreement, but the panel supported Thailand, finding that a reasonability test was not required and therefore Article 2 of the AD agreement had not been violated.

In the finding of injury (Article 3 of the AD Agreement), Poland argued that Thailand had not considered the injurious factors listed in Article 3 (specifically Article 3.4). Thailand argued that it did not have to consider all of the injurious factors listed; it was sufficient only to examine relevant factors. The panel ruled that all of the injury factors listed must be studied.

In the procedures used to initiate the investigation (Article 5 of the AD Agreement), Poland argued that the application filed by domestic Thailand industries did not include information causal relationships between dumping and injury, in violation of Article 5. The panel rejected this argument, noting that the Thailand complaint format contained a column for injury that included data, evidence and information (production capacity, market share, etc.) on the causal relationship between dumping and injury. It therefore judged there to be no problem with the format of the application. Poland also argued that Article 5.5 had been violated because there was no written “notice” of the investigation from Thailand, but Thailand responded that government officials from both countries had talked about this issue and that this was sufficient “notice”. The
The panel ruled that Article 5.5 of the AD Agreement does not obligate “notification” to be in writing.

We find the panel’s judgement on injurious findings (Article 3 of the AD Agreement) to be reasonable, but think its finding on profit calculations (Article 2) opens the door for potentially unfair profit calculations. We also find problems with its judgement that “notification” need not be in writing, because this will reduce the clarity of communications between exporting countries and importing countries.

The panel did not render any judgements on Article 6 of the AD Agreement and Article VI of the GATT because Poland's request of panel establishment was inadequate.

Thailand has appealed the case to the Appellate Body because of dissatisfaction with the panel’s ruling on burden of proof and DSU Article 6.2 requirements (the extent of notation by the member filing the complaint in its request for panel establishment). The Appellate Body is now reviewing the case.

US Anti-dumping Measures Against Korean Stainless Steel Sheets (DS179)

Korea requested the establishment of a panel in October 1999 because of violations of GATT Article VI and AD Agreement Articles 2, 6, and 12 in the imposition and calculation of dumping margins by the United States. The panel was established in November and distributed its report to Members in December 2000. This report was adopted by the DSB on February 1. Below are the highlights.

Korea argued that the United States violated Article 2.4 of the AD Agreement because the US DOC made adjustments for unpaid sales of bankrupt companies, this would not constitute a “difference that would affect price comparisons”. Korea also argued violations of Article 2.4.2 of the AD Agreement because the investigation period calculated dumping margins separately before and after the Korean won fell against the US dollar.

The United States responded that the US DOC could adjust for unpaid sales because they were indeed a “difference that would affect price comparison”, and that it was possible to divide the investigation period because transactions before and after the fall of the Korean won were not comparable.

The panel found in favour of Korea on virtually all points. For the unpaid
sales issue, it ruled that this was not a “difference that would affect price comparisons”. For the division of the investigation period, it ruled that prices alone were not sufficient to judge whether transactions before and after the fall of the won were comparable, and “differences in the relative weights by volume” must also be considered, which the US DOC failed to do.

*Argentine Anti-dumping Measures Against Italian Ceramics (DS189)*

The EU requested the establishment of a panel in September 2000 because of perceived violations of Articles 2, 6 and Annex II of the AD Agreement in the dumping margin calculation method used by Argentine for Italian ceramics and in the handling of evidence submitted by exporters. The panel was established in November 2000.

**OTHER CASES**

*Guatemalan Anti-dumping Measures Against Mexican Portland Cement (DS60, DS156)*

Mexico requested the establishment of a WTO panel, alleging violations of the GATT Article VI and several articles in the AD Agreement because the anti-dumping investigation conducted by Guatemala against Mexican Portland cement was neither unbiased nor objective. (DS60)

The biggest point of contention in this case was the relationship between the dispute settlement procedure stipulated in Article 17 of the AD Agreement and the dispute settlement procedure stipulated in the Dispute Settlement Understanding (DSU).

