NECESSITY OF ANTI-CIRCUMVENTION RULES IN KOREAN ANTIDUMPING PROCEDURES

by

Baik, Seung-Gwon

THESIS

Submitted to
KDI School of International Policy and Management
in partial fulfillment of the requirements
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ABSTRACT

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This dissertation presents some of the practical problems experienced in the procedures of the antidumping duties, and continues with suggestions for the necessity of introducing anti-circumvention rules in Korean antidumping procedures.

Dumping is the sale of a product for export at a price less than its normal value. Despite the pursuit of the free trade principle, GATT Article Ⅵ allows WTO Members to take discriminatory and remedial measures against the unfair trade practices of trade partners. One of the remedial measures is an antidumping duty. However, exporters are attempting to circumvent the antidumping duty orders.

One of the key goals of the U.S. and the EU in negotiating new provisions in the GATT Antidumping Code was to adopt a specific provision permitting WTO Members to address the circumvention of antidumping duty orders. At the end of the day, however, a consensus

simply could not be reached on the issue. Rather, the most that the U.S. and EU could get was statement in the Ministerial Declaration issued at Marrakesh. And pursuant to the Ministerial Decision, the Informal Group on Anti-Circumvention was established by the Committee on Antidumping Practices. Now the Informal Group is trying to seek uniform rules on anti-circumvention.

After the WTO entered into force in January 1995, Korea has no longer victimized by antidumping actions. Indeed, many Korean companies are now being injured by dumped exports from China, Southeast Asian countries and Japan. In 1997, Korea was also party to an antidumping case that was related with anti-circumvention, namely, a case involving "non-refillable disposable pocket lighters" from China. And despite the absence of multilateral rules, a number of countries have adopted anti-circumvention provisions unilaterally. Thus, this paper suggests that Korea needs to adopt anti-circumvention rules to effectively enforce the antidumping duties that it imposes.

Key words : dumping, antidumping duty, circumvention, anti-circumvention rule, minor alteration, later-developed product.

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Ⅰ INTRODUCTION

We can define circumvention as the evasion of antidumping duty measures by modifying or altering marginally the physical nature, production or shipment of merchandise otherwise subject to antidumping duty measures, in a manner which ultimately undermines the purpose and effectiveness of remedies provided under the WTO Antidumping Agreement.[1)]

Korea has been one of the main targets of the antidumping proceedings by the four users of antidumping measures - the United States, the European Union, Canada and Australia. Many Korean industries subject to antidumping duties went through severe hardships. Some industries even collapsed when they were subject to antidumping duties in their major markets. For example, the Korean album industry collapsed almost entirely when albums were subject to antidumping measures in the United States, because that industry was composed of many small companies and depended heavily on their exports to the United States.

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1) Agreement on Implementation of Article Ⅵ of the General Agreement on Tariffs and Trade 1994, in Annex Ⅰ. of the Agreement Establishing the World Trade Organization.

However, as the General Agreement of Tariffs and Trade (GATT) entered into force on 1 January 1995, more products have become subject to import liberalization and the tariff rates have been lowered. It became more difficult to resort to the non-tariff barriers because the Agreement on Technical Barriers to Trade, concluded as a part of the UR negotiations, severely restricts the use of the non-tariff barriers. Therefore, it is expected that there will be a growing need to protect domestic industries through antidumping measures.

Dumping is the sale of a product for export at a price less than its normal value, which is usually understood to be the price at which those same products are sold on the "home or exporting markets". Despite the pursuit of the free trade principle, GATT Article VI allows WTO Members to take discriminatory and remedial measures against the unfair trade practices of trade partners.

However, exporters are attempting to circumvent the antidumping duty orders. In 1997, Korea was also party to an antidumping case that was related with anti-circumvention, namely, a case involving "non-refillable disposable pocket lighters" from China.[2] After preliminary

2) See section Ⅳ 3.

measures were taken, the exporters altered them into the refillable lighters which were slightly modified versions of the disposable lighters subject to the antidumping duties, and asserted that they were not to be the "like products". So Korea Trade Commission (KTC) suffered difficulties to make a decision about that antidumping. Thus, although the WTO Antidumping Agreement does not address the issue of circumvention, it needs to adopt anti-circumvention rules into the Korean antidumping procedures.

This paper presents some of the practical problems experienced in the procedures of the antidumping duties, and continues with suggestions for the necessity of introducing anti-circumvention rules in Korean antidumping procedures.

The structure of the current study is the following. Section Ⅱ provides an overview of the antidumping system of the GATT/WTO rules and Korea. GATT Article Ⅵ allows WTO Members to take discriminatory and remedial measures against the unfair trade practices of trade partners. Korea enacted the antidumping law in the Customs Act[3] in 1963. Korea, however, had not initiated investigation of antidumping

3) Available at e-mail: http://www.mocie.go.kr/ktc/.

cases until the Korea Trade Commission (KTC) was established in July 1987. Section Ⅲ describes what constitutes circumvention, and what are the elements for circumvention. Hypothetical examples are given as well. Then the anti-circumvention law of the United States is explained. There are four types of circumvention: U.S. manufacturing; third country manufacturing; minor alteration; and later developed product. Section Ⅳ examines results of the multilateral negotiations on the issue of circumvention in the Informal Group on Anti-circumvention, in order to explain why anti-circumvention rules are needed in the Korean antidumping system. It also examines a Korean antidumping case that was related with anti-circumvention, namely, a case involving "non-refillable disposable pocket lighters" from China in 1997.

Section Ⅴ concludes with a brief summary of the previous sections and some suggestions for Korean antidumping procedures. The Dunkel Draft is appended, which suggested measures to prevent circumvention of definitive antidumping duties during the Uruguay Round negotiations. It will be helpful in making the future Antidumping Agreement on anti-circumvention.

