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CAN ANTIDUMPING LAW APPLY TO TRADE IN SERVICES?

Hideaki Kubo*

I. OVERVIEW OF TRADE IN SERVICES AND ANTIDUMPING LAW

A. Introduction

Legal issues concerning international trade in services have garnered increased attention recently, as manifested by attempts in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) to negotiate a multilateral framework for trade in services.¹ One of the reasons for this increased attention is the increase in volume of trade in services. In 1960, industrialized countries generated forty percent of their gross domestic product (GDP) in manufacturing and fifty-four percent in services, while in 1986, manufacturing accounted for thirty-six percent and services for sixty-one percent of GDP. The outlook is similar for developing countries; in 1960, agriculture accounted for thirty-four percent of their GDP and services accounted for forty percent, while in 1986, agriculture contributed eighteen percent and services forty-eight percent.² Moreover, services provide more than half of the overall employment in industrialized countries.³

In spite of the growing importance of international trade in services, there is no constitutional framework that liberalizes world trade in services; there is no equivalent to the GATT. Thus, to establish such a constitutional framework, the participants in the ministerial meeting of the GATT in September 1986, at Punta Del Este, Uruguay, decided to include trade in services as a subject of negotiation.⁴ The Group of Negotiators on Services agreed that principles and rules for the future framework for trade in services would include, inter alia, transparency, progressive liberalization, market access, national treat-

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³. Id.
ment, and most-favored-nation treatment.\(^5\)

One of the key principles that has played a major role in the current GATT but has not yet been thoroughly discussed in the trade in services negotiations at the Uruguay Round is an antidumping régime. The U.S. proposal made in October 1989 for the services negotiation prohibited subsidy, but did not have a provision regarding dumping. On the other hand, the European Communities (EC) proposal made in June 1990 had a provision stating that dumping is "to be condemned."\(^6\) This position is similar to Article VI of the GATT. It appears, however, that there has been no substantial discussion about an antidumping provision since the EC proposal was made. Although the Uruguay Round was to be completed in December 1990,\(^7\) that did not happen. At the ministerial meeting in December 1990, which was the last chance to conclude the negotiation on time, the United States and EC could not reach an agreement on the issue of agriculture.\(^8\)

Since then, the negotiation has been suspended, and has not yet been resumed as of this writing.

In this paper, I will investigate whether current U.S. antidumping law can apply to trade in services. Because service industries vary significantly in nature, I take an industry-specific approach. That is, I select three service industries — insurance, banking, and construction — and discuss possible problems in applying the U.S. antidumping law to these industries.

In Part I, I will discuss trade in services in general terms and briefly examine the current antidumping régime in the GATT and in U.S. law. In Part II, taking U.S. antidumping law as my model, I analyze possible problems and difficulties in applying antidumping law to the three industries. Finally, in Part III, I identify four basic issues concerning the regulation of dumping which appear common to most service industries. These issues are: (i) is there a sale? (ii) is the price ascertainable? (iii) is there price regulation? and (iv) does it make sense to compare prices? My general conclusion is that, while it would be feasible to apply antidumping law to some service industries, each industry must be analyzed individually in light of the above issues to determine whether antidumping law can reasonably apply.

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B. The Nature of Trade in Services

Trade in services is usually invisible and encompasses extremely heterogeneous economic activities. Some services involve the provision of information (e.g., consulting services), some provide certain performances (e.g., transportation), and others require face-to-face physical proximity between supplier and consumer (e.g., lodging services). Because of this peculiarity, no solid definition of service has yet been established. Generally speaking, however, the following industries, *inter alia*, have been recognized as service industries:

- insurance
- banking
- accounting
- advertising
- communications
- computer services
- construction and engineering
- consulting and management
- education
- franchising
- leasing
- legal services
- filmmaking
- shipping
- air transport
- tourism (including development of hotels).

Generally, trade in services has two distinguishing characteristics: (i) production and consumption of services must take place simultaneously, which implies that services usually cannot be stored, and (ii) services tend to be intangible. Because of this intangibility and non-storability, services have to be applied to (or embodied in) objects, an information flow, or persons. Then, such objects, information flow, or persons must be transported from one country to another for trade in services to occur. Trade in services is usually broken down into three groups: (i) cross-border transactions, (ii) transactions that require the movement of the producer to the location of the demander ("demander-located services"), and (iii) transactions that require the movement of the consumer to the location of the provider ("provider-located services").

Another implication of intangibility is that governments will have difficulty in measuring service transactions. A government will have to collect data by either (i) requiring domestic producers and consumers of services to report all exports and imports of services, or (ii) establishing a foreign exchange control system to cover the cross-border flow of services. To achieve the former, a government must persuade

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13. *Id.*
14. *Id.*
16. *Id.* at 4-5.
all firms which may be involved in trade in services to generate comprehensive records of service transactions.\textsuperscript{17} As for the latter option, only a few developed countries now utilize foreign exchange controls, and developing countries often lack the technology to compile the necessary data.\textsuperscript{18} Thus, both of the options above would be very difficult to implement. This contrasts with trade in goods, for which many countries have some system to measure imports and to collect tariff duties.

C. Antidumping Law

1. Dumping under the GATT and the Code

"Dumping" in the international law context is defined in article VI of the GATT and in the 1979 Tokyo Round Antidumping Code.\textsuperscript{19} Under this scheme, for a Contract Party to impose an antidumping duty on certain imports, two requirements must be met: (i) there must be sales at less than the normal value in an importing country (price requirement), and (ii) such sales must cause or threaten material injury to an established industry, or materially retard the establishment of a domestic industry (injury requirement).\textsuperscript{20}

To meet the price requirement, a product must be sold in another country at a price less than its "normal value." Article VI of the GATT and article 1 of the 1979 Code provide for three types of prices as normal values. The first price is the comparable price for the like product in the exporting country (home market price). The second is the highest comparable price for the like product when exported to any third country (third country price), and the third is the cost of production of the product in the country of origin plus a reasonable addition for selling costs and profit (constructed value). Under the GATT and the 1979 Code, the home market price is preferred to the third country price and the constructed value.\textsuperscript{21} Thus, the third country price or constructed value is used only if the home market price is not available.

To discuss the specific application of antidumping law to the three service industries, I will use the antidumping law of the United States. The reason for this is that the United States is one of the most frequent

\begin{itemize}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Contracting Parties to the GATT, Basic Instruments and Selected Documents Supp. No. 26, at 65-66 (1979) (Agreement on Interpretation) [hereinafter 1979 Code].
\item \textsuperscript{21} GATT, art. VI, para. 1. See also 1979 Code, supra note 19, art. 2, para. 1.
\end{itemize}
2. U.S. Antidumping Law

Under the U.S. antidumping statute, if the U.S. Department of Commerce (Commerce) determines that the "U.S. price" is less than "fair value," an antidumping duty is imposed on the products, provided that the International Trade Commission (ITC) makes an affirmative injury determination. Although "fair value" is not statutorily defined, it is meant to be the "foreign market value," a term that the statute does define. In short, the U.S. price is compared with the foreign market value to calculate the dumping margin.

The preferred basis for establishing the foreign market value is the price in the home market at which the product in question is sold. If the home market price is not viable, e.g., if the volume of sales in the home market is inadequate in relation to the quantity sold for export, the third country price or constructed value is used. Although the U.S. statute mandated a preference for the third country price over the constructed value prior to 1980, that mandatory preference no longer exists. However, there still remains a preference for the third country price in the legislative history and regulations.

Under the statute, if home market sales or third country sales are made below cost of production (i) "over an extended period of time and in substantial quantities" and (ii) "not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade," such sales are disregarded in determining the foreign market value. If the remaining sales at or above cost of production are inadequate for the determination of the foreign market value, the constructed value must be used. The constructed value consists of

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26. "Dumping margin" refers to the difference between the home market price and the export market price. If the export market price is less than the home market price, the difference is deemed to be a dumping margin. Jackson, supra note 22, at 2.
28. If home market sales constitute less than 5% of all non-U.S. exports, third country sales or constructed value will be used. 19 C.F.R. § 353.48(a) (1990).
32. Id.
the sum of the following:

(1) the cost of materials and of fabrication or other processing;
(2) general expenses, at least ten percent of (1);
(3) profit, at least eight percent of (1) and (2); and
(4) cost of packing. 33

Recently, this constructed value has become increasingly important in antidumping investigations. 34 In 1987, for example, approximately two-thirds of the antidumping investigations in the United States involved the cost of production or constructed value analyses. 35

3. Criticism of Antidumping Régimes

Antidumping law has been criticized from an economic perspective. For example, economists argue that a rational firm maximizing profit will charge different prices by market. A rational firm will set its output level at the place where the firm’s marginal costs equal the marginal revenue. 36 In addition, the marginal revenue curve is different depending upon the demand curve, or demand elasticity, of the particular market in question. As a result, the argument contends, a rational firm attempting to maximize profit will charge different prices in different markets. 37

Another argument states that if a firm faces a less elastic demand at home than in an export market, it will respond to that discrepancy by charging higher prices at home than in the export market. 38 Therefore, in the extreme case in which a firm is a monopolist at home and a perfect competitor abroad, the firm will surely dump. 39 From an economic viewpoint, a monopoly price is objectionable because resources are wasted; monopolies restrict output relative to the competitive market and charge a higher price. 40 Thus, the undesirable price is not the low price in the export market, but the higher price in the home market. However, antidumping regulations impose an antidumping duty

35. Id.
37. Barcelò, Antidumping Laws as Barriers to Trade — The United States and the International Antidumping Code, 57 CORNELL L. REV. 491, 503-05 (1972). Barcelò states: “[t]he foreign supplier, if he is to compete effectively in international commerce, would frequently be forced to discriminate in price to some degree, because a competitive price must reflect the local conditions in each national market.” Id.
39. Id.
on the export price, not on the higher price that is more pernicious than the export market price. Therefore, according to the argument, the antidumping rule makes no economic sense.\textsuperscript{41}

The fact that the U.S. law has been criticized in this fashion does not necessarily mean that it will be amended or repealed soon. In fact, it would be unrealistic to expect that the antidumping law will be repealed in the near future.