The panel found that Article 17 of the AD Agreement constitute *lex specialis* vis-à-vis Article 6 of the DSU and therefore determined it to be acceptable to question the agreement’s conformance of a Member’s dumping procedures even if a final anti-dumping duty had not been decided. It went on to find Guatemala in violation of its obligations under the AD Agreement.

The Appellate Body, however, found the relationship between the AD Agreement and DSU to be one of mutual complementation. The provision of Article 17 of AD Agreement did not fully replace those of DSU. Thus it
overturned the panel’s finding and dismissed Mexican suit. The interpretation in this case clarified that WTO disputes settlement procedures can be resorted to for anti-dumping violations only in the three cases specified in Article 17.4 of the AD Agreement: 1) to levy definitive anti-dumping duty, 2) to accept price undertaking, or 3) to levy provisional measures that cause significant impact.

In light of this finding, Mexico filed another panel establishment request for the same case in July 1999, and the panel was established in September. (DS156)

In the new case, Mexico claimed that the anti-dumping measures which Guatemala took did not conform with the AD Agreement on several ground: 1) sufficiency of evidence used to make the decision to initiate the investigation, 2) sufficiency of description in the application, 3) simultaneous study of evidence and rejection of applications by defendants, 4) notification period of initiation of investigation, 5) information included in the public notice of the initiation of investigation, 6) failure to provide the application for anti-dumping investigation to the defendants, 7) handling of confidential information submitted, 8) insufficient opportunity for response by defendants when investigation period was extended, 9) use of only “best information available” in making final determination. The panel report found that the anti-dumping measures Guatemala took did not conform to the AD Agreement. The panel report was adopted in November 2000.

US Anti-dumping Measures Against Korean DRAM (DS99)

The United States has conducted administrative reviews of dumping margins ever since it imposed anti-dumping duties on Korean semiconductors (DRAMs) in 1993. During the third annual review, Korean companies requested the US Department of Commerce to revoke the anti-dumping order because there had been three consecutive years of no dumping. The administrative review found that Korean companies had not dumped, but did not revoke the anti-dumping order.

Korea requested consultations under the WTO dispute settlement procedures, alleging that the United States Department of Commerce (DOC) regulations and the third annual review results violated the GATT and the AD Agreement.

The main point of this dispute was whether the DOC regulation section
353.25(a)(2) was consistent with the “likely” standard in Article 11.2 of the AD Agreement. The DOC regulations stipulate that the Secretary [of Commerce] may revoke an order if the Secretary concludes that (1) One or more producers or resellers covered by the order have sold the merchandise not less than foreign market value for a period at least three consecutive years; (2) It is not likely that those persons will in the future sell the merchandise at less than foreign market value.

The panel found the DOC regulation is not consistent with the AD Agreement because the “not likely” standard did not conform to the “likely” standard in Article 11.2. Furthermore, the third administrative review results not to revoke the anti-dumping duty order on Korean DRAMs is inconsistent with the AD Agreement since the results was based on the “not likely” criterion. The panel recommended the United States to bring the DOC regulations, and the third administrative review results, into conformity with the obligation under Article 11.2 of the AD Agreement.

The United States did not appeal the panel findings. To implement the recommendation, DOC amended its regulations and conducted the third administrative review based on DOC amended regulations. However, the anti-dumping order was not revoked. Korea asserted the United States failed to implement faithfully the recommendation and requested the establishment of a panel to determine whether the United States complied. This panel was established in April 2000.

However, this panel suspended its work. Korea and the United States notified the DSB of a mutually satisfactory solution, and the anti-dumping order on DRAMs was revoked as the result of a five-year “sunset” review by DOC. Thus, the analysis of consistency of the amended DOC regulations with the AD Agreement was not conducted.