Ⅱ OVERVIEW OF THE ANTIDUMPING SYSTEM

A. Economics of Dumping

For more than a century the international trade policy rules have recognized that "dumping" is a practice that "is to be condemned," and have allowed an importing country to take certain countermeasures, at least when the dumped goods cause "material injury" to competing industries in the importing country. The definition of dumping as described in GATT and elsewhere, is often expressed as the export of products at a price less than "normal value," which roughly means the price at which those same products are sold on the "home" or exporting markets. In other words:

home-market sales price - export sales price = margin of dumping

When that margin is greater than zero, there is "dumping" in the sense used in the international trade policy.

With respect to the core idea (export sales at prices lower than home-market sales), what is the underlying policy that has led the international trading community for more than a century to consider "dumping" to be an action that is somehow "unfair"? This is a question

that is not easy to answer. The original focus on the "price difference" can be described as one on the "price discrimination."[4] There seems to be a notion that sales at different prices to different persons are somehow unfair.

An example of the interface problem and the difficulty of defining unfairness can be seen in the following example, which focuses on the so-called variable cost analysis.[5]

It may arise in the context of two economies that differ only slightly in their acceptance of basic free-market economic principles. As the example demonstrates, given such similarities, differences may exist between the ways the respective economies operate over the course of the business cycle that could create situations that are considered unfair, even though these differences may not have resulted from any consciously unfair policies or practices.

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4) Krugman & Obstfeld (1997), pp. 142-147.

5) For further details on unfair trade and the rules of dumping, see John H. Jackson (1997).

< John H. Jackson's numerical Example>

Take an industrial sector (such as steel) in two economies (such as the United States and Japan) with the following characteristics:

Society A is characterized by:
Worker tenure (no layoffs of workers)
Capitalization with a high debt-equity ratio (e.g., 90 percent debt)

Society B is characterized by:
No worker tenure (wages for workers are therefore variable costs)
Capitalization with low debt-equity ratio (e.g., less than 50 percent; dividends can be skipped)

In times of slack demand, economists note that it is rational for a firm to continue to produce as long as it can sell its product at or above its short-term variable costs. This is true because it must in any event pay its fixed costs. Of course, this is true only for limited periods; presumably over the regular course of the business cycle, the firm must not incur losses in the long term.

An analysis of the short-term variable cost of firms in Societies A and B can be detailed as follows:

Costs of a firm (per unit of production)	Society A	Society B
Plant unkeep	20 fixed	20 fixed
Debt service	90 fixed	50 fixed
Dividends (cost of capital)	10 variable	50 variable
Worker costs	240 fixed	240 variable
Cost of materials	240 variable	240 variable
Total "costs" (per unit of production)	600	600
Fixed	350	70
Variable	**250**	**530**

Source : Jackson, John H., 1997, *The world trading system: law and policy of international economic relations (2nd)*, pp. 249-250.

Thus, total average "costs" in both societies are the same, but as noted here, it will be rational for producers in Society A to continue production as long as they can obtain a price of 250, whereas producers in Society B need to receive a price of 530. Thus, in a period of falling prices and demand, the producers in Society A can be expected to garner, through exports to Society B, the increasing share of Society B's market. Suppose this happens and the firms in Society B go out of business. Are Society A's exports to Society B unfair? No easy answers exist to such question. That is why most international economists support competition policy.

B. GATT/WTO Rules on Antidumping[6)]

Although most international economists do not refute the superiority of free trade over protection in improving national welfare, policy makers in most countries except for a few city states actively practiced some form of trade protection. Multilateral trade negotiations have brought

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6) Most of this section mainly draws from Section 2 of Mah, Jai S. "The United States antidumping decisions against ASEAN" (1999 a).

down average tariffs to alleviate the trade barriers. Tokyo Round in the 1970s began to alleviate the non-tariff barriers practiced by the then GATT contracting parties. Important advances have been made in the Uruguay Round negotiations to guarantee the freer and more transparent trade policies of the WTO Members: mandatory, not voluntary, nature of various Agreements on the non-tariff barriers; strengthening the dispute settlement mechanism; and comprising new areas such as trade in agricultural goods, trade-related intellectual properties, and trade in services. However, despite the successive, multilateral trade negotiations, the uses of contingent protection such as antidumping have been certainly on the increase.

In economic sense, it is needed to check whether antidumping laws enhance world welfare or not. One of the recent works on this subject showed that,[7] provided the trade barrier is a pure resource cost like a transport cost, social surplus is greater when there exist worldwide antidumping laws than without them. Thus, lobbying activities by firms leading to antidumping legislation can be welfare improving. It suggests that the use of antidumping laws by the members of the global trading

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7) See Anderson, Schmitt, and Thisse (1995) for further details.

system could be seen as a cooperative agreement on the part of governments. In this setup, not only does the WTO allow antidumping laws but should encourage them to be strictly applied.

Legally, GATT Article Ⅵ allows the Members of the WTO system (contracting parties of the GATT system until the end of 1994) to take discriminatory, remedial measures such as antidumping and countervailing duties against the unfair measures of the trade partners under certain conditions. As are similar in other Articles like XX(general exceptions), XXI Ⅳ nternational economic integration), and XXV Ⅵ is exceptional in the spirit of the GATT/WTO system in the sense that it allows exception to the most-favored-nation (MFN) treatment (Article Ⅰ which constitutes one of the mainstays of the WTO system together with the national treatment (Article Ⅲ There are three basic conditions to antidumping decisions in GATT Article Ⅵ first, the existence of the dumping margin; second, material injury to the concerned industry; and, third, causal relationship between dumped imports and the material injury to the industry.[8)]

8) GATT, The results of the Uruguay Round of multilateral trade negotiation: The legal text, 1994.

C. Korean Antidumping System[9)]

Korea enacted the antidumping law in Article 10 of the Customs Act in 1963. Antidumping duties will be imposed by the Minister of Finance and Economy (MOFE) when the Korean Trade Commission (KTC) determines that a foreign product is sold in the domestic market at a price lower than normal value, and that a domestic industry is materially injured, or that the establishment of an industry is materially retarded by the reason of imports of that product.