II. CAN ANTIDUMPING LAW APPLY TO TRADE IN SERVICES: INDUSTRY-SPECIFIC ANALYSIS

A. Can Antidumping Law Apply to Insurance?

1. The Nature of the Insurance Industry

Insurance is a transaction between a consumer and an insurer whereby the former pays a premium to the latter in return for which the insurer undertakes to pay the consumer a sum of money, depending on an occurrence of a particular event.\textsuperscript{42} The insurance industry is enormous in both its size and its impact on national and international economies. It is one of the largest industries in the world; in most developed countries, insurance premiums account for more than five percent of GDP.\textsuperscript{43} Within domestic economies, the industry provides important services, supplies a large amount of funding for investment, and functions as a source of employment.\textsuperscript{44}

An insurance company sells insurance services to foreign countries in two ways: (i) it sells the insurance service through a subsidiary in the host market and (ii) it exports the insurance service directly to a foreign market.\textsuperscript{45} The former corresponds to the "demander-located service," and the latter to the "cross-border transaction" discussed in Part I.

2. Expected Problems

In this section, I will discuss whether the current U.S. antidumping law can apply to insurance transactions. In a number of aspects, characteristics peculiar to the insurance industry present difficulties in applying the antidumping law.

\textsuperscript{41} Deardorff, supra note 38, at 27.
\textsuperscript{42} R. Carter & G. Dickinson, Barriers to Trade in Insurance 5 (Trade Policy Research Centre Thames Essay No. 19, 1979).
\textsuperscript{44} Id.
\textsuperscript{45} R. Carter & G. Dickinson, supra note 42, at 5.
a. Price Regulation

In some countries, insurance premiums are regulated by industry associations or the government. Usually, this is not the case in goods transactions. If the premium is regulated in both the home market and the export market, and if the regulated price in the home market is higher than that in the export market, does it make sense to impose an antidumping duty on the exports? The answer is no. In this case, the exporter is simply complying with the regulations in both markets. To impose a duty on such an exporter would be to levy an undeserved penalty.

If price is regulated in only one market, does it make sense to apply antidumping law? The answer is again no. If price is regulated only in the export market, and the exporter complies with it, there is no reason for the government of the export market to impose an antidumping duty. The government of the export market does not have an interest in the exporter's home market price as long as there is compliance with the price regulation in its own market.

On the other hand, if solely the price in the home market is regulated, and if that price is higher than the price in the export market which is decided through free competition, again it makes no sense to impose an antidumping duty on the exports. If the antidumping law were applied to this situation, an exporter in a market where there is price regulation would be required to sell at the same price in all markets as long as the market price in the export market was less than the home market's regulated price. However, the regulated price in the home market is decided by taking into account the conditions of the home market, such as expected cost for losses, the solvency of the insurers, and competition in the market. The regulation has nothing to do with the other markets. Therefore, requiring an exporter subject to price regulation in the home market to sell at the same price in all other markets would not make sense.

In short, if the price of insurance is regulated in either market, it would be inappropriate to apply antidumping law to insurance.

b. Product Definition

(i) Like Product

In order to impose an antidumping duty under the U.S. antidumping law, there must be injury to domestic producers of "like products"
of the dumped goods. "Like product" means, under the U.S. statute, "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." In determining like products, therefore, "characteristics and uses" of insurance must be analyzed. These factors include the type of insurance (e.g., life insurance or non-life insurance), amount of coverage, geographical area covered, period of time covered, and quality of service. Many of these factors can be ascertained by referring to an insurance policy. Unlike the quality of goods, however, the quality of insurance service, i.e., how quickly and accurately the insurer can process claims from policy-holders, is not visible. Since quality is an important aspect of comparisons between like products, evaluating the quality of services would be an important, if difficult, task.

The fact that the quality of insurance service is not visible does not necessarily mean, though, that defining like products in insurance is impossible. Even in goods proceedings, evaluation of quality is a difficult task. For example, the ITC is unable to complete an evaluation and comparison of the quality of imported and domestic TVs simply by looking at both types of TVs. In addition, it must take into account consumers' and salespeople's opinions and perceptions of these products. The consumers tell why they selected a product; their reasons may include price, quality, and other factors. The salespeople report what the sales force's general perception of the product is. While defining like products in insurance would be more difficult than in goods because of the invisibility of the quality of performance, such difficulties could be managed by pursuing similar methods. Thus, such a difficulty alone would not preclude the application of antidumping law to insurance.

In addition, the solvency of an insurer must be taken into account as an element of the quality of performance. Because an insurer has a contractual obligation to pay a certain sum of money to an insured on the occurrence of a certain event, the insurer is expected to maintain sufficient funds to pay such money. Thus, in analyzing quality of performance, the government must look into the degree of solvency of insurers. This task would require the government to obtain financial information from a foreign insurer and to compare it with that of domestic insurers. While financial information could be obtained from a

foreign insurer through the questionnaire-response method that the current U.S. statute allows, the scope of the information to be covered by such "discovery" would be broader in insurance than in goods. In the case of goods, the information necessary to calculate the dumping margin is limited to that relevant to the merchandise subject to the investigation. If a foreign manufacturer also produces merchandise not subject to the investigation, cost and price information for that merchandise is not relevant. In the case of insurance, however, information about all the business activities of the foreign insurer would be required to evaluate the solvency of that insurer. Therefore, the government would face stronger resistance from the foreign insurer than it would in goods proceedings. Also, the comparison of solvency itself would be difficult because it would be a question of degree. However, the difficulty in evaluating and comparing solvency would not be so serious that it would render the application of the U.S. law entirely impossible. Under the current law, the Department of Commerce obtains confidential information, i.e., cost information, from foreign exporters through the questionnaire-response method, sometimes with the threat of use of the "best information available." Thus, in the same way, broader "discovery" in the insurance field could be achieved. Also, comparisons of solvency could be made more objective by converting the financial condition of the insurer into some numerical measurement, perhaps by the use of a system similar to the risk rating system of a bank to evaluate the risk of default of a borrower.

To summarize, defining like products in insurance would be more difficult than defining like goods in three respects: (i) the quality of service is not visible, (ii) the government must obtain financial information for solvency evaluation purposes from a foreign insurer and such discovery would be broader than in goods proceedings, and (iii) the government must compare the solvency of the foreign insurer with that of the domestic insurer. However, these problems could be solved as discussed above; they themselves would not render the application of antidumping law to insurance impossible.

(ii) Such or Similar Merchandise

Under the U.S. antidumping statute, the export price of a "class or kind of merchandise" is compared with the price of "such or similar merchandise" sold in the exporting country to calculate the dumping

50. 19 C.F.R. § 353.31 (1990)
margin. Thus, while the like product issue is a question of comparison between imported products and domestic products in the importing country, the question of "such or similar merchandise" is one of comparison between home market products in the exporting country and exported products therefrom. The like product issue involves different producers, i.e., domestic producers and foreign producers, but the such or similar merchandise question involves only one producer, i.e., a foreign producer. Because the same insurer is at issue, there would be no question of difference in quality of performance, unless the foreign insurer were intentionally to discriminate in service against export markets.

Instead, the such or similar merchandise question involves a difference in cost. An insurance premium consists of the cost of paying for expected losses, the cost of selling and administration, reserves for unexpected loss, and investment earnings (which are negative as a cost). The cost of losses is different in each market depending upon the legal system and other social and cultural factors. Therefore, the total cost of an insurance policy is different if sold in different markets, even though the terms of the policy, i.e., its physical characteristics, are the same. This point may be unique to insurance, because the cost of the production of goods usually does not differ depending upon the market to which the products are destined if the physical characteristics of the products are the same.

Then, can insurance constitute "such or similar merchandise" even when there is a difference in cost? Under the U.S. law, such or similar merchandise means merchandise that the Department of Commerce determines may reasonably be compared with the subject merchandise. This means that Commerce has discretionary authority to identify such or similar merchandise. Under this authority, Commerce often uses a twenty percent guideline to ensure that the home market product chosen is of approximately equal commercial value to the U.S. product. Under this guideline, if the difference in physical characteristics adjustment is in excess of twenty percent of the cost of manufacturing of the U.S. product, Commerce disregards the home

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market product as a basis for the foreign market value. Thus, home market insurance having a difference in cost in excess of twenty percent will not constitute such or similar merchandise when compared with insurance exported by the same insurer.

Even if the home market insurance qualifies as such or similar merchandise under the Department of Commerce's guideline, the price comparison does not make sense if the difference in cost is not adjusted. Then, is an adjustment for the difference in cost allowed where physical characteristics are identical? The U.S. antidumping statute is not clear on this point.

Nineteen U.S.C. section 1677b(a)(4) provides that an adjustment will be made if it is established to the satisfaction of Commerce that the amount of any difference between the U.S. price and the foreign market value of the merchandise is wholly or partly due to differences in circumstances of sale. The statute, however, offers little guidance in making adjustments. Specifically, it places no limitations on Commerce's authority to allow or deny adjustments, and provides no guidelines to aid the decisionmaking process. It does not define the term "circumstance of sale," nor does it set forth any method for determining allowances. Congress seems to have deferred to Commerce's expertise in this matter, and given the Secretary of Commerce broad discretion to employ circumstance-of-sale adjustments. However, judicial notice has been taken of the fact that the Department of Commerce is required by statute to make the fair value comparison on a fair basis, that is, by comparing apple-to-apple. Therefore, Commerce's discretion in making its determinations is limited by this fair comparison requirement.