**Mexican Anti-dumping Measures Against US High Fructose Syrup (DS132)**

In 1997, Mexico initiated an anti-dumping investigation against imports of US high fructose corn syrup at the request of Mexico's National Chamber of Sugar and Alcohol Industries (Sugar Chamber). It reached a final determination on anti-dumping duties in 1998. The US requested the establishment of a panel for the case in October 1998, alleging violations of Articles 1, 2, 3, 4, 5, 6, 7, 10 and 12 of the AD Agreement because of problems with Mexican anti-dumping
procedures, specifically: 1) the initiation of the anti-dumping investigation, 2) the final determination on anti-dumping duties, 3) the period of application for a provisional anti-dumping duties, and 4) the retroactive application of provisional anti-dumping duties. The panel was established in November and its report was adopted in February 2000.

The panel report found that the Mexico conformed to the Agreement in its procedures for initiating the investigation. The application filed by domestic Mexican industry satisfied the requirements of Article 5.2 and the Mexican authorities publicly announced the initiation of the investigation. However, in the final determination on anti-dumping duties, the panel found that Mexican authorities did not fully consider all of the matters to be studied when verifying “threat of injury” (Article 3.4 and 7 of the AD Agreement). It ruled the determination to be in violation of Article 3 of the AD Agreement because the scope of the verification did not include the entire domestic industry.

The Mexican authorities imposed provisional anti-dumping duties in excess of the period stipulated in Article 7 of the AD Agreement (6 months), and the panel ruled that the continuation of provisional duties beyond 6 months violated Article 7.4. It also found that Mexico failed to satisfy the provisions of Article 10.2 of the AD Agreement for the retroactive application of provisional anti-dumping duties, and ruled that Mexico had violated Articles 10 and 12 of the AD Agreement.

Mexico followed the recommendations of the panel report, publishing a new “final solution” for the anti-dumping measure and refunding the provisional anti-dumping duties. The United States, however, requested a panel to judge the conformance of Mexican fulfilment of the advisory under the provisions of Article 21.5 of the DSU because of dissatisfaction with the WTO conformance of the measures taken by the Mexican authorities.
### Figure 5-5

Anti-dumping Cases in the WTO Disputes-settlement Process After the Establishment of the WTO (as of the end of February 2001)

<table>
<thead>
<tr>
<th>DS number</th>
<th>Date of requested consultation</th>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Commodity concerned</th>
<th>Situation</th>
</tr>
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<tbody>
<tr>
<td>DS23</td>
<td>1995.12.5</td>
<td>Mexico</td>
<td>Venezuela</td>
<td>Certain Oil Country Tubular Goods</td>
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<td>1996.7.1</td>
<td>Mexico</td>
<td>United States</td>
<td>Fresh and Chilled Tomatoes</td>
<td>Termination</td>
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<tr>
<td>DS60</td>
<td>1996.10.15</td>
<td>Mexico</td>
<td>Guatemala</td>
<td>Portland Cement</td>
<td>The appellate body report was adopted</td>
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<tr>
<td>DS63</td>
<td>1996.11.28</td>
<td>European Union</td>
<td>United States</td>
<td>Solid Urea from the Former German Democratic Republic</td>
<td>Consultation</td>
</tr>
<tr>
<td>DS89</td>
<td>1997.7.10</td>
<td>Korea</td>
<td>United States</td>
<td>Colour Television Receivers</td>
<td>Korea’s withdrawal</td>
</tr>
<tr>
<td>DS99</td>
<td>1997.8.14</td>
<td>Korea</td>
<td>United States</td>
<td>Dynamic Random Access Memory Semiconductors</td>
<td>The panel report was adopted</td>
</tr>
<tr>
<td>DS101</td>
<td>1997.9.4</td>
<td>United States</td>
<td>Mexico</td>
<td>High-Fructose Corn Syrup</td>
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<tr>
<td>DS119</td>
<td>1998.2.20</td>
<td>Switzerland</td>
<td>Australia</td>
<td>Coated Wood Free Paper Sheet</td>
<td>Mutually agreed solution</td>
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<tr>
<td>DS122</td>
<td>1998.4.6</td>
<td>Poland</td>
<td>Thailand</td>
<td>Iron or Non alloy steel and H-beams</td>
<td>The appellate body report was adopted</td>
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<td>1998.5.8</td>
<td>United States</td>
<td>Mexico</td>
<td>High-Fructose Corn Syrup</td>
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<td>DS136</td>
<td>1998.6.9</td>
<td>European Union</td>
<td>United States</td>
<td>Anti-Dumping act of 1916</td>
<td>The appellate body report was adopted</td>
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<td>DS140</td>
<td>1998.8.3</td>
<td>India</td>
<td>European Union</td>
<td>Unbleached Cotton Fabrics from India</td>
<td>The appellate body report was adopted</td>
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<td>DS141</td>
<td>1998.8.3</td>
<td>India</td>
<td>European Union</td>
<td>Cotton-Type Bed-Linen</td>
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<td>Guatemala</td>
<td>Gray Portland Cement</td>
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<td>Argentina</td>
<td>Drill Bits from Italy</td>
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## Chapter 5  Anti-Dumping Measures