C.1. Institutions

(a) The Ministry of Finance and Economy (MOFE)

The MOFE takes over all the functions relating to the enforcement of the antidumping laws. The major functions of the MOFE are: the imposition of antidumping duties; the imposition of provisional measures; the acceptance of proposals for undertakings; and reviews of the antidumping duty and the undertaking.

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9) For further details on the Korean antidumping system, see Kim, Hyung J. (1996) and the Korean Trade Commission (1997).

(b) The Korean Trade Commission (KTC)

The KTC was established in July 1987 for the purpose of protecting domestic industries which were suffering from injuries due to imports. One of the main functions of the KTC is to find an injury and dumping margin in the antidumping procedures. With regard to the anti-dumping procedures, the KTC is responsible for: receiving the petition for the imposition of antidumping duties; determining whether to initiate an investigation; determining dumping margin in the preliminary and final investigations; and determining injury in the preliminary and final investigations.

The KTC is composed of one Chairman and six Commissioners. The Chairman and the Commissioners are appointed by the President of Korea according to the recommendation of the Minister of the Ministry of Commerce, Industry and Energy (MOCIE). The Chairman and each of the Commissioners has a right for one vote. A determination by the KTC requires an affirmative vote of more than half of the members participating in the vote.

C.2. Procedures

(a) Investigation

Interested parties of the domestic industry which is allegedly suffering injury and the Minister in charge of the relevant industry have the right to submit a petition for the imposition of an antidumping duty. Interested parties include producers and associations of producers, and the petition should be submitted to the KTC.

The KTC should determine whether it is necessary to initiate an investigation, within one month from the date of receiving petition. The KTC may refuse to initiate an investigation in one of the following situations: the petitioner is not an interested party; the petition does not include sufficient evidence of dumping and injury; dumping margin is less than 2 percent of the dumping price; the products of the producers in favour of the petition account for less than 25 percent of the domestic production of "like products"; or when other measures are taken to remove adverse effects to the domestic industry before the initiation of the investigation.

The KTC should finalize the preliminary investigation as to whether there is sufficient evidence to presume the existence of dumping and

injury within three months from the date of public notice of the initiation of the investigation. This period may be extended for one month.

The KTC should finish the final investigation within three months from the date of reporting the result of the preliminary investigation. This period may be extended for one month.

(b) Provisional Measures

When there is sufficient evidence to presume the existence of dumping and injury and it is necessary to prevent injury which might be incurred during the period of investigation, provisional measures may be applied. Provisional measures can be applied in the form of a provisional antidumping duty or an order to deposit security. In practice, most of the provisional measures have been applied in the form of provisional antidumping duties. Provisional measures can be applied for term of less than four months.

(c) Undertakings

After determination of the preliminary investigation is made, either the exporter or the MOFE may propose an undertaking. Under the Korean law, an undertaking can be a revision of price, or cessation of

exports. And if the undertaking is accepted, the investigation shall be terminated.

(d) Antidumping Duties

The Anti-Dumping Code 1994[10] provides that "it is desirable that the imposition of antidumping duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry." Korea has adopted such the "lesser-duty rule" both in law and in practice. According to the Customs Act, antidumping duties may be imposed in an amount equal to or less than the dumping margin.

Antidumping duties can be determined in the form of an ad valorem duty or a basic import price. A dumping rate is calculated as follows:

$$\text{Dumping Rate} = \frac{\text{adjusted normal value} - \text{adjusted dumping price}}{\text{assessment price (CIF)}} \times 100(\%)$$

Unless otherwise specified, anti-dumping duties or undertakings are effective for five years after their effective date.

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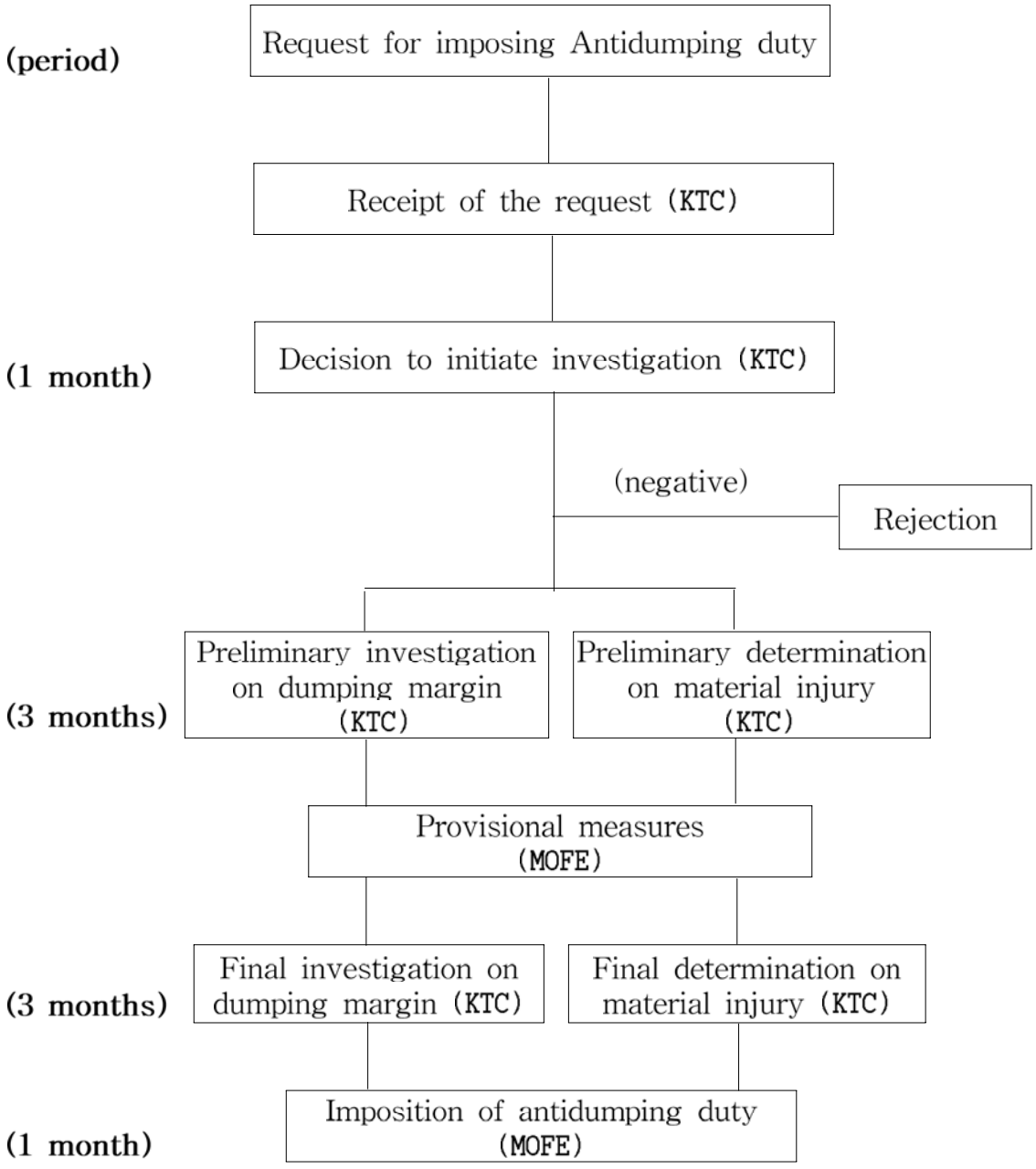
10) Antidumping Code 1994, Article 9.