Commerce has promulgated a regulation to implement the circumstance-of-sale adjustment under the statute. It divided the circumstance-of-sale adjustment under the statute into three types: (i) circumstance-of-sale adjustment, which usually deals with differences in selling expenses, (ii) physical-characteristics adjustment, and

58. 19 U.S.C. § 1677b(a)(4) (1988) provides in pertinent part:
[i]n determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to —
(B) other differences in circumstances of sale; then, due allowance shall be made therefor.
60. Id.
61. Id.
62. Id. at 1578.
(iii) level-of-trade adjustment.\textsuperscript{65}

In its study of antidumping adjustment methodology,\textsuperscript{66} the Department of Commerce stated, "we do not make adjustment for difference in costs of producing merchandise with identical physical characteristics."\textsuperscript{67} This policy is also reflected in the antidumping regulations, which state that Commerce "will not consider differences in cost of production when compared merchandise has identical physical characteristics."\textsuperscript{68}

It appears, however, that the courts are not in complete agreement with the Department of Commerce. In \textit{NAR v. United States}, the Court of International Trade (CIT) modified the above policy of Commerce by adding an exception, \textit{i.e.}, "unless an exceptional market situation renders the comparison of identical goods unrealistic,"\textsuperscript{69} and denied the claim of plaintiff on the ground that it did not argue the existence of an "exceptional market situation." This modification implies the willingness of the court to allow adjustments for cost of production where there is no difference in physical characteristics, as long as there is "an exceptional market situation." In addition, in \textit{Alhambra Foundry Co. v. United States}, the CIT stated, though in \textit{dictum}, that "the costs that will vary according to market destination are 'circumstances of sale,' for which Commerce must make a circumstance of sale adjustment [under statute]."\textsuperscript{70} These opinions are in line with the principle stated by the CIT in \textit{U.H.F.C. Co. v. United States}, that the purpose of the statutory circumstance-of-sale adjustment is "to fulfill the fundamental objective of the antidumping statute to obtain a fair comparison of prices at which identical or similar merchandise is sold in two different markets, at the same point in a chain of commerce, and under similar commercial conditions."\textsuperscript{71} Therefore, it is

\begin{flushleft}
\textsuperscript{64} 19 C.F.R. § 353.57 (1990).
\textsuperscript{65} 19 C.F.R. § 353.58 (1990).
\textsuperscript{66} U.S. DEP’T OF COMMERCE, \textsc{Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change} (Nov. 1985).
\textsuperscript{67} \textit{Id.} at 53 (emphasis in original) (citation omitted).
\textsuperscript{68} 19 C.F.R. § 353.57(b) (1990).
\textsuperscript{69} \textit{NAR v. United States}, 707 F.Supp. 553, 557-58 (Ct. Int’l Trade 1989). The court stated, in pertinent part:
Commerce does not make adjustments for merchandise with identical physical characteristics, even if differences in cost of production exist, \textit{Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change}, U.S. Dep’t. of Commerce (1985) at 53; 19 C.F.R. § 353.16; \textit{Defendant’s Memorandum} at 41-42, unless an exceptional market situation renders comparison of identical goods unrealistic.
\textit{Id.} (emphasis added).
\end{flushleft}
likely that the CIT would allow an adjustment for differences in cost of insurance even if the policies' physical characteristics were identical, because a comparison without such an adjustment is not an apple-to-apple comparison.

In addition, even under Commerce's regulation, adjustments based on differences in market value may be possible. The regulation states that "the Secretary normally will consider differences in the cost of production but, where appropriate, may also consider differences in the market value."\(^7\) Thus, if Commerce considered that an adjustment based on the market value were "appropriate" for insurance, the premium difference would be adjusted based on the market value.

To summarize, home market insurance having a difference in cost from, but physical characteristics identical to, export market insurance could constitute such or similar merchandise if the difference in cost were less than twenty percent. And if the home market insurance constituted such or similar merchandise, it is likely that current U.S. regulations would allow an adjustment for the difference in cost even though physical characteristics were identical. If that is the case, the price comparison would be made on an apple-to-apple basis.

c. Difference in Physical Characteristics

The U.S. antidumping statute provides, in pertinent part, that if it is established to the satisfaction of the administering authority that any difference between the U.S. price and the foreign market value of a product is wholly or partly due to "other circumstances of sale," then due allowance shall be made therefor.\(^7\) Under this provision, Commerce promulgated a regulation stating, "the Secretary will make a reasonable allowance for differences in the physical characteristics of merchandise compared to the extent that the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference."\(^7\)

Adjustments in goods proceedings under this provision are usually made on a cost basis, based on cost of materials, direct labor, and factory overhead.\(^7\) For example, assume that certain cars sold in the home market of the exporter are equipped with airbags, and that the same models, when exported, are sold without airbags. Further assume that the price of a car with an airbag is $1,000 higher than that

\(^7\) 19 C.F.R. § 353.57(b) (1990).
\(^7\) 19 C.F.R. § 353.57(a) (1990).
\(^7\) Macrory, supra note 25, at 32.
of the same model without an airbag, but that the cost of an airbag is $700. In this situation, the difference in physical characteristics, namely the presence or absence of an airbag, is adjusted on a cost basis, not on a price basis. In other words, the cost of an airbag ($700), not the price ($1,000), is deducted from the home market price of the model equipped with the airbag in order to make an apple-to-apple comparison with the export price of the model without an airbag.

In insurance, adjustments could be made in a similar way, based on cost of losses, selling and administrative expenses, and reserves for unexpected losses. For example, if the amount insured by home market property damage insurance is $10,000 and the annual premium is $100, and if the corresponding figures in exported insurance are $11,000 and $105, the difference in physical characteristics (difference in amount insured) could be adjusted in the following way:

Assuming that the antidumping law for insurance requires that the adjustment for difference in physical characteristics be made based on a cost of loss basis, and that the ratio of the cost of losses to the amount insured is 0.7%, the difference in amount insured of the two insurance policies ($11,000 - $10,000 = $1,000) would be adjusted by $1,000 \times 0.7\% = $7. The adjusted home market premium would be $100 + $7 = $107. Therefore, in this example, the exporter would have a dumping margin of $107 - $105 = $2.

In a similar way, adjustments for differences in term (period of time covered by the policy) could be made. Therefore, it appears that there would be no serious problems in making adjustments for differences in physical characteristics.

d. Circumstance-of-Sale Adjustment under Regulation

Under the circumstance-of-sale provision mentioned above, Commerce promulgated a regulation stating, "the Secretary will make a reasonable allowance for a bona fide difference in the circumstances of the sales compared if the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference."\textsuperscript{76} Examples of these differences include selling expenses (such as advertising costs), commissions, credit terms, guarantees, warranties, technical assistance and servicing.\textsuperscript{77}

Some of these expenses, such as selling costs, credit terms, and commissions, would be common to all types of insurance. Therefore,
there would probably be no serious problem in making those types of adjustments to insurance transactions.

e. Resale by a Subsidiary

Under the U.S. antidumping law, if an importer in the United States is related to an exporter, the price at which the related importer sells the merchandise to an unrelated buyer is used as the U.S. price; this price is called exporter's sales price, or ESP. This U.S. price is then used to derive the ex-factory price by subtracting various expenses (such as sales and transportation expenses) from the ESP and making some other adjustments.

If a foreign insurer establishes a subsidiary in the United States and sells insurance through such a subsidiary, can the ex-factory price of insurance be calculated from the ESP in the same manner as for goods? In other words, does the ex-factory price calculated from the ESP of insurance have any meaning? An insurer's subsidiary would receive invisible business resources from the parent, such as capital and financial assistance, know-how about insurance, human resources for management, and reinsurance. However, these business resources, except for reinsurance, are quite different from the specific insurance coverage sold by the subsidiary, and their identities are already lost when the second sale occurs in the form of a policy. Therefore, the relationship between the first sale and second sale is so remote that the ex-factory price of the first sale does not have a meaningful connection to the second sale. Thus, the calculation of the ex-factory price from the ESP would make sense only when a second sale of insurance could be recognized as a direct resale of the first sale. In insurance, such a resale could be recognized only if reinsurance were purchased by the subsidiary.

Among several types of reinsurance, a resale could be recognized only if the reinsurance were specifically purchased to reinsure a particular insurance policy sold by the subsidiary. In contrast, if the reinsurance arrangement were based on a continuing relationship between the subsidiary and parent, and if each additional insurance policy the subsidiary sold were automatically covered by the reinsurance, these second sales would be too removed to recognize as resales of the reinsurance.

The fact that antidumping law could not apply to exports of services through a subsidiary except where the second sale could be recognized as a resale is not significantly different from the application to

goods of the U.S. antidumping law. In the case of goods, under the current law, merchandise produced within the United States, whether by a related party or unrelated party, is not covered except where the production arrangement meets the requirements of the anticircumvention law.\(^7\)\(^9\) This is so even when the subsidiary's manufacturing in the United States is not completely independent of the parent. For example, even if a subsidiary manufacturing products in the United States receives the assistance of human resources from its parent, the subsidiary's products are not covered by the antidumping law unless the manufacturing operation is covered by the anticircumvention provision.\(^8\)\(^0\) Antidumping law, which is designed to combat dumped imports, inherently cannot deal with merchandise produced domestically. In insurance, a sale by the subsidiary which cannot be recognized as a resale would correspond to a product “produced domestically.” Therefore, the fact that the antidumping law cannot apply to certain sales of the subsidiary does not preclude the application of the law to insurance.

f. Circumvention

If certain exports of insurance through a subsidiary could not be covered by antidumping law, a foreign insurer who became subject to an antidumping order could circumvent the order simply by establishing a subsidiary in the host country. To avoid this tactic, some type of anticircumvention law for services, probably similar to the current U.S. law aimed at trade in goods, would have to be promulgated.

Under current U.S. law, if merchandise subject to an antidumping order is assembled in the United States from parts or components produced in the exporting country, and the difference between the value of the completed merchandise sold in the United States and the value of the imported parts is small, Commerce may include such parts and components within the scope of the order.\(^8\)\(^1\) The rationale for this provision is that if the value added in the United States is small, the assembly operation in the United States should be considered a method of circumvention.