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<th>Case Number</th>
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<th>Country</th>
<th>Description</th>
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<td>South Africa</td>
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<td>DS179</td>
<td>1999.7.30</td>
<td>Korea</td>
<td>United States</td>
<td>Stainless Steel Platen Coils and Stainless Steel sheet and strip</td>
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<td>DS184</td>
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<td>DS185</td>
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<td>DS187</td>
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<td>DS203</td>
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<td>DS217</td>
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<td>Australia, Brazil, Chile, European Union, India, Indonesia, Japan, Korea, Thailand</td>
<td>United States</td>
<td>Amendment to the Tariff Act of 1930 signed on 29 October 2000 with the title of &quot;Continued Dumping and Subsidy Offset Act of 2000&quot;</td>
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<td>DS219</td>
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PROBLEMS OF TRADE POLICIES AND MEASURES IN INDIVIDUAL COUNTRIES

1. UNITED STATES

While the United States is one of the most open markets in the world, it still has elements of unilateralism and protectionism in its trading systems. Anti-dumping legislation is perhaps the largest source of hidden protectionism in the United States, and many countries have complained about its shortcomings. Some of these problems have been remedied in the Uruguay Round implementation legislation, in which the United States brought certain parts of its anti-dumping system in line with the new Anti-Dumping Agreement. This progress is among the most noteworthy achievements of the eight-year long Uruguay Round negotiations. Notwithstanding these improvements, there are two concerns. First, in some areas, the US implementing legislation could be interpreted or applied in ways that may be inconsistent with the Anti-Dumping Agreement. Second, even in areas where the implementing legislation seems to be clear, there is a concern that actual practice under the new provisions might violate the intent of the Anti-Dumping Agreement. Therefore, it will be very important to monitor closely the future administration of the US anti-dumping law and, if any problems exist, to point them out.

Problems Involved in Determining Dumping

The United States has restructured the basis for price comparison. There are three major new elements to the comparison. First, the new law adds a provision to deduct from the “constructed export price” (which replaces the prior “exporters sales price”) an allocated portion of total profit. Second, the new law clarifies the importance of making comparisons at comparable levels of trade and revising the provisions on level of trade adjustments. Third, the new laws limits the offset for indirect selling expenses to those situations where a proper level of trade comparison or level of trade adjustment cannot ensure price comparability (the CEP offset).
Chapter 5  Anti-Dumping Measures

The new laws state that the profit of a related importer shall be deducted from the constructed export price. However, it is not clear how profit in the normal value shall be accounted for. We need to monitor this point. In addition, US law prescribes several factors to be considered in determining “affiliated parties”, but in actual administration the authorities consider only the percentages of shares held. This raises the risk that parties that are not, in essence, “affiliated parties” will nonetheless be deemed to be so.