<Chart 1> Investigation procedure for the imposition of AD duty[11)]



11) Source: Korean Trade Commission (KTC).

C.3. Substantive Elements for Decision

(a) Determination of Dumping

Dumping is defined as importing a foreign product at a price below normal value. Dumping margin is defined as the difference between the normal value and the dumping price. Detailed definitions follow in the following manner.

< Normal Value >[12)]

The primary basis for determining the normal value is by reference to the price of the "like-product" sold in the ordinary course of trade for home consumption in the country of export. When there are grounds for disregarding the domestic market price for the "like-product" in the exporting country, the normal value may be determined based either on the export price of the "like-product" to a third country or on a constructed value. Constructed value is the manufacturing cost plus reasonable administrative/selling costs and profits.

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12) The Act, Article 10:1. The literal translation of *chongsang kakyok* in Article 10:1 of the Act is "normal price". However, the official translation by the MOFE submitted to the GATT for approval uses the term "normal value".

< Dumping Price >

The dumping price is the price which was actually paid or which had to be paid for the product subject to investigation.

< Comparison >

The comparison of the normal value and the dumping price should be made, as nearly as possible, at the same time and at the same level of trade.[13)]

(b) Determination of injury

Material injury to the domestic industry is the requirement for the imposition of an antidumping duty. While the Anti-Dumping Code 1994 has detailed provisions on the determination of dumping, it does not do so with regard to the determination of injury.

< Like-Product >

According to the Anti-Dumping Code 1994, a "like-product" is a product which is identical, i.e. alike in all respects, to the product under

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13) Normally ex-factory level.

consideration, or, in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration. The KTC mentioned that the determination of "like-products" is to be made on a case-by-case basis considering the specific aspects of each case.

< Domestic Industry >

The injury with which the Korean antidumping law is concerned must affect a domestic industry. However, Korean law does not define domestic industry expressly. Instead, it provides that when the petition is not made on behalf of the domestic industry, the KTC may deny initiation of investigation.

< Material Injury >

There are three tests through which a determination of "material injury" can be made: (i ii threat of material injury; (iii material retardation of the establishment of domestic industry. The following factual elements should be considered in finding injury: the volume of the dumped imports; the prices of the dumped imports; the

resulting impact on the domestic industry; and the actual or potential effects of the former on the domestic industry.

< Causation >

The Korean law explicitly provides that affirmative determination of injury is justified only if the dumped products are, through the effect of dumping, causing injury to the domestic industry. Injury caused by other factors may not be attributed to the dumped imports.

D. Remarks

Korea did not initiate investigation of antidumping cases until twenty years after the enactment of Article 10 of the Customs Act. When the Korean government first received a petition from industry for the imposition of antidumping duties, there were no established systems and no experienced personnel to deal with the cases. Korea, therefore, had to go through much trial and error. However, in such a trial and error process, which happened in a relatively short period of time, Korea came to set up its own system.

In the development of the Korean antidumping system, foreign laws and practices, especially those of the United States and the European Union, have played a very important role.

After the World Trade Organization (WTO) was established in January 1995, the circumstances of international trade have been quickly changing in order to make a new order. So Korea should completely prepare for changes in the global trading system. One of them is the Informal Group on Anti-circumvention.

Ⅲ PREVENTING CIRCUMVENTION OF ANTIDUMPING ORDERS

A. What Constitutes Circumvention?

Antidumping duty order is specific to a particular product and to a particular country. An exporter can try to escape the application of antidumping duties on his/her products by making alterations to his products so that these no longer fall within the product scope of the duties. He can do this by downgrading[14] or upgrading[15] his product, or simply modifying it in some way so as to fall outside the product definition. Circumvention can be defined as the evasion of antidumping measures through certain methods or actions designed only for avoiding the payment of antidumping duty.

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14) For instance, suppose that an antidumping duty order is imposed on steel plate exported from France.
- efore AD order: France Co. exported steel plates to oil rig producers in Korea.
- fter AD order: France Co. exports oil rig to Korean oil rig exploration Co.

15) For instance, antidumping duty order is on color TVs from Japan.
- efore AD order: Japan Co. exported color TVs to Korea.
- fter AD order: Japan Co. exports color picture tubes and printed circuit boards to Japan Co. in Korea, and Japan Co. in Korea assembles them.