Can this provision directly apply to insurance? The answer is no, because there are no “parts and components” and no “assembly” in insurance. Thus, to prevent circumvention, a new law for insurance would have to be created. If the same principle were applied by the

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80. Id.
81. Id.
new law for insurance, since there are no "parts and components,"
investigation would focus on the degree to which the subsidiary carries
out its business independently of its parent. For example, does it have
reinsurance with its parent? If so, what type of reinsurance? Does it
need assistance from its parent for financing, resources, business
know-how, or management? If the subsidiary's activities were consid-
ered to be heavily dependent upon the parent, after taking into ac-
count these types of factors, the subsidiary would be covered by the
original antidumping order as a method of circumvention.

g. Constructed Value

Under the U.S. antidumping statute, if home market sales are inade-
quate as a foreign market value because the number of sales is insuffi-
cient, or because they are made below cost of production, the
constructed value is used as the foreign market value.82 The con-
structed value, roughly speaking, consists of (i) cost of materials and
(ii) general expenses and profit in the home market. With respect to
the cost of materials, it appears that Commerce has taken two conflict-
ing approaches as to which merchandise should be used to calculate
the cost of materials.83

One approach considers the cost of materials of exported merchan-
dise, as opposed to that of home market merchandise, together with
the general expenses and profit of the home market (hereinafter "ex-
ported merchandise approach").84 Thus, the constructed value under
this method is a hybrid value consisting of cost of exported products
plus home market expenses and profit. The purpose of this approach
is to construct a hypothetical sales value at which the exported mer-
chandise would have been sold in the home market.85

The other approach uses the cost of materials of the home market
merchandise plus the general expenses and profit of the home market

83. A telephone interview with a former International Trade Specialist of the ITA (Nov. 23,
1990) indicated that the ITA has been taking two conflicting approaches as to what materials
should be used to determine the cost component of constructed value; one approach is to use the
cost of materials of "exported merchandise" and the other is to use the cost of materials of
"home market merchandise." The rationale for the first approach is to construct a hypothetical
sales value at which the exported merchandise would have been sold in the home market. The
rationale for the second approach is that, since constructed value is one of the foreign market
values, the cost of home market merchandise should be used. However, a legal counsel of the
ITA declined to confirm the "export merchandise" rationale.
84. Certain Small Business Telephone Systems and Subassemblies Thereof from Korea, 54
Fed. Reg. 53141, 53144 (Int'l Trade Admin., 1989) (final determination); Portable Electric Type-
85. See supra note 83.
"home market merchandise approach").\textsuperscript{86} The rationale for this approach is that, because the constructed value is one of the foreign market values, the cost of the foreign products should be used.\textsuperscript{87} This method constructs the sales value at which the home market merchandise would have been sold where there are no, or insufficient, home market sales, or at which it should have been sold where the home market sales were made below cost of production. Because this price is constructed based upon the cost of materials of the home market merchandise (which in many cases will be different from that of the exported merchandise), adjustments for the difference in cost are required for a fair comparison. Commerce's policy allows a circumstance-of-sale adjustment under the statute not only for the home market price and third country price, but also for the constructed value.\textsuperscript{88} This position was upheld by the CIT on the ground that the definition of the "foreign market value" for which the circumstance-of-sale adjustments under the statute must be made includes the constructed value.\textsuperscript{89} Therefore, this article's previous discussion with respect to adjustments for differences in cost where physical characteristics are identical would also equally apply to the constructed value. Thus, it is likely that the difference in cost in the constructed value would be adjusted even where physical characteristics are identical.

If the exported merchandise approach were applied to insurance, the constructed value of insurance would consist of the cost of exported insurance plus the general expenses and profit of the home market. However, if an insurance policy with certain policy terms were sold in the home market, its cost would be different from the cost of exported insurance with the same policy terms sold in the export market because costs for losses would be different in each market. Thus, the constructed value under this approach would not represent the hypothetical price at which the exported insurance would have been sold in the home market. The constructed value under this approach would not represent anything real. Therefore, the exported merchandise approach to constructed value could not be applied to insurance.

On the other hand, the home market merchandise approach could be applied to insurance. This approach would not present serious problems because cost of losses for the home market is used as a sub-

\textsuperscript{86} Kaplan, Kamark, & Parker, supra note 34, at 400.  
\textsuperscript{87} See supra note 83.  
\textsuperscript{88} U.S. DEP'T. OF COMMERCE, supra note 66, at 24.  
stitute home market price. In insurance, therefore, only the home market merchandise approach to constructed value could be applied.

h. Identification of Sale, Price, and Value

(i) Sale

To compare prices and calculate a dumping margin, the unit of sale must be identified. In the case of non-life insurance, each policy covers some definite period of time, e.g., a six-month period or a one-year period, and the premium for the period of time covered by each policy corresponds to the risk in that period. Thus, the unit of sale for non-life insurance could be identified by each policy, and the premium for each policy could be compared to calculate the dumping margin. Therefore, non-life insurance would not present serious problems in identifying the unit of sale.

In the case of whole-life insurance that utilizes the level-premium method, the premium in each year does not exactly correspond to the risk in that year. Under this type of policy, the insurer, during the initial stage of the policy's duration, charges a larger premium than is necessary to cover early mortality claims. These "excess" premium payments, together with the compound interest on them, constitute a savings amount for the consumer. That savings amount eventually helps to finance the large premiums necessary to keep the policy in force in later years when the probability of death is higher. When the consumer becomes elderly, the insurer's mortality cost is much more than the amount of the level premium paid by the consumer; however, the insurer is compensated for the difference by the "excess" premium amounts, plus accrued interest, paid earlier by the consumer. Thus, it would not make sense to divide one policy of whole-life insurance into separate units, by year or month. The entire policy should be identified as one sale.

(ii) Price

Under the U.S. antidumping statute, the preferred basis of foreign market value is the price at which such or similar merchandise is sold.

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90. Under a whole-life insurance policy, the insurer promises to pay the beneficiary whenever death occurs, or when the insured reaches the age of 100. The level-premium method means that the insured periodically pays a certain, unchanging amount of money as the premium. M. DORFMAN, supra note 53, at 270.
91. Id.
92. Id.
93. Id.
94. Id.
for home consumption.\textsuperscript{95} In the case of non-life insurance, the premium actually paid can be used as a price for the dumping margin calculation.

But what is the price of whole-life insurance? Does it make sense to calculate the dumping margin by comparing the total amount of premiums paid? The answer is no. In whole-life insurance, there is no definite period of time to be covered. The insurer's obligation continues until the insured dies or reaches 100.\textsuperscript{96} Thus, the total amount of premium payments to be made is not known until the insured dies or reaches 100. In addition, the total premium payment is an inadequate basis for comparison because the total payment is different depending upon the time of the death of the insured. For example, the total premium payment on a whole-life insurance policy where the insured dies five years after the time of the contract and the total premium payment where the insured dies twenty years after the time of the contract are different. There is no meaning in comparing those premiums.

An alternative would be to compare the amount of the premiums that the insured is expected to pay until he reaches an average life expectancy, no matter how long he lives after the contract is made and no matter how much of a premium he actually pays. By this method, the price of whole-life insurance could be ascertained at the time of the contract without waiting for the death of the insured.

(iii) Valuation

After a dumping margin is calculated in terms of a percentage, that percentage is applied to the value of the import to arrive at the amount of the antidumping duty. For this purpose, the merchandise must be valued.

Under the U.S. antidumping law, imported goods are usually valued for customs duty purposes by transaction value.\textsuperscript{97} This value is the "price actually paid or payable for the merchandise when sold for exportation to the United States," plus other items of cost to the buyer, such as royalties.\textsuperscript{98}

If this concept is applied to non-life insurance, imported insurance would be valued according to the premium, because the premium for a particular contract year is the "price actually paid or payable" for the

\textsuperscript{96} M. DORFMAN, supra note 53, at 271.
\textsuperscript{97} 19 U.S.C. § 1401a(b) (1988).
\textsuperscript{98} Id.
insurance covering that one year. It seems, therefore, that there would be no problem in using this method for valuing non-life insurance.

However, in order to value life insurance, especially whole-life insurance, can the same method be used? If the premium actually paid or payable for whole-life insurance were used, the government would wait until the total premium were ascertained, that is, until the insured died or reached the age of 100. This could be twenty or thirty years after the time of the contract. Thus, this method does not make sense from a practical viewpoint. An alternative would be, as discussed above, to use the amount of premiums the insured is expected to pay during his average life expectancy. By this method, the amount of premiums payable could be ascertained at the time of the contract.

i. Sales Below Cost of Production

Under the U.S. antidumping statute, if home market sales are made at less than cost of production (i) "over an extended period of time and in substantial quantities" and (ii) "not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade," such home market sales are disregarded on the ground that they were not made in the normal course of trade.99 These two criteria constitute the "below-cost test" for ascertaining whether to disregard some home market sales as bases for price comparisons.

When covered by whole-life insurance with the level-premium method, the insured continues to pay periodically a premium of the same amount until he dies or reaches the age of 100.100 With this insurance type, the negative difference between the high mortality cost and the premium in a later stage is made up by a positive difference in the initial stage.101 Thus, in a later stage of the policy, the level premium is below the mortality cost. Then, does it make sense to apply the below-cost test to these premiums? The answer is no. As discussed above, the entire life insurance policy should be treated as one unit of sale. Therefore, it would be inappropriate to apply the below-cost test to separate premium payments.

Then, if the total premium is below cost, does it make sense to apply the below-cost test? For example, assume that an insurance company sold ten policies of life insurance in a particular year, and that seven of the ten insured died within one year, so that premiums paid for those seven policies were below cost of claim payments. In

100. M. DORFMAN, supra note 53, at 271.
101. Id.
this situation, the below-cost test is applicable. Under the test, however, the sales of the seven policies would not be disregarded. As long as the premium is calculated based on an appropriate mortality rate to cover expected claim payments, "recovery of all costs within a reasonable period of time in the normal course of trade"102 would be possible. In insurance, therefore, it would not make sense to apply the below-cost test based on the total premiums actually paid. However, it would be appropriate to apply the test based on total expected premium payments, namely the total amount of premiums the insured is expected to pay during the average life expectancy.

j. Enforcement

In the case of goods transactions, virtually all imported goods must go through customs procedures, where antidumping duties, as well as customs and countervailing duties, are collected. Under the U.S. antidumping law, enforcement of an antidumping duty order against a goods importer works in the following way. Once an antidumping duty order is issued, the importer is required, at customs, to deposit an antidumping duty (the deposit requirement) for each import in accordance with the duty rate specified in the order.103 However, this duty is an estimated duty since it was calculated based upon cost, price, and other information that was accurate when the order was issued, but is not necessarily accurate later.104 Therefore, any difference between the estimated duty deposited and the actual dumping margin must be liquidated through an administrative review. This review grants a refund to an importer who deposited an estimated duty that was greater than the actual dumping margin, and requires an additional duty payment from an importer whose deposit was less than the actual dumping margin.105

In the case of insurance, however, there is no comprehensive system which captures all the cross-border flow of insurance. This raises the question of how to enforce an antidumping law for insurance services. At best, the current customs service system could not apply to insurance transactions. Some alternative method of enforcement would have to be created.