Problems Involved in Determining Injury

The AD Agreement contains no provisions for aggregating the effect of dumping exports and subsidized exports when assessing injury (so-called “cross cumulation”). The United States argues that cross cumulation is obvious, but if the United States were to conduct this in actual administration, it would likely violate against attributing to injury caused by other factors as stipulated Article 3.5 of the AD Agreement.

In addition, the “captive production” provision of the new anti-dumping statute allows, if certain conditions are met, exclusion of the internal consumption of the United States industry from the domestic production volume that serves as the denominator in calculations of market share for imported goods under investigation. This tends to overstate changes in import share when analyzing injury. The United States bases this measure on the idea that imports that do not compete with domestic production are excluded from the numerator (products consumed by the importers), so that both numerator and denominator are adjusted. However, in some sectors there is significant unevenness in the adjustments between the two, so the administration of this provision will need to be monitored in the future.

Problems Involved Scope of Anti-dumping Duty

The scope of anti-dumping duty is largely left up to the discretion of investigating authority, and this is an area that often causes problems, as was discussed earlier (see the “Effects on Technology Transfers” section, above). Specifically, in areas like semiconductors, anti-dumping duties may also be applied to later developed products in addition to the products originally subject to duties. This has been taken issue with as an arbitrary expansion of application
to later developed products. Determination of the scope of products subject to anti-dumping duties must be approached with extreme care, and the scope should not be needlessly expanded. If application is to be expanded to later developed products, the original investigation should be redone.

The Byrd Amendment (The Fiscal Year 2001 Agricultural Appropriations Bill)

In October 2000, the US Congress passed the Fiscal Year 2001 Agricultural Appropriations Bill, which included a provision amending the Tariff Act of 1930 so as to distribute the revenues collected from anti-dumping duties and countervailing duties to domestic US companies filing complaints (this is called the “Byrd amendment” because it was submitted by Senator Byrd). The president signed this Act into law.

Japan, the EU, Korea, Canada and Australia all expressed reservations about the Byrd amendment before it passed and protested to the US Congress and executive branch. The amendment has also been on the agendas of the WTO Anti-dumping Committee and Subsidies Committee, and 12 members have expressed concerns about its conformance to the WTO Agreement.

There are two specific concerns about the measure. First, the imposition of anti-dumping duties can only be interpreted as a tool to counteract or prevent dumping activities, but in addition to relief from the imposition of anti-dumping duties, the amendment would distribute subsidies (distributions constitute subsidies), which is not in conformance with the WTO. (For a discussion of problems related to the Subsidies Agreement, see Chapter 6 “Subsidies and Countervailing Duties”.) Second, the amendment gives an unnecessary incentive to plaintiffs and has the potential to foster abuse in seeking the initiation of anti-dumping investigations. It is therefore extremely problematic from the perspective of maintaining the free-trade system.

In December 2000, Japan joined with Australia, Brazil, Chile, the EU, India, Indonesia, Korea and Thailand in jointly requesting consultations with the United States under the WTO dispute settlement procedures. (Argentine, Canada and Mexico requested to be included in the consultations as third countries, but the US refused.) The request for WTO consultations so early after the legislation was designed to highlight the legal problems with the Byrd amendment, to strongly urge the United States to abolish it, and to prevent other members from passing similarly protectionist legislation.
Sunset Provision

Because past US anti-dumping laws lacked a sunset provision such as that provided by the European Union, Australia, Canada, and other countries, there was no time limit on orders imposing anti-dumping measures. Consequently, anti-dumping duties tend to remain in force much longer in the United States than in other importing countries (see Figure 5-6).