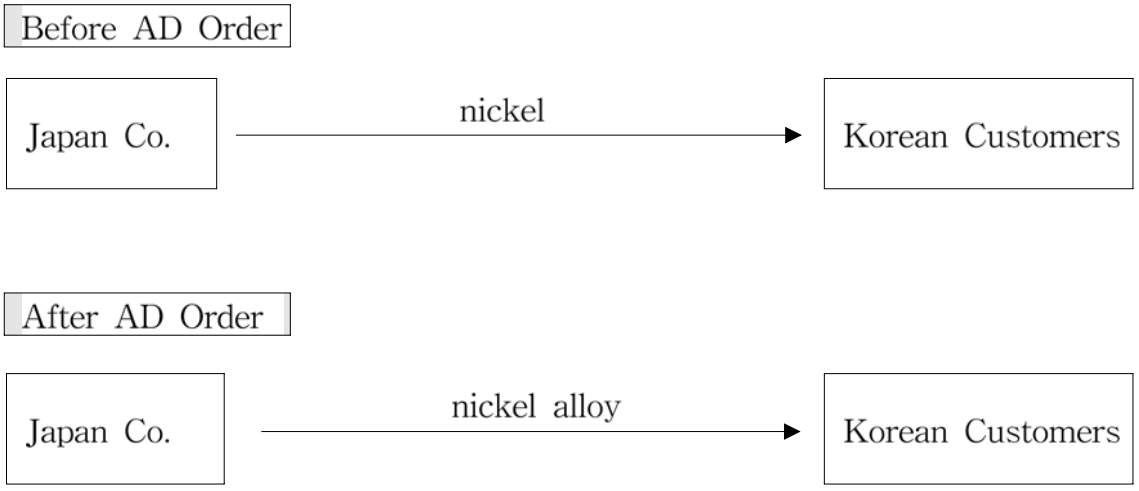
A.1. Hypothetical Examples

We can think of the following hypothetical examples as circumvention cases: minor alteration, importing country assembly, and third country assembly.

[Example A] : Circumvention case of minor alteration

After an antidumping duty order was issued on 99 percent pure nickel, 0.5 percent silver was added to the product by the same producers in the exporting country, and sold under the original contracts, at very similar prices and volumes, to the same customers in the importing country, and for similar purpose. The sales of 99 percent pure nickel dropped to zero. (The 98.5 percent nickel and 99 percent nickel are classified in different HS lines.)

<Chart 2> Circumvention case of minor alteration



Note) Japan : Exporting Country, Korea : Importing Country.

[Example B] : Circumvention case of importing country assembly

After an antidumping duty order was placed on hinges, a few essential parts of hinges, produced by the original hinge producers in the exporting country, were shipped to the importing country, for an extremely simple and fast assembly process. The finished hinges were sold to the same customers in the importing country, at similar prices and volumes, and under the same contracts and for similar uses, as before the orders were put in place. (The parts of hinges and finished hinges are classified in different HS lines.[16])

<Chart 3> Circumvention case of importing country assembly

Before AD Order

After AD Order

Note) Japan : Exporting Country, Korea : Importing Country.

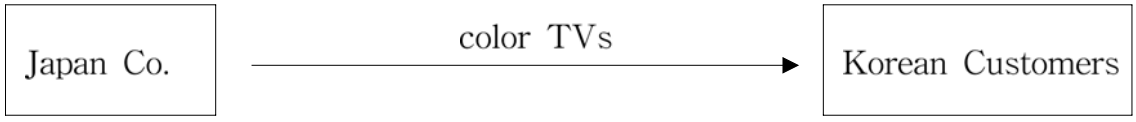
16) Harmonized Commodity Description and Coding System.

[Example C] : Circumvention case of third country assembly

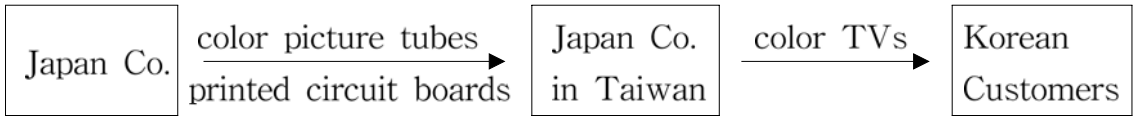
After an antidumping duty order was placed on color TVs, the color picture tubes and printed circuit boards, produced by the original color TV producers in the exporting country, were shipped to the third country, for an extremely simple and fast assembly process. The finished color TVs were sold to the same customers in the importing country, at similar prices and volumes, as the antidumping orders were put in place previously.

<Chart 4> Circumvention case of third country assembly

Before AD Order



After AD Order



Note) Japan : Exporting Country, Korea : Importing Country, Taiwan : Third Country.

A.2. The Elements for Circumvention

The three examples mentioned above share some common factors: First, each example involves an inconsequential change in either the product or the production process. Changes in the product or in the manner of its production, were made after issuance of the order, and they were also made by the producers of the original product in the exporting country, or companies related to them. Second, the resulting products were sold to the same customers in the importing country, for the same purposes, and under the same contracts, with prices and sales volumes similar to those of the original product. Third, the physical changes in [Example A] were insubstantial and did not change the nature of the product in any meaningful way or affect the uses to which it could be put. Similarly, the assembly operation in [Examples B and C] was insignificant in terms of the resources, labor, materials, and investment needed to convert the parts to a finished product.

Therefore, these factors support the conclusion that in each instance an antidumping duty order is being evaded by parties covered by the order through a minor change in practice.

B. Anti-circumvention Law of the United States

Since antidumping duty orders are specific to particular goods from particular countries, producing the product in a country not subject to the order, or producing the product in the importing country would mean that antidumping duties may not apply to the newly exported (produced) product. Moreover, given free flows of capital and technology, even if the producers of the importing country sought to file new complaints against the newly exported (made) relatively low-cost products, foreign producers could continue to shift the production to other countries almost indefinitely.