International insurance transactions can be divided into three types: (i) transactions through a subsidiary in the importing country, (ii) transactions by means of some international communication, such

104. Id.
as mail, telephone, or telecopier, and (iii) transactions between insurer and customer, both of whom are located in a foreign country (for example, product liability insurance covering the U.S. market underwritten by an insurer for a manufacturer, when both are located in a foreign country).

For type (i), an appropriate enforcement mechanism would be to impose some duty, such as an income tax type of duty, on the subsidiary itself. Because that duty would be considered an internal tax, as opposed to a border tax, such a duty imposed only on imports could be inconsistent with the national treatment clause of the GATT. Thus, unless a modified national treatment clause were adopted by the service agreement, duties on subsidiaries would be difficult to implement.

Another method would be to impose a duty on sales agents. However, this method would require complicated procedures to record and calculate the amount of tax. Because an antidumping duty would be imposed on a company- (insurer-) specific basis, and a sales agent usually deals with more than one insurance company, the agent would have to apply different tax rates for each insurer. Furthermore, if the duty were eventually borne by consumers, as sales tax is, the agent would have to liquidate the difference between the estimated antidumping duty deposited by consumers and the actual antidumping duty determined through the administrative review. Giving a refund to, and collecting additional duties from, the consumer after an administrative review, which usually takes more than one year from the date of sale to complete, would be too burdensome for both agent and consumer. In particular, it would be unreasonable for the consumer not to be able to ascertain his tax liability at the time of purchase; instead, his tax liability would be determined at a future date by an event beyond his control. Therefore, a sales tax type of duty borne by consumers would be unworkable.

As for type (ii), there would be two ways to cope with this situation, namely, to impose a tax liability on an importer located in the importing country, or to impose a tax liability on an exporter located in a foreign country. However, the latter would be unrealistic; it is unlikely that a country could extend its tax jurisdiction to a company located in a foreign country, or that it could enforce its own tax law against that company. Thus, imposing a tax liability on the importer is the only feasible means of enforcement. The importers of insurance would be either sales agents or consumers. A duty could be imposed on a sales agent in two ways, by an income tax type of duty or by a sales tax type of duty. However, the sales tax type of duty, which
would eventually be borne by consumers, would be unworkable because of the need for future refunds and additional tax collection after the administrative reviews. Thus, the only way to collect the duty would be to impose an income tax type of duty (which would not be borne by consumers) on the sales agent. To impose this type of duty on consumers directly would not be feasible because the consumers would have to be involved in administrative reviews.

Type (iii) transactions would be the most difficult to reach because both insurer and purchaser are located in a foreign country. If the insurance is product liability insurance, the only nexus with the dumped-on market is the product that is exported to the market in question. If the insurance is traveler's insurance, the only nexus is the insured person who travels into the market in question. Thus, the only possible way to impose a duty in those situations would be to impose the duty on the nexus, i.e., the products insured or the person insured. In the case of a product, an antidumping law for insurance could require the importer to declare if the product is insured, and if so, to declare an amount insured and the premium, and to pay the tax. In the case of a person, a law could require the person to declare the same information at the immigration point, and to pay the tax. While these procedures are not impossible, the taxation of persons could not include the collection of any additional tax or refund of the tax after an administrative review. Thus, applying an antidumping law to traveler's insurance would be very difficult. And, although it would not be impossible to implement the law in a situation in which the nexus is a product, enforcement would surely increase the complexity of customs procedures.

3. Conclusion

The application of antidumping law to insurance does not make sense when premiums are regulated in either the home market or the export market. Apart from price regulation, it would be difficult to apply antidumping law to insurance transactions in several respects, including like product definition, differences in cost by market, resale by subsidiaries, identification of prices, and enforcement. However, none of these difficulties presents an insurmountable problem to application of the law to insurance. As discussed previously, each of these problems could be managed. Therefore, while the application of antidumping law to insurance would be more difficult and complex than its application to goods, it could be accomplished.
B. Can Antidumping Law Apply to Banking?

1. The Nature of The Banking Industry

Banking services include a wide range of transactions such as deposit-taking, lending, international money transfer, fiduciary trusts, financial advisory services, and safekeeping services. Generally, banking firms providing these services are integrated into national monetary and fiscal policy. Also, banks carry a fiduciary responsibility for depositors and investors. If banks fail in their management, not only will depositors and investors suffer serious damages, but the national economy as a whole will also be adversely affected. In this way, the banking industry is a sensitive industry in terms of national economic policy.

2. Expected Problems

In this section, I will discuss whether the U.S. antidumping regime can be applied to the banking industry. I focus my discussion on bank loans, because loans are the major source of income for most banks.

a. Product Definition

(i) Like Product

If a foreign bank exports a loan denominated in its domestic currency (e.g., a Japanese bank exports a loan denominated in yen to the United States), is it a like product compared to loans offered in the domestic currency of the host country (e.g., a loan denominated in U.S. dollars in the U.S. market)? Probably the answer is no. Classes of customers (borrowers) and their purposes would be different in the case of a domestic currency loan than in the case of a foreign currency loan. For example, a foreign currency loan is used for transactions involving the particular country using that currency, while a domestic currency loan is used for transactions within the domestic market, or if that currency is commonly used in international transactions, as is the U.S. dollar, such a loan may be used widely. Therefore, these different types of loans will not compete directly, and it is likely that they would not be considered like products.

107. Id. at 5.
108. Id.
109. Id. at 7.
110. Id.
Even if these loans were considered like products, how would the dumped rate of interest be identified as the cause of lost sales where the currencies are different? For example, assume that the prime rate in the United States (for the U.S. dollar) is eight percent per year and that the prime rate is five percent in Japan (for Japanese yen), and that a Japanese bank exports a loan denominated in Japanese yen at the five percent rate to a U.S. customer. Can U.S. domestic banks claim that they lost sales because the five percent rate is lower than the eight percent rate? Is the five percent rate for Japanese yen really lower than the eight percent rate for the U.S. dollar? In other words, does it make sense to compare the interest rates of loans denominated in different currencies? Economists say no. A major factor which determines any given interest rate is the exchange-rate change expected in the market.\(^{112}\) In addition, of course, an expected exchange-rate change differs by currency. It necessarily follows that interest rates would differ depending on their currencies.\(^{113}\)

This point can be illustrated by the following example. If the U.S. government is to attract investors from the international money market, it should offer a higher interest rate on its bonds than on other investment instruments. However, if a depreciation of the U.S. dollar is expected in the market such that it will offset the higher rate of return from U.S. bonds, investors will not buy U.S. bonds. Thus, the U.S. government needs to offer, taking into account the exchange-rate change expected in the market, an interest rate high enough to attract investors. To summarize, an interest rate set by a particular government is affected by the expected exchange-rate change in the market, and hence, interest rates differ by currency. Therefore, it is not credible to argue that domestic banks lose their sales because the interest rate of imports is lower than that of domestic loans where the loans are denominated in different currencies.

However, if a foreign bank exports a loan in the currency of the host country (e.g., a Japanese bank exports a loan to the United States in U.S. dollars), it will directly compete with domestic-currency loans offered by domestic firms. In this situation, the loans would probably be considered like products.


\(^{113}\) Kasman & Pigott, supra note 112, at 38-39.
(ii) Such or Similar Merchandise

The export price of a class or kind of merchandise is compared with the price of "such or similar merchandise" sold in the exporting country to calculate the dumping margin. Can a home market loan be compared with an exported loan? Or, in other words, does a home market loan constitute such or similar merchandise when compared to an exported loan? When comparing domestic loans and exported loans, there are three factors to be taken into account: risk of default of an individual borrower, differences in currency, and country risk.

The risk of default of an individual borrower, together with the cost of funds, and selling and administrative expenses, is a part of the cost of a loan. Most banks use a risk-rating system, and incorporate the risk factor into the cost of a loan. Thus, the degree of risk can be compared in terms of cost. If such a cost is so different that the comparison does not make sense, that loan should not be considered to be such or similar merchandise. As discussed in the previous section, the Department of Commerce currently uses a twenty percent cut-off line to ensure that the home market merchandise has a commercial value approximately equal to that of the U.S. product. Thus, under the current U.S. antidumping law, a home-market loan having a cost difference of more than twenty percent when compared with an exported loan (a difference that reflects a significant difference in the respective degrees of risk of the loans compared) would not be considered such or similar merchandise for price comparison purposes.

If the cost difference is less than twenty percent, the home market loan could be considered such or similar merchandise. This situation is similar to that of insurance coverage in that the home market and exported merchandise are different in cost while having identical physical characteristics. As discussed in detail in the previous section, although the U.S. antidumping law is not clear as to whether an adjustment for difference in cost is allowed where physical characteristics are identical, there are indications that the law would allow some adjustments in order to make fair and apple-to-apple comparisons in that situation. If that is the case, it would make sense to compare the interest rates of loans differing in cost.

If a foreign bank exports a loan in a different currency from that used in its home market loans (e.g., a Japanese bank exports a loan in U.S. dollars), can the home market loan denominated in the home

114. G. Ruth, supra note 111, at 248.
115. Id. at 248-49.
market currency be considered such or similar merchandise in comparison to the exported loan denominated in a foreign currency? In other words, does it make sense to compare the price (interest rate) of loans denominated in different currencies? As discussed above, economists say no. An interest rate is affected by expected exchange-rate change in the market, and hence, interest rates differ by currency. Therefore, it is inappropriate to compare the prices of loans denominated in different currencies. Moreover, since this difference stems from the nature of the interest rate, namely the fact that an interest rate is governed by type of currency, this is not an issue that can be solved by making adjustments. As a concept, antidumping law, the purpose of which is to compare prices, cannot apply to the case of interest rates of loans denominated in different currencies.