The AD Agreement provides for a “sunset clause” for the first time ever (Article 11.3). Anti-dumping duties automatically expire at the end of five years unless the duties are reviewed and found to have a positive impact on both dumping and injury. This led to the inclusion of a sunset clause in the new US Anti-dumping law. Under the law, all anti-dumping measures imposed prior to 1 January 1995 will be reviewed in order beginning July 1998 (Sunset Reviews). Some 46 antidumping measures against Japan have come up for review, and 29 had been terminated by 1 January 2000 (number as of November 2000). The introduction of sunset reviews for antidumping measures was one of the results of the Uruguay Round negotiations, and we need to monitor the more than 300 reviews currently in progress to ensure that they are administered in an appropriate manner.
Anti-Dumping Measures  Chapter 5

Figure 5-6
Revoke or Continuance of Anti-dumping Duties
(1970-present; products imported from Japan)

<table>
<thead>
<tr>
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<tbody>
<tr>
<td></td>
<td>Duties in</td>
<td>Total</td>
<td>Duties</td>
</tr>
<tr>
<td></td>
<td>Effect</td>
<td>Cases</td>
<td>Revoked</td>
</tr>
<tr>
<td>US</td>
<td>3</td>
<td>61</td>
<td>31</td>
</tr>
<tr>
<td>EU</td>
<td>0</td>
<td>34</td>
<td>27</td>
</tr>
<tr>
<td>Canada</td>
<td>0</td>
<td>15</td>
<td>12</td>
</tr>
</tbody>
</table>

Note: Figures valid as of the end of November 2000.

Actions by the United States Steel Industry

Since the summer of 1997, the US steel industry and labour unions have filed antidumping complaints against steel products in 14 categories from 33 countries including Japan. Anti-dumping investigations or measures have been implemented for 13 categories of steel products that account for a combined 80 percent of Japanese steel exports to the US. The government of Japan has used diplomatic and other channels to express its concerns over the protectionist aspects of this abuse of the antidumping regime. The government also studied the WTO-conformance of measures at the request of our steel industry. As a result, the government of Japan request for the establishment of a panel pursuant to Dispute Settlement Understanding regarding the anti-dumping measures on import of Japanese hot-rolled steel sheets. (See the “US Anti-dumping Measures Against Japanese Hot-rolled Steel Sheets (DS184)” section, above.)

We will need to continue to monitor anti-dumping measures against other steel products for conformity to the WTO Agreement.
2. **EUROPEAN UNION**

Anti-dumping is an area of hidden protectionism in the European Union. Recent EU legislation contained amendments to bring European practice into line with the new anti-dumping Agreement. We consider this to be one of the major successes of the Uruguay Round negotiations. However, regarding abuse in this area which seems to have become common practice, there are legitimate concerns that abuse may continue where discretion is allowed even if the EU implementing legislation do not seem to violate the Agreement. This is especially the case in the European Union because authorities have greater discretionary powers than they do in the United States, and it is still too early to tell whether past administrative practices will really be corrected. It will, therefore, be necessary to monitor the administration of the new EU Anti-dumping provisions for conformity to the Anti-Dumping Agreement.

*Recent Trends*

The number of complaints being filed has declined in comparison to the 1980s and the revocation of anti-dumping duty orders has increased. However, there are still problems. The price comparisons used for the personal facsimiles case that began in 1997 lack fairness and the definition of relevant products for the laser optical reading system for use in motor vehicles (car audio) case is unjustifiably broad and arbitrary. (This investigation was terminated without imposing anti-dumping duties.) In June 1998, the EU initiated an anti-circumvention investigation against Japanese television camera systems, although there was no rationale under the WTO for such investigation. (This investigation terminated in February 1999. However, the EU initiated an anti-dumping investigation on their own initiative of certain parts of television camera system at the same time. The European Commission proposed an anti-dumping duty imposition, but there was no majority in favour among the member states. This case was terminated when its deadline passed.) The EU also appears to be attempting to expand the scope of anti-dumping duty order in its review investigation for the personal facsimiles case.

Other anti-dumping complaints brought against Japan include malleable cast iron or pipe fittings (initiated in May 1999), black colorformers for use in paper coating applications (initiated in July 1999), and internal gear hubs for bicycles (initiated in July 2000).
Problems Involved in Determining Dumping

Under EU practice, when a company employs an affiliated importer in the export market, the EU applies asymmetrical rules to adjust the prices. For domestic prices, the European Union deducts only direct selling expenses, while for export prices the European Union deducts direct and indirect selling expenses as well as profits. This leads to an overstatement of domestic prices, which makes it easy to artificially create and expand dumping margins (See Figure 5-7).