In response to U.S. producers' concerns about such operations, anti-circumvention provisions were for the first time added to the Omnibus Trade and Competitiveness Act of 1988 in the United States. And somewhat ironically, even though the Uruguay Round Antidumping Agreement does not address circumvention issues, it was through the Uruguay Round Agreement Act that Congress completely rewrote the U.S. anti-circumvention law.

According to the current U.S. anti-circumvention law, there are four types of circumvention: U.S. manufacturing; third country manufacturing; minor alterations; and later-developed product.

B.1. Anti-circumvention Relating to U.S. Manufacturing

A foreign manufacturer could circumvent an antidumping duty order on a finished product by importing parts into the United States and assembling them. If the antidumping order itself only applies to the finished product, parts imported into the United States would not normally be subject to the order. Hence, a foreign manufacturer could import subassemblies or relatively finished parts into the United States free of antidumping duties and assemble them into the finished product at minimal additional cost.

But in order not to be used to interfere with real manufacturing operations in the United States, it required that three conditions must be met. First, the merchandise sold in the United States must be made from parts or components produced in the country subject to the antidumping duty order. Second, the value of the parts or components imported from the country subject to the order must be "a significant portion of the total value of the merchandise." And third, the process of assembly or completion in the United States must be "minor or insignificant."

B.2. Anti-circumvention Related to Assembly in Third Countries

In this case, the merchandise being imported into the United States is not parts or components but rather the finished product itself. However, since an antidumping duty order only applies to countries named in the order, if the merchandise is assembled in a country not subject to the order, it may avoid antidumping duties.[17)]

Despite the differences between assembly operation in the United States and those in third countries, the statute treats them in the same manner. The value of parts or components from the country subject to the order must be a "significant" portion of the value of the merchandise exported to the United States, and the process of assembly in the third country must be "minor or insignificant."

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17) Under U.S. Customs law, the merchandise assembled in the third country would not become the product of that country unless it was substantially transformed in that country.

B.3. Minor Alterations of Merchandise Subject to an Order

In 1980 the U.S. Department of Commerce issued an antidumping duty order on portable electric typewriters from Japan.[18] After a few years of being subject to this order, however, some Japanese manufacturers discovered that if they attached a simple four-function calculator to the typewriter (at a cost of less than $5), the machine would be reclassified as a business machine, and initially, at least, would not be subject to the antidumping duty order.

In response to these concerns the U.S. created a provision that would permit antidumping duty orders to apply to merchandise that is "altered in form or appearance in minor respects" from the merchandise subject to the original order.

B.4. Later-developed Merchandise

After the electronic revolution overtook the typewriter industry, simple typewriters were largely replaced in home and office use by word

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18) Portable Electric Typewrites from Japan: Antidumping Order, 45 Fed. Reg. 30618 (May 9, 1980).

processors and personal computers, which were lighter and smaller than original typewriters but contained a small amount of memory, plus a single line of text display. The U.S. producer claimed that this machine was fundamentally a portable electric typewriter subject to the antidumping duty order. The Japanese manufacturer countered that it was a completely different product - a personal word processor - which by virtue of its memory and display functions could perform tasks not within the capacity of an ordinary portable electric typewriter. The U.S. producer ultimately won. The Court of International Trade overturned the initial decision of the Commerce Department and ruled that the personal word processor was within the scope of the original antidumping duty order on portable electric typewriters.

Inclusion of later-developed merchandise within a prior order is, however, a delicate matter. It is because that the market that contains the newly developed merchandise is a fundamentally different market from that originally considered by the U.S. International Trade Commission.

Ⅳ NECESSITY OF ANTI-CIRCUMVENTION RULES

A. Multilateral Negotiation on the Issue of Circumvention

A.1. GATT Antidumping Code in 1994

The first and perhaps the most important aspect to note is that the WTO Antidumping Agreement does not address the issue of circumvention. The actual Antidumping Agreement is very much silent on the issue. This fact was a significant setback for the United States and the European Union.

One of the key goals of the U.S. and the EU in negotiating new provisions in the GATT Antidumping Code was to adopt a specific provision permitting WTO members to address the circumvention of antidumping duty orders. At the end of the day, however, a consensus simply could not be reached on the issue. Rather, the most that the U.S. and EU could get was statement in the Ministerial Declaration issued at Marrakesh concluding the Uruguay Round. The statement only stated that the subject of anti-circumvention was part of the negotiations that no agreement was reached and that uniform rules are desirable as soon

as possible.[19)]

What was the reason that no agreement could be reached on the issue of anti-circumvention? The principal reason is that the issue is extremely complicated.

The issue of circumvention law involves distinguishing between the legitimate efforts of a national administering authority to ensure the effectiveness of antidumping duties lawfully imposed and the more questionable use of circumvention to punish what are simply the natural ripple effects of the barriers imposed by the antidumping duties. That is, how to distinguish between illegitimate "evasion" of antidumping duties and lawful "avoidance" of antidumping duties.

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19) Ministerial Decisions and Declarations stipulates that: "The problem of circumvention of antidumping duty measures formed part of the negotiations which preceded this Agrement. Negotiators were, however, unable to agree on specific text, and, given the desirability of the applicability of uniform rules in this area as soon as possible, the matter is referred to the Committee on Antidumping Practices for resolution."

A.2. Informal Group on Anti-Circumvention

The Ministerial Decision on Anti-Circumvention was adopted by Governments at Marrakesh and forms an integral part of the Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations. This Decision acknowledged the problem of circumvention and recognized the desirability of applying "uniform rules in this area as soon as possible" to prevent the evasion of antidumping measures resulting from circumvention.

Pursuant to the Ministerial Decision at the conclusion of the Uruguay Round, the Informal Group on Anti-Circumvention was established by the Committee on Antidumping Practices to seek uniform rules on anti-circumvention. At the first meeting of the Informal Group on Anti-Circumvention in October 1997, submissions were received from five Members.[20] Those submissions formed the basis for the discussion in the group.