Country risk refers to additional risks incurred by a lender when it exports a loan;\(^{116}\) it includes transfer risks, economic risks, and political risks.\(^{117}\) Most commercial banks use some kind of country risk rating system.\(^{118}\) After evaluating the country risk, banks use the result of the risk analysis for their credit decisions, setting of exposure guidelines, and development of pricing policy.\(^{119}\) That is, banks spread risks by charging higher interest rates,\(^{120}\) syndicating loans, or securing home government guarantees.\(^{121}\)

If the response of a bank to a country risk is only to charge higher interest rates, and all other terms of the loan are equal to the home market loan, the exported loan will have a difference in cost but will have physical characteristics identical to those of the home market loan. This is a situation similar to that of insurance coverage. Thus, the first question is whether the home market loan has a commercial value approximately equal to that of the exported loan, that is, whether the difference in cost is less than twenty percent of the cost of the exported merchandise. If the difference in cost is over twenty percent, the home market loan would not be considered such or similar merchandise. If the difference is less than twenty percent, the next question is whether an adjustment for such a difference in cost is allowed under the antidumping law. As discussed in the previous section, the U.S. law is likely to allow such adjustments to make a fair

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117. Id. Transfer risk means that a borrower cannot obtain foreign exchange to repay the loan, or that he cannot transfer the foreign exchange even if he obtains it. Id.
119. Id.
comparison. Thus, the home market loan having a difference in cost but having physical characteristics identical to those of the exported loan could be compared on an apple-to-apple basis.

If a bank spreads the risk by syndication of the loan or through a guarantee from the home market government, that difference in the legal structure of the loan would be considered a difference in physical characteristics. Thus, this type of home market loan would not be considered such or similar merchandise, depending upon the degree of the difference. In the case of a syndicated loan, each participant bank has only a part of the right to repayment, while the bank in a non-syndicated loan has the entire right to the repayment. Therefore, it appears that non-syndicated loans would not be considered to be such or similar merchandise when compared with syndicated loans.

On the other hand, a home market loan without a guarantee could be considered such or similar merchandise when compared to an exported loan that has a guarantee from the home market government. The function of a guarantee is to reduce the risk of default. Thus, the degree of risk reduction obtained by securing a guarantee could be converted into a cost factor of the loan. If such a difference in cost were not so large as to raise the question of the equality of commercial value, i.e., if the difference in cost were less than twenty percent, the home market loan without a guarantee could be considered such or similar merchandise.

In summary, exported loans which respond to country risk by charging a higher interest rate or by securing a guarantee could be, depending upon the degree of the difference in cost, compared with home market loans. However, syndicated loans could not be compared with home market non-syndicated loans.

b. Difference in Physical Characteristics

If there is a difference in physical characteristics between a home market loan and an exported loan, the price of the home market merchandise would be adjusted for such a difference. For example, if the term of loans is different by one year (that is, if one loan agreement is to last longer than the other by one year), the cost to one of the lenders to keep a certain amount of the loan outstanding for the additional year could be calculated from the allocated cost of funds, cost of risk, and administrative expenses for a particular period of time. The same is true for differences in the amount of the loan and the method of

repayment. Thus, it appears that there would be no serious problems in making adjustments for differences in physical characteristics among bank loans.

c. Deposit-taking

One of the major operations of a bank is deposit-taking. This is one of the sources of funds to finance loans. To attract these funds, banks pay interest on deposits. If a foreign bank offers a higher interest rate on deposits in the export market than it does on deposits in the home market, domestic banks would be injured in the sense that they would attract fewer deposits. They could claim that they lost deposits because of the "dumped" imports of deposit-taking. Can antidumping law apply to this situation? The answer is no. There is no sale at less than fair value in offering a higher interest rate on deposits. When accepting deposits from consumers, banks do not charge any prices. Instead, they pay interest on the deposits. Thus, the current U.S. antidumping law cannot apply to deposit-taking. To cope with the "dumping" of deposit-taking, an entirely new concept that condemns a purchase at "more" than fair value would be necessary.

d. Circumstance-of-Sale Adjustment under Regulation

Under this circumstance-of-sale regulation, adjustments for selling expenses such as advertisements and commissions are allowed. It appears that banks have selling expenses similar to those in goods industries, and that therefore there would be no serious problems in making these adjustments.

e. Resale by a Subsidiary

Could an ESP situation in a bank loan be covered by the U.S. antidumping statute? The answer depends upon whether the second sale could be recognized as a resale of the first. For example, if a parent makes a loan to a subsidiary in an amount and term exactly equal to a particular loan that is to be made by the subsidiary to a customer, the second loan could be identified as a resale. On the other hand, if the parent makes to the subsidiary a loan that is not designed to assist a particular loan to be made by the subsidiary, it would be difficult to recognize the second loan as a resale. In such a case, calculation of the "ex-factory" price would not make sense.

As discussed in the previous section, however, the fact that an antidumping law could not cover some ESP situations does not render the application of the law to bank loans entirely meaningless. Antidumping law is not designed to apply to products produced domesti-
cally in the first place. Thus, it is an inevitable consequence that such a law cannot cover bank loans “produced domestically” by a subsidiary.

f. Circumvention

Because some ESP situations would not be covered by the antidumping law, an exporter could circumvent an antidumping order by establishing a subsidiary. In that case, could the current anticircumvention provision of U.S. law apply to circumvention in banking? The answer is no, because there are no “parts and components” and “assembly” in banking.

If a new anticircumvention provision for banking were created, it would have to distinguish between a subsidiary for circumvention purposes and one for noncircumvention purposes. Investigation would focus on the degree to which the subsidiary carries out its business independently of its parent. If the subsidiary’s activities were considered heavily dependent on the parent, such a subsidiary would be covered by the original antidumping order.

g. Sales below Cost of Production

There is a risk that the interest rate a bank must pay to its depositors might exceed the rate it earns from lending. This risk is especially high when the term of the loan is long. If this happens, one could argue that such loans are sales below cost of production. Under U.S. law, if home market sales are made at less than cost of production (i) “over an extended period of time and in substantial quantities,” and (ii) “not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,” then “such sales shall be disregarded in the determination of foreign market value,” on the ground that they are not considered part of the normal course of trade. Then, does it make sense to apply that provision to interest rates below cost of funds, and to disregard them in the calculation of foreign market value?

To address this question, the number of sales in one loan must be identified. For example, if repayment for a five-year loan is to be made in sixty monthly installments, is it one transaction or sixty transactions? The loan should be treated as one transaction, because the installment repayment represents only a method of repayment; it does not represent the number of contracts. It is the same as a purchase

123. G. RUTH, supra note 111, at 249.
agreement with installment payments. Therefore, it does not make sense to apply the below-cost provision to each interest payment separately. If it is to be applied, the provision must be applied to the entire loan transaction.

Then, if the total amount of interest paid for an entire loan is below the cost of funds, does it make sense to apply the provision and disregard the entire loan? The answer would be yes, theoretically, but no, practically. To compare the total interest income and the total cost of a loan, the government would have to wait until repayment was completed because the interest rate on deposits could fluctuate depending upon the market rate over time. Thus, the government could be required to wait for ten or twenty years until a maturity date, which would be impracticable. Therefore, the below-cost provision could not apply to a long-term loan from a practical viewpoint.

h. Identification of Sale, Price, and Value

(i) Sale

Like an installment purchase contract, a loan with an installment repayment plan should be treated as one sale. Therefore, there would be no problem in identifying the unit of sale.

(ii) Price

There would be a problem in ascertaining the price of a loan, which is the total amount of interest paid, in the case of a long-term loan with a fluctuating interest rate. If the interest rate is fixed, the total amount of interest can be ascertained at the time of the contract. In the case of a fluctuating interest rate, however, the government would have to wait until the maturity date to ascertain the total amount of interest paid. If the loan is long-term, the wait could be ten or twenty years. Thus, practically speaking, antidumping law could not apply to a long-term loan with a fluctuating interest rate.

(iii) Valuation

Under the U.S. antidumping law, the valuation of imports is usually made by transaction value, which is the "price actually paid or payable for the merchandise."125 Could this provision apply to a loan? The answer is yes, if the price can be ascertained at the time of the contract, as in the case of a loan with a fixed rate of interest. If the loan in question is a long-term loan with a fluctuating interest rate, the valuation cannot be made until the maturity date. Thus, the above

provision could not practically apply to a long-term loan with a fluctuating interest rate.

i. Constructed Value

Under the exported merchandise approach discussed in the previous section, the cost of materials of the exported merchandise is used to calculate its constructed value. The constructed value of a bank loan would consist of the cost of an exported loan, plus general expenses and profit in the home market. However, if a loan with the same terms as those of an exported loan is made in the home market, its cost could be different because of individual as well as country risk. Thus, if those risks differ between the two markets and they are incorporated into the cost of the loan, the constructed value under this approach would not construct the hypothetical price in the home market. Therefore, calculating the constructed value under the exported merchandise approach would not make sense in this situation.

Under the home market merchandise approach, the cost of materials of the home market merchandise is used to calculate constructed value. This approach would not present serious problems in constructing a substitute home market price because the cost of the home market loan would be used for the calculation of the substitute home market price. As discussed earlier, the cost of the home market loan could be different from that of an exported loan because of the difference in risk among individuals and countries. However, such differences in cost in the constructed value could be adjusted because the circumstance-of-sale adjustment under statute is available not only for the home market or third country sales values but also for the constructed value.126

For bank loans, therefore, constructed value, but only under the home market merchandise approach, could be utilized.

j. Enforcement

Since the current customs service system cannot cover international loans, the current system could not apply to exported loans for enforcement purposes.