This problem affects every determination of dumping in cases involving affiliated importers; the degree of the problem is the only variable in any particular case. The ubiquitousness of this problem makes it especially serious. With respect to a case involving anti-dumping duties on Japanese audiocassette tapes, a panel was established in October 1992. The panel reported in April 1995 and found EU price comparison methods and related rules to be in violation of the Anti-Dumping Agreement. The report was not adopted because of opposition by the European Union. The European Union, however, revised its AD regulations in December 1996 partly in response to the panel's recommendation. Nevertheless we still need to monitor how the new regulations will be administered.

Note: Asymmetrical Comparison of Normal Value and Export Price in the European Union

The Agreement stipulates that when calculating dumping margins, comparisons between export prices and domestic prices must be fair, and that any differences affecting price comparability must be adjusted for. However, what the European Union did was to only allow direct selling costs to be deducted from the domestic price, while from the export price it deducted full direct and indirect selling costs of affiliate companies and also the profits of affiliate companies. This overstated the domestic price and resulted in the creation and expansion of the dumping margin.
Figure 5-7
Asymmetrical Comparison of Normal Value and Export Price in the European Union

Margin of dumping is the difference between "(A)Normal value" and "(B)Export price".

Notes:
(1) Net sales price 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 percent to direct selling expenses and 50 percent to indirect selling expenses)
(3) EU considers all the advertising expenses as indirect selling expenses.

After the EC regulation amendment, it has been possible to compare price symmetrically such as inclusive indirect expenses' adjustments in comparison of constructed export prices.
Deduction of Anti-dumping Duties as Costs

Under the EU policies governing refunds, when a request for a refund of anti-dumping duties is made and the import transaction is carried out by an affiliate of the exporter, there are problems stemming from the way in which constructed export prices are calculated. The price used to determine the existence of dumping is reduced by the amount of anti-dumping duties already paid (in calculating constructed export prices for the purpose of refunds, the amount of tax is deducted from the resale price along with sales and administrative expenses and profits). In effect, the European Union will not make a full refund of an anti-dumping duty unless the resale price is raised by at least twice the amount of the dumping margin (See Figure 5-8). This same problem has also been seen in reviews of anti-dumping measures (the case of Japanese bearings).

The issue arose because there are cases in which the anti-dumping duty that is supposed to be reflected in the export price is not reflected adequately because of the mediation of affiliated importers. The rule seeks to counteract such opaque dealings on the part of the exporters. The Anti-Dumping Agreement stipulates that no deduction for anti-dumping duties paid should be applied in determining the amount of duties to be refunded, if conclusive evidence is provided (Article 9.3.3). The EU amended its Directive 11 (10) to bring it in line with these provisions. We will need to continue to monitor administration of the EU rules.
The “Duty as a cost” rule is always applied to cases in which export sales are made through an importer associated with the exporter.

As shown in the above, in the case of associated importers, the export price (1), which is compared with the domestic price, is calculated by deducting the costs and profit of company A-EU from the sales price (2) to an independent purchaser.

<table>
<thead>
<tr>
<th></th>
<th>Original Investigation</th>
<th>Refund without “duty as a cost”</th>
<th>Refund with “duty as a cost”</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Normal value (ex-factory)</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>B. Export price (1) Price to first independent purchaser</td>
<td>110</td>
<td>120 (dumping eliminated)</td>
<td>120 (dumping eliminated)</td>
</tr>
<tr>
<td>(2) Deduction of costs and profit of associated importer</td>
<td>-15</td>
<td>-15</td>
<td>-15</td>
</tr>
<tr>
<td>(3) Deduction of costs from factory to CIF point of importation</td>
<td>-5</td>
<td>-5</td>
<td>-5</td>
</tr>
<tr>
<td>(4) Deduction of AD duty</td>
<td>--</td>
<td>--</td>
<td>-10</td>
</tr>
<tr>
<td>(5) Constructed Export price (ex-factory) (=(1)-(2)-(3))</td>
<td>90</td>
<td>100</td>
<td>90 (=(1)-(2)-(3)-(4))</td>
</tr>
<tr>
<td>C. Dumping amount (=(A-(5)))</td>
<td>10</td>
<td>0</td>
<td>10</td>
</tr>
</tbody>
</table>
Problems Involved Scope of Anti-dumping Duty