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20) Available at e-mail: http://www.wto.org/ddf/cgi-bin/.

(a) The European Union[21)]

The paper submitted by the European Union presented what it considers to be obvious examples of circumvention. The delegation of the European Union, in its oral remark, noted that it is difficult to define precisely what constitutes circumvention or evasion of an antidumping duty order, and thus the subject can best be approached, as in their paper, by providing examples of circumvention. They urged that a pragmatic approach be taken in fulfilling the mandate of the Ministerial Decision to reach uniform rules on the subject.

(b) The United States[22)]

The United States also presented examples of what it considers to be clear-cut cases of circumvention. In oral remarks, the United States delegation agreed with the remarks made by the European Union and stated that without meaningful rules dealing with circumvention, antidumping orders would frequently be made meaningless. The delegation also discussed the examples provided and urged agreement that these obvious examples do constitute circumvention, to permit the group to move on to a more detailed discussion of exactly what circumvention is and is not.

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21) WTO document G/ADP/IG/W/1, dated 3 October 1997.
22) WTO document G/ADP/IG/W/2, dated 8 October 1997.

(c) Canada[23)]

The paper submitted by Canada discussed a number of factors which it considers critical in determining whether circumvention exists. The Canadian delegation noted that the issue is a very complex one, and stated that circumvention can begin as early as the time of initiation of an antidumping investigation. The delegation also stated that circumvention would not exist if the industry injured by the newly imported product were different from the industry determined to be injured in the original investigation.

(d) Japan[24)]

Japan took the view that since antidumping measures are a specific exception to the free trade principles of the WTO, they must be construed narrowly. As such, anti-circumvention measures are inconsistent with existing WTO rules. The Japanese delegation stated that only fraudulent activity by exporters and importers could properly be considered as circumvention, and since such activities are properly dealt with under existing rules, no new rules are needed.[25)]

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23) WTO document G/ADP/IG/W/3, dated 23 October 1997.

24) WTO document G/ADP/IG/W/4, dated 29 October 1997.

25) Mah (1996 b) expressed opinion similar to Japanese proposal.

(e) The ASEAN countries[26)]

The ASEAN countries noted that the increasing globalization of production has given rise to changes in the production and sourcing of products that should not be mistaken for circumvention. They suggested that circumvention could not be determined to exist in the absence of a very comprehensive examination of the situation.

(f) Overall remarks

All Members agreed that the increasing globalization of business has introduced a new dynamics into the question of circumvention of antidumping duty orders. Many Members made constructive comments, to the effect that anti-circumvention measures were necessary, at least in some situation, while expressing concerns about the standards and scope of such measures. Most Members also agreed that circumvention is an important and complex subject which will require much thought and study, and that reaching agreement on specific rules or guidelines for anti-circumvention measures will be a long and difficult process. Nonetheless, there appeared to be a general consensus that it was important and worthwhile to move forward with efforts to reach agreement on exactly what constitutes circumvention.

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26) WTO document G/ADP/IG/W/5, dated 29 October 1997.

B. Korea's Antidumping Case Related with Anti-circumvention

Korea has not so far initiated an anti-circumvention investigation because the domestic legislation does not contain any provisions specifically designed to deal with the issue of circumvention. However, there has been one antidumping case, one of the main concerns of which was the circumvention of an existing antidumping duty by the exporting country.[27] The facts of this case are summarized below:

In February 1997 the Korean Trade Commission (KTC) received a request for the imposition of on antidumping duty on the imports of "non-refillable disposable pocket lighters" (HS 9613.10).[28] At the end of the preliminary investigation, it was established that the aforementioned products were imported at dumped prices and that they caused material injury to the domestic industry. Consequently, a preliminary antidumping duty was imposed on the imports of these products in June 1997. At that time the preliminary rate of dumping margin was 31.39 percent.

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27) Korean Trade Commission, *Injury Investigation Result: Non-refillable disposable pocket lighters (China),* 1997.

28) Classification of lighters by HS code:
- ɔn-refillable pocket lighters (HS 9613.10).
- ɛfillable pocket lighters (HS 9613.20).
- ıble lighters (HS 9613.30).

In July 1997, while the mentioned duty was in force, another complaint, which contained evidence regarding dumping and injury, was lodged by the domestic producers for the levying of an antidumping duty on the imports of "refillable disposable pocket lighters" (HS 9613.20) originating in the same country (China) - both of them are classified in different HS lines. Moreover, it was alleged in the complaint that the antidumping duty on the imports of "non-refillable disposable pocket lighters" had been circumvented.

As started above, since there is no legal remedy specifically aimed at offsetting circumvention of an existing antidumping duty, the Korean authorities decided to extend a definition of the like-products. While, in the course of the investigation, it was found that imports of "non-refillable pocket lighters" decreased drastically, both in absolute terms and in terms of market share, after the imposition of the antidumping duty,[29] the imports of "refillable pocket lighters" originating in the same country increased.[30]

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29) See Table 1.

30) See Table 2.

<Table 1> Import trend of "non-refillable pocket lighters"

(thousand dollars)

Month	Import volumes		
	1996 (A)	1997 (B)	B/A (%)
Jan.	377	1,093	190.0
Feb.	476	516	8.4
Mar.	246	1,093	344.3
Apr.	503	924	83.7
May	527	582	10.4
Jun.	437	412	△ 7

Source : Korean Trade Commission (KTC)

<Table 2> Import trend of "refillable pocket lighters"

(thousand dollars)

Month	Import volumes		
	1996 (A)	1997 (B)	B/A (%)
Jan.	104	150	44.2
Feb.	254	248	△ 4
Mar.	211	363	72.0
Apr.	191	612	220.4
May	189	669	254.0
Jun.	60	701	1,068.3

Source : Korean Trade Commission (KTC).