A loan can be exported (i) through subsidiaries or (ii) through direct contract between a foreign bank and a borrower. With respect to type (i), the most feasible way to enforce the law would be to impose an income tax type duty on the subsidiary. As an alternative, one could impose a duty on the borrower. However, if a duty were im-

126. See supra notes 88-89 and accompanying text.
posed on borrowers, they would have to be involved in the processes of collecting additional taxes or of obtaining refunds after administrative reviews. This procedure would be unreasonably burdensome for individual consumers. Thus, if the borrowers were individual consumers, imposing a tax on the borrowers would not be appropriate.

With respect to type (ii), one enforcement method would be to impose a tax liability on the foreign bank. However, the possibility of extending tax jurisdiction to a corporation located in foreign country is unrealistic. Another method would be to impose a tax liability on borrowers in the host country. As discussed above, however, this approach would not be appropriate where borrowers are individual consumers, because of the problems that would result from the administrative review procedures.

3. Conclusion

The most serious problem in applying antidumping law to bank loans is product comparison. Comparing interest rates among loans denominated in different currencies would not make sense from an economic viewpoint. This means that all loans in the home market, exported loans, and domestic loans in the host market would have to be denominated in the same currency in order to make a meaningful comparison. This would limit the scope of the application of antidumping law so severely that it would not be practical to apply the law to bank loans. Moreover, the law could not apply to a long-term loan with a fluctuating interest rate because the price of such a loan cannot be ascertained until the maturity date. Furthermore, it would be very difficult to enforce a duty where a loan is exported directly to a borrower, because the borrower would have to be involved in the administrative review.

B. Can Antidumping Law Apply to Construction?

1. The Nature of The Construction Industry

The construction industry consists of two groups of services: design and implementation. Design involves preinvestment services (including market studies and feasibility studies) and project execution services (including product design, planning, and scheduling). Implementation involves managing projects as well as securing the com-


ponents of projects, such as labor, equipment, supplies, and financing.\textsuperscript{129}

Design and implementation services not only involve providing study results and product design to the client, but also require the presence of the provider at the construction site.\textsuperscript{130} Services provided on-site include "supervision of construction, purchasing, inspection and testing of materials and equipment, construction management and on-the-job technical personnel training."\textsuperscript{131} Thus, construction services can be categorized as both cross-border transactions and demander-located services.

The construction industry plays a major role in the domestic economies of both developed and developing countries.\textsuperscript{132} This sector accounts for about ten percent of GDP in industrialized countries and provides a significant amount of employment opportunities.\textsuperscript{133} The corresponding figure in developing countries varies with the level of economic development. The reasons for the importance of the construction industry are that it directly contributes to the realization of investment projects and that it links different parts of the economy, namely the provision of services and the manufacture of supplies and equipment.\textsuperscript{134}

The construction industry is different from other service industries in that the government plays a major role. Governmental policies affect demand for construction services\textsuperscript{135} and, in addition, the government functions as an originator of demand.\textsuperscript{136} Thus, the importance of the government in the construction industry is two-fold.

2. Expected Problems

a. Product Definition

(i) Like Product

To define like products in the context of trade in services, the levels of quality of the service in question must be compared. Although con-

\textsuperscript{129} J. Lee & D. Walters, \textit{supra} note 127, at 2.

\textsuperscript{130} Soubra, \textit{supra} note 128, at 189.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 191.

\textsuperscript{133} Id.


\textsuperscript{135} J. Lee & D. Walters, \textit{supra} note 127, at 2.

struction services eventually produce tangible products such as buildings, airports, and bridges, final products are not enough on which to base an evaluation of the quality of a construction service. Invisible aspects of the service provided, such as feasibility studies, supervision of construction, and on-the-job technical training, must be compared. As in the case of insurance, therefore, defining like products in the construction sector would be more difficult than in the case of goods. However, that difficulty could be managed to a certain extent by utilizing interviews with customers and officials in the industry about their views of the quality of the services in question. Thus, the difficulty in evaluating quality would not preclude the application of the law to the construction industry.

(ii) Such or Similar Merchandise

(A) Uniqueness of Construction

Small-scale construction projects, such as single-family homes or small roads, have not been markets for international competition.\textsuperscript{137} Thus, construction projects relevant to this discussion are large-scale projects, such as airports, petrochemical processing plants, and subway-systems. They are usually especially designed for each individual project and thus have unique custom-made specifications.\textsuperscript{138} Problems arising from this situation are (i) there will be a smaller number of home market sales for purposes of comparison than are available in goods transactions and even in other service sectors, such as insurance and banking, and (ii) custom-designing of products further reduces the number of comparable home market sales, because home market products that differ in cost from the exported products by more than twenty percent are not considered such or similar merchandise for antidumping law purposes.

For a dumping margin calculation, the U.S. price for an imported product is usually compared with the weighted average of home market prices for the product in the exporting country.\textsuperscript{139} This methodology reduces the impact of exceptionally high or low prices of home market sales on the dumping margin. For example, if there are four sales at $50 and one at $80 (exceptional sale) in the home market, the weighted average of home market prices is $56. However, if there are forty sales at $50 and one at $80, the weighted average home market price is $50.70. Thus, the larger the number of home market sales

\begin{itemize}
  \item \textsuperscript{137} J. Lee \& D. Walters, supra note 127, at 17.
  \item \textsuperscript{138} P. Hillebrandt, Economic Theory and the Construction Industry 8 (1974).
  \item \textsuperscript{139} 19 C.F.R. § 353.44 (1990).
\end{itemize}
from which the weighted average is taken, the more accurately will the averaged home market price reflect the level of home market prices. Therefore, a dumping margin calculation in the construction industry, where only small numbers of comparable home market sales are available, will be more likely to result in a distorted dumping margin than will such a calculation in other industries.

(B) Difference in Cost

The price of construction services, including final products, is affected by prices of land, equipment and materials, and labor, which vary by market. For example, even if airports identical in physical characteristics were constructed in different locations, the price of that type of airport in a large city where land prices are high and its price in a rural area would be different. Therefore, the cost of construction services differs by market. This problem is the same as that of insurance and bank loans. If such differences in cost are not adjusted, a price comparison does not make sense. As discussed earlier, U.S. law is not clear as to whether a difference in cost is adjusted where the products have identical physical characteristics. However, in light of the fundamental objective of the antidumping statute, i.e., making a fair comparison, it appears that the law would allow such adjustments. Therefore, the existence of differences in cost where physical characteristics are identical would not prevent the antidumping law from being applied to construction services.

(iii) Class or Kind of Merchandise

One of the unique features of the construction industry is that it consists of separate segments of industry, such as feasibility studies, designs, and materials and equipment, and that these are separately imported without being assembled into a final product. In contrast, in the manufacturing industry, these items are assembled into a final product before they are imported. Thus, when crossing the international border, elements of construction services are still in the form of "raw" materials, as opposed to final products.

The current antidumping law is designed to apply to goods transactions. It is expected to apply to final products, rather than "raw" materials, and is designed to cover one "class or kind" of merchandise. Therefore, one must ask if the components of a construction project constitute a "class or kind" of merchandise. In other words,
are materials for construction, such as air conditioners and elevators for a building, the same "class or kind" of merchandise?

Under the current law, the Department of Commerce, in *Cellular Mobile Telephone and Subassemblies from Japan*, expanded the scope of "class or kind of merchandise" to include discrete subassemblies (subassemblies that are imported separately rather than in kits) of completed cellular mobile telephones (CMTs). Commerce's rationale in this case was that CMT subassemblies which are "dedicated exclusively" to CMTs are the same "class or kind" of merchandise as complete CMTs. Under this standard, the question is whether the construction materials in question are "exclusively dedicated" to the final product of the construction contract. Therefore, if the materials have unique specifications designed for a particular project, it is likely that they would be considered "exclusively dedicated" to the project. On the other hand, if the materials have the same specifications as those that are sold for general usage, it would be difficult to consider them "exclusively dedicated" to a particular project.

Therefore, it would be difficult to apply the current concept of the "class or kind" of merchandise to the construction industry if imported materials are not designed specifically for a particular project.

b. Circumstance-of-Sale Adjustment under Statute

(i) Differences in Physical Characteristics

As discussed above, under 19 C.F.R. § 353.57, a price difference resulting from a difference in physical characteristics is adjusted to the extent that the price difference is due to the varying physical characteristics. In a goods proceeding, the difference in physical characteristics is adjusted based on cost of materials, direct labor, and factory overhead.

In construction, a difference in physical characteristics could occur in both the final product and the service portion of the contract (feasibility studies, designs), and so on. The adjustment for the difference in physical characteristics of the final products could be made in the same way as it is in goods proceedings, that is, on a cost basis. The adjustment for the service portion could be made in the same way. For example, if one contract includes a feasibility study and another does not, or one contract includes a broader feasibility study than does...
the other, such a difference in physical characteristics could be adjusted based on cost, for example, fees for engineers and economists. To make the adjustment, however, the costs (for both the service portion and the final product) must be available, and in construction, the costs for both elements are not ascertainable at the time of the contract. It is not feasible to ascertain the costs of the design and feasibility studies before completing them. Moreover, the cost of materials and labor cannot be ascertained at the time of the contract because prices and wage rates change over time; also, labor costs are affected if workers have low morale or go on strike.

Thus, in construction, the dumping margin cannot be calculated until the project is completed, or comes close enough to completion so that costs are ascertainable. This presents a problem in applying the antidumping law to construction, because the Department of Commerce would be required to wait to make its determination until costs become available. In the case of a large project, that could take three to five years.

For example, if a contract for the export of an airport is made in year one, and five years are needed for the completion of the airport, the dumping margin calculation could not be completed until five years later. Thus, in this hypothetical situation, an antidumping order would be issued in year six. Then, if the estimated dumping margin determined in the antidumping order were thirty percent, any export of a similar airport taking place after the order would be subject to a deposit requirement at the duty rate of thirty percent. Assuming that a second project (a second airport, that also requires five years to complete) were imported soon after the order was issued in year six, the administrative review of duties imposed on the second airport would not be completed until that airport was finished, i.e., five years after its import, or year eleven. This means that the dumping margin of a contract made in year one would affect the financial burden of the exporter until year eleven; this delayed effect would be unreasonable. Thus, the application of the antidumping law to the construction industry, especially to large projects, would not be practical.