We have already considered problems in the identification of “like” products (see the “Effects on Technology Transfers” section, above). During the review, the EU included products such as high-speed copy machines and high-performance television camera systems that were not part of the original anti-dumping investigation, and it ultimately expanded the scope of the products on which duties were imposed. The investigation into Laser Optical Reading System (presumed primarily to consist of car CD decks) that was initiated in October 1997 also used an extremely broad definition that tries to encompass products that the parties filing the complaint were not even producing, products that were clearly not “like products” and that include the components that were not the subject of the complaint. The investigation was terminated without finding any injury and causation. We will need to continue to monitor to ensure that any future investigations are conducted with fair and rigorous similar products definitions.

3. OTHER COUNTRIES

In addition to the United States, the EU, Australia, Canada, and other long-time users of anti-dumping measures, a number of developing countries have also begun to invoke anti-dumping measures. There has been a particularly strong increase in the number of anti-dumping investigations and duties against Japan taken by China, India, Indonesia, Venezuela, and Mexico. We will need to monitor the administration in these countries to comply with the AD Agreement.

INDIA

In recent years, India has had more anti-dumping measures against Japan than any other developing country, and most of the measures are concentrated in chemical products.

India’s anti-dumping law took effect in 1985, but had not been invoked until recent years. No sooner were Indian tariffs reduced, however, then anti-dumping measures began to be seen, and they continue to increase. This is probably the result of the new competition faced by domestic Indian industries that had long been protected by high tariff rates.
Further reductions in Indian tariffs are anticipated, and we are concerned that they will lead to more anti-dumping measures against other sectors as well.

**INDONESIA**

Indonesia has had two applications for initiation of anti-dumping investigation against Japanese products (tin and steel pipe). The application covered items that were not manufactured domestically in Indonesia or could only be supplied by the plaintiffs at great difficulty. It is therefore doubtful whether Indonesian industry has been injured by the products.

**CHINA**

China formulated its anti-dumping law 1997 and has had anti-dumping applications against six items and nine countries. Two of these applications have been against Japan, in stainless steel cold rolled sheets and acrylic ester. The final affirmative determination on the stainless steel cold rolled sheets in December 2000 found against Japan.

China’s anti-dumping law has provisions that are clearly in violation of the WTO and the AD Agreements (for example, retaliatory measures). Nor has China sufficiently protected the rights of defendants, particularly in information disclosure. In as much as China is negotiating membership in the WTO, we urge it to bring its law and its administration in conformance with the WTO and AD Agreements.

There are some commentators who anticipate an increase in anti-dumping applications by Chinese companies in the future, so we will need to vigilantly monitor the anti-dumping measures taken by Chinese authorities. (See also Chapter 16 “WTO Accession for China, Russia, and Taiwan”.)

**LATIN AMERICA (MEXICO, BRAZIL, VENEZUELA)**

Latin American countries had not had any anti-dumping application against Japan after the start of the WTO, but since 1998 there have been seven applications filed (2 in Mexico, 1 in Brazil, 2 in Argentine, and 2 in Venezuela).
Many of the anti-dumping applications were filed right after local companies had failed to win international tenders (applications are primarily against steel products). In one case, the plaintiff was deemed ineligible to participate in the tender because of lack of technical capacity. One must focus on whether Japanese products are really causing injury in such cases.