Another reason of this decision was that even though the altered lighters can be refilled, it was similar to the subject merchandise in terms of materials (Acrylonitrile Styrene Resin), functions, endurances and prices (about 300 won). Accordingly, a preliminary antidumping duty was imposed on imports of altered "refillable disposable pocket lighters" in October 1997.

Ⅴ CONCLUSION

Dumping is the sale of a product for export at a price less than its normal value. Despite the pursuit of the free trade principle, GATT Article Ⅵ allows WTO Members to take discriminatory and remedial measures against the unfair trade practices of trade partners. Antidumping duties are designed to remedy injury caused to a domestic industry in one importing country by the dumping of "like product" from one or several individually named exporting countries.

Circumvention of antidumping duties may occur where, in reaction to the existence of an antidumping proceeding, duties are either evaded or are not paid, in full or in part. Since antidumping duty order is specific to a particular product and to a particular country, an exporter can escape the application of antidumping duties by downgrading or upgrading his product, or simply modifying it in some way so as to fall outside the product definition. According to the current U.S. anti-circumvention law, for instance, there are four types of circumvention: U.S. manufacturing; third country manufacturing; minor alterations; and later-developed product.

One of the key goals of the U.S. and the EU in negotiating new provisions in the GATT Antidumping Code was to adopt a specific provision permitting WTO Members to address the circumvention of antidumping duty orders. As a result of sharp differences in view between traditional users and victims of antidumping action, however, the Agreement does not contain any provisions on anti-circumvention. Despite the absence of multilateral rules, a number of jurisdictions, including the EU, the U.S. and some Latin American countries, have adopted anti-circumvention provisions unilaterally. And pursuant to the Ministerial Decision at the conclusion of the Uruguay Round, the Informal Group on Anti-Circumvention was established by the Committee on Antidumping Practices to seek uniform rules on anti-circumvention.

Up to now, the main users of antidumping laws were the United States, the European Communities, Australia and Canada, while Korea has been one of the main targets of the antidumping proceedings by them. Although the Korean companies have tried to circumvent the imposition of antidumping duties by the major users of such measures, in 1997, Korea also experienced a case which was related to circumvention. To prevent the avoidable trade disputes arising from circumvention, Korea

needs to adopt anti-circumvention rules to effectively enforce the antidumping duties that it imposes. However, not to prevent globalized production and legitimate foreign direct investment, it is recommendable to define circumvention tightly and impose strict conditions for the imposition of anti-circumvention measures.

The views expressed in this paper are the author's own and do not represent an official position of the MOCIE.

APPENDIX : Dunkel Draft

Article 12
Measures to Prevent Circumvention of Definitive Antidumping Duties

12.1 The authorities may include within the scope of application of an existing definitive antidumping duty on an imported product those parts or components destined for assembly or completion in the importing country, if it has been established that:

(i) the product assembled or completed from such parts or components in the importing country is a like product to a product which is subject to the definitive antidumping duty;

(ii) the assembly or completion in the importing country of the product referred to in sub-paragraph (i) is carried out by a party which is related to or acting on behalf of[1] an exporter or producer whose exports of the like product to the importing country are subject to the definitive antidumping duty, referred to in sub-paragraph(i);

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1) Such as when there is a contractual arrangement with the exporter or producer in question (or with a party related to that exporter or producer) covering the sale of the assembled product in the importing country.

(iii) the parts or components have been sourced in the country subject to the antidumping duty from the exporter or producer subject to the definitive antidumping duty, suppliers in the exporting country who have historically supplied the parts or components to that exporter or producer, or a party in the exporting country supplying parts or components on behalf of such an exporter or producer;

(iv) the assembly or completion operations in the importing country have started or expanded substantially and the imports of parts or components for use in such operations have increased substantially since the initiation of the investigation which resulted in the imposition of the definitive antidumping duty;

(v) the total cost[2] of the parts or components referred to in sub-paragraph (iii) is not less than 70 percent of the total cost of all parts or components used in the assembly or completion operation of the like product[3], provided that in no case shall the parts and components be included within the scope of definitive measures if the value added by the assembly or completion operation is greater than 25 percent of the ex-factory cost[4] of the like product assembled or completed in the territory of the importing country.

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2) The cost of a part or component is the arm's length acquisition price of that part or component, or in the absence of such a price (including when parts or components are fabricated internally by the party assembling or completing the product in the importing country), the total material, labour and factory overhead costs incurred in the fabrication of the part or component.

3) i.e., parts or components purchased in the importing country, parts or components referred to in sub-paragraph (iii), other imported parts or components (including parts or components imported from a third country) and parts or components fabricated internally.

4) i.e., cost of materials, labour and factory overheads.

(vi) there is evidence of dumping, as determined by a comparison between the price of the product when assembled or completed in the importing country, and the prior normal value of the like product when subject to the original definitive antidumping duty; and

(vii) there is evidence that the inclusion of these parts or components within the scope of application of the definitive antidumping duty is necessary to prevent or offset the continuation or recurrence of injury to the domestic industry producing a product like the product which is subject to the definitive antidumping duty.

12.2 The authorities may impose provisional measures in accordance with Article 7:2 on parts or components imported for use in an assembly or completion operation only when they are satisfied that there is sufficient evidence that the criteria set out in sub-paragraphs (i)-(vi) are met.

Any provisional duty imposed shall not exceed the definitive antidumping duty in force. The authorities may levy a definitive antidumping duty once all of the criteria in paragraph 1 are fully satisfied. The amount of the definitive antidumping duty shall not exceed the amount by which the normal value of the product subject to the existing definitive antidumping duty exceeds the comparable price of the like product when assembled or completed in the importing country.

12.3 The provisions of this Code concerning rights of interested parties and public notice shall apply mutatis mutandis to investigations carried out under this Article. The provisions of Articles 9 and 11 regarding refund and review shall apply to anti-dumping duties imposed, pursuant to this Article, on parts or components assembled or completed in the importing country.

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