(ii) Circumstance-of-Sale Adjustment under Regulation

Nineteen C.F.R. § 353.56 allows a circumstance-of-sale adjustment when calculating price differentials between domestic and im-

144. P. Hillebrandt, supra note 138, at 97-102.
145. Id. at 99.
146. Id.
ported goods. This provision usually deals with expenses incurred for sales activities, such as advertisement, commissions, and so on. As in insurance and banking, it seems that the construction industry worldwide incurs similar types of sales expenses. Thus, there would be no serious problems in making this adjustment.

c. Constructed Value

Constructed value under the exported merchandise approach is inappropriate for the construction industry because the cost of construction differs by market. For example, it would be meaningless to construct a hypothetical price at which an airport that a Japanese firm “exported” to and constructed in Manhattan would have been sold in Narita, Tokyo (a rural town in the home market), because the prices of land are so different in the two locations.

Constructed value under the home market merchandise approach requires an adjustment for any difference in cost because the cost of materials of the home market merchandise and of the exported merchandise will be different. This would create a problem in applying constructed value to the construction industry, because many construction projects are individually designed and would require a large number of adjustments for differences in physical characteristics. If the monetary amount of these adjustments for differences in physical characteristics were so large as to lead to a question about the equality of commercial value, the constructed value would be useless. Thus, the application of constructed value under the home market merchandise approach to the construction industry would be limited because of the uniqueness of each construction project.

d. Country of Origin

If an exporter in country A, who exports construction services to the United States, purchases materials from country B, and orders the materials shipped from country B directly to the United States, what is the country of origin of the materials? In a goods transaction, a “substantial transformation,” or process significant enough to change the product, must occur in country A for the materials to have A origin. But under this hypothesis, the materials are shipped from country B directly to the United States, and therefore, nothing is done to transform the materials in country A. Thus, under the current law, the materials would have B origin. This would mean that the service portion of the contract and the materials used under the contract would

have different countries of origin. This, in turn, would create a problem in applying the antidumping law to construction services, because the antidumping law is applied on a country-specific basis, and even on an exporter-specific basis. For example, if an exporter in country A becomes subject to a twenty percent dumping margin, and the "all-other rate" for country B is forty percent, the service exported from country A will be subject to a twenty percent dumping duty, and the materials shipped from country B will be subject to a forty percent duty even though the materials and the services are part of the same construction contract.

Therefore, in order to apply the antidumping law to construction services, the country of origin should be determined on an entire contract basis, by tying the service and materials together. A new system to identify the relationship between the service portion and the materials of a contract would have to be created for this purpose. Also, guidelines to determine the country of origin of an entire construction service would be needed. For example, if the value of materials shipped from a third country is ninety percent of the total value of the contract, that contract should be considered to originate from the third country. But if that value is just ten percent, the contract should be considered to originate from the country exporting the service. A cut-off line must be drawn somewhere.

e. Valuation

Under the U.S. antidumping law definition of "transaction value," the price of a contract for services would be used for valuation of those services. If an exporter of construction services to the United States acquires materials and labor within the United States, the contract price will include the costs of these items. However, the portion of the contract price corresponding to the materials and labor to be acquired within the United States does not represent the real value imported. In goods transactions, there are similar situations.

149. 19 C.F.R. § 353.42. The Department of Commerce typically examines only a part of the exports (representative sales) from a given foreign country. Thus, while its investigation usually covers more than 60% of the dollar value or volume of merchandise exported, it does not necessarily cover 100%. For this purpose, Commerce identifies major exporters and sends questionnaires only to them. These exporters are usually called "mandatory respondents," because other exporters do not receive questionnaires and are not required to file responses. The mandatory respondents are subject to an antidumping duty based on the information in their responses. Non-mandatory respondents are subject to an antidumping duty based on an averaging of the duty rates of the mandatory respondents. The averaged duty rate is known as the "all-other rate" because it applies to all non-mandatory respondents. See Horlick, supra note 49, at 10.

For example, if a transistor radio is assembled in a foreign country from foreign-made components and U.S.-made transistors, the total value of the completed radio imported to the United States includes the value of U.S.-made transistors. However, the value of those U.S.-made transistors should not be included in the value imported. Thus, under U.S. law, the transistor radio is subject to a duty upon the value of the completed radio less the cost or value of the U.S.-made transistors.

A similar method could be used to properly assess the imported value of the construction services.

f. Resale by a Subsidiary

Could an ESP situation in the construction industry be covered by the antidumping law? The answer depends upon whether the second sale could be recognized as a resale of the first sale. If the second sale is not a resale, it is inappropriate to calculate the ex-factory price of the construction service.

A resale of construction services could occur (i) where the construction services provided by the parent are provided to the customer through the subsidiary, and the subsidiary does not change the substance of the services at all, and (ii) where the subsidiary adds some value to the substance of the services provided by the parent, but only to an extent that the substance does not lose its identity.

Except for the above situations, the calculation of the ex-factory price from the ESP in the construction industry would not make sense. As discussed in the previous sections, however, the inability of U.S. antidumping law to cover certain ESP situations in trade in services would not render the application of the law meaningless.

g. Circumvention

Because many ESP situations would not be covered by the antidumping law, an exporter could circumvent an antidumping order by establishing a subsidiary. However, although there are "parts and components" and "assembly" in the construction industry, the current anticircumvention provision of the U.S. law could not apply to the construction industry. The essence of construction services is to assemble or produce a final product by putting together the services (design, technology, and so on) and materials in the host country. Thus, the goal of the anticircumvention provision, which is to prevent a certain type of assembly operation in the host country, does not fit the construction industry well in the first place.

Therefore, a new anticircumvention provision for the construction
industry should not focus on the assembly activity in the host country. Rather, it should focus on the operation of the subsidiary to distinguish between a subsidiary for circumvention purposes and one not for circumvention purposes. As discussed in the previous section, investigation would focus on the degree to which the subsidiary carries out its business independently of its parent. If the subsidiary’s activities were considered to be heavily dependent upon the parent, such a subsidiary would be covered by an original antidumping order.

h. Enforcement

An export of a construction service can be made through (i) a subsidiary and (ii) a direct export. With respect to type (i), a workable method of enforcement would be to impose an income tax type of duty on the subsidiary. In construction, unlike insurance, a sales tax type of duty to be imposed on a buyer would also be feasible, because buyers of construction services involved in international transactions would be local or central governments, or at least would not be individual consumers. Although these buyers might be required to pay additional duties after the administrative reviews were completed, that would not be as burdensome for them as it would be for individual consumers.

With respect to type (ii), there would be two ways to levy an antidumping duty, namely, by imposing a duty on a foreign exporter or on a domestic buyer. Imposing a duty either on an exporter located in a foreign country would not be workable because it is beyond the tax jurisdiction of the host country. On the other hand, imposing a duty on a domestic buyer would be workable even though the buyer would be involved in the administrative reviews, because these buyers would not be individual consumers.

Another way to enforce a duty in the construction industry would be to collect the duty through the existing customs system when materials and equipment are imported. However, this approach would present problems because: (i) materials and equipment are not always imported, (ii) the existence of a construction service contract under which those materials are imported would have to be identified, and (iii) the materials could be imported from a third country (and their country of origin would have to be determined in conjunction with the construction service contract). Thus, this method would be difficult in a practical sense.

3. Conclusion

An insufficiency in the number of comparable home market sales
would present a problem in applying antidumping law to the construction industry. First, there would be relatively few large-scale construction projects in the home market. Second, the number of comparable sales would be further limited because of the uniqueness of each project. Although application of the antidumping law under these circumstances would not be impossible, it would probably create a distorted result, since exceptionally high or low prices would affect the calculation of dumping margins disproportionately. Thus, the law applied to the construction industry would not be able to achieve fair and apple-to-apple comparisons.

Moreover, the fact that the costs of a construction contract are not ascertained until the project comes close to completion prevents the application of the law from a practical point of view.

III. GENERAL CONCLUSION

Among the various issues discussed in the previous sections, the following are directly related to the fundamental structure of antidumping law (including not only the U.S. antidumping law but also that of GATT and of other nations), which is the comparison of sales prices. Therefore, these issues are relevant to most service industries. At the very least, these issues must be addressed when a specific service industry is analyzed to determine whether antidumping law (including not only the U.S. law but also that of GATT and of other nations) could apply to that industry.

(1) Is there a sale?

Because antidumping law mandates a comparison of sales prices, the transaction must be a sale, or at least equivalent to a sale. Otherwise, antidumping law cannot apply. For example, antidumping law cannot apply to a purchase.

(2) Is the price ascertainable?

The sales price should be ascertainable at the time of the sale or soon thereafter so that the dumping margin can be calculated. For example, if a long-term (for example, a twenty-year) loan is made with a fluctuating interest rate, the total price (total interest) is not known until the completion of the repayment (twenty years later). If such is the case, it would not only be impracticable to calculate the dumping margin, but it would also be very difficult to conduct administrative reviews thereafter. The same problem would arise in a construction project which requires a long period to complete. Thus, it would be,
at least, very difficult to apply antidumping law to transactions in which sales prices are not ascertainable within a reasonable period of time.

(3) Is there price regulation?
In some industries, such as insurance, prices are regulated by governments or industry associations. If that is the case, the application of antidumping law is not meaningful. Thus, the existence of price regulation is an important factor in determining whether antidumping law can apply.

(4) Does it make sense to compare the prices?
As discussed in Part II, the comparison of interest rates on bank loans denominated in different currencies does not make sense from an economic viewpoint. As in this example, if the price comparison itself does not make sense, the application of antidumping law is not meaningful.

The ultimate question in this paper is whether the U.S. antidumping law can apply to trade in services. To answer this question, however, the above issues must be analyzed on an industry-specific basis to determine whether antidumping law could apply to a particular service industry. There is no answer which is applicable to all service industries.