



저작자표시-비영리-변경금지 2.0 대한민국

이용자는 아래의 조건을 따르는 경우에 한하여 자유롭게

- 이 저작물을 복제, 배포, 전송, 전시, 공연 및 방송할 수 있습니다.

다음과 같은 조건을 따라야 합니다:



저작자표시. 귀하는 원저작자를 표시하여야 합니다.



비영리. 귀하는 이 저작물을 영리 목적으로 이용할 수 없습니다.



변경금지. 귀하는 이 저작물을 개작, 변형 또는 가공할 수 없습니다.

- 귀하는, 이 저작물의 재이용이나 배포의 경우, 이 저작물에 적용된 이용허락조건을 명확하게 나타내어야 합니다.
- 저작권자로부터 별도의 허가를 받으면 이러한 조건들은 적용되지 않습니다.

저작권법에 따른 이용자의 권리는 위의 내용에 의하여 영향을 받지 않습니다.

이것은 [이용허락규약\(Legal Code\)](#)을 이해하기 쉽게 요약한 것입니다.

[Disclaimer](#)

국제학석사학위논문

**Evolution and Limitations of the
Lesser Duty Rule Under the WTO
Anti-Dumping Agreement**

WTO 반덤핑 협정상
최소부과원칙의 발전과 한계

2021년 8월

서울대학교 국제대학원
국제학과 국제통상전공

전 현 지

Evolution and Limitations of the Lesser Duty Rule Under the WTO Anti-Dumping Agreement

by

Hyun Ji Chun

A thesis submitted in conformity with the requirements for
the degree of Master of International Studies (M.I.S.)

Graduate School of International Studies

Seoul National University

International Commerce Major

August 2021

Evolution and Limitations of the Lesser Duty Rule Under the WTO Anti-Dumping Agreement

WTO 반덤핑 협정상
최소부과원칙의 발전과 한계

지도교수 안 덕 근
이 논문을 국제학석사학위논문으로 제출함.
2021년 8월

서울대학교 국제대학원
국제학과 국제통상전공
전 현 지

전현지의 국제학석사학위논문을 인준함.
2021년 8월

| | |
|------|--------------|
| 위원장 | <u>이 영 섭</u> |
| 부위원장 | <u>안 재 빈</u> |
| 위원 | <u>안 덕 근</u> |

THESIS ACCEPTANCE CERTIFICATE

The undersigned, appointed by

**The Graduate School of International Studies
Seoul National University**

Have examined a thesis entitled

**Evolution and Limitations of the Lesser Duty Rule
Under the WTO Anti-Dumping Agreement**

Presented by **Hyun Ji Chun**, candidate for the degree of Master in International Studies, and hereby certify that the examined thesis is worthy of acceptance:

August 2021

| | |
|----------------------|------------------------|
| Committee Chair | <u>Rhee, Yeongseop</u> |
| Committee Vice Chair | <u>Ahn, Jae Bin</u> |
| Thesis Advisor | <u>Ahn, Dukgeun</u> |

Abstract

Evolution and Limitations of the Lesser Duty Rule Under the WTO Anti-Dumping Agreement

Hyun Ji Chun

International Commerce Major, International Studies
Graduate School of International Studies
Seoul National University

Under the Lesser Duty Rule(LDR) of the WTO Anti-Dumping Agreement, anti-dumping duties are imposed as the lower of the two: dumping margin and injury margin. It was established to impose anti-dumping duties only to the amount necessary to eliminate injury on domestic industries caused by dumping. Most WTO members have long advocated the mandatory application of the LDR. The LDR was first introduced during the Kennedy Round and was adopted in the WTO Anti-Dumping Agreement without major changes. The Rule has not changed since then and still remains a discretionary rule. Although the LDR is theoretically a very ideal rule, it has many flaws when applied to actual anti-dumping cases. Furthermore, the European Union, Australia, and Korea, the countries that have used the LDR most actively, have shown a more flexible application of the LDR in recent anti-dumping investigations. Given these changes and the limitations of the rule, the LDR under the WTO Anti-Dumping Agreement must be urgently improved in line with the new trade order.

Keywords : WTO Anti-Dumping Agreement, Lesser Duty Rule, Dumping Margin,
Injury Margin

Student Number : 2019-24542

Table of Contents

Abstract

| | |
|---|-----------|
| I. Introduction | 1 |
| II. Evolution of the Lesser Duty Rule | 3 |
| 1. Kennedy Round | 3 |
| 2. Tokyo Round | 7 |
| 3. Uruguay Round | 8 |
| 4. Doha Round | 10 |
| III. Application of the Lesser Duty Rule | 19 |
| 1. European Union | 19 |
| 2. Australia | 29 |
| 3. Republic of Korea | 39 |
| IV. Rationale and Limitations of the LDR | 45 |
| V. Conclusion | 49 |

Reference

국문초록 (Abstract in Korean)

I. Introduction

Under the WTO Anti-Dumping Agreement, the amount of the anti-dumping duty “shall not” exceed the margin of dumping.¹ Article 9.1 of the Agreement suggests WTO members to impose duties lower than the dumping margin if the duties are sufficient to remove the injury caused by dumping.² As it is written in Article 9.1, the application of the Lesser Duty Rule(LDR) is left to the members’ discretion. Therefore, the member states are not obliged to impose the lesser duty in all anti-dumping investigations. Whether to impose the lesser duty depends on the decision of an investigating authority of each country.³

In fact, there have been many attempts to amend the LDR to a mandatory regulation. There has been much discussion regarding the expression “desirable” in Article 9.1. Some drafts proposed during trade negotiations made the LDR an obligatory rule using the phrase “shall”, but the final Anti-Dumping Agreement used a much softer word ”desirable”.⁴ The LDR was first designed more than 50 years ago and has never been revised since then. However, countries that have been

¹ Article 9.3 of the WTO Anti-Dumping Agreement is as follows:

The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

² Article 9.1 of the WTO Anti-Dumping Agreement is as follows:

The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

³ Mavroidis, *The Regulation of International Trade Vol. 2*, 115.

⁴ Wolfrum, Stoll, and Koebele, *WTO : Trade Remedies*, 130.

actively using the LDR recently amended their national legislations to allow some exceptions in applying the Rule.

All regulations in the WTO Agreements are very clear and what is stated in the Agreements must be followed by the members. Therefore, the criteria for dumping measures are also explained in great detail. However, the application of the LDR is left to the discretion of the members. It is the only vague provision in the WTO Anti-Dumping Agreement in which all regulations are stated in detail. Therefore, the LDR left at the discretion of the member countries is a noteworthy rule. It is meaningful to find out why the Rule has not been made mandatory yet in the WTO Anti-Dumping Agreement despite much effort and why there have been changes in the application of the LDR in many countries recently.

First, the paper delves into the history of the LDR in trade negotiations to see how it was first introduced and discussed. The paper looks into the genuine purpose of the Rule and what aspects of the LDR were discussed in each stage of trade negotiations. Then, the paper examines how the Rule has been applied differently in different countries. It focuses on three members of the WTO: the European Union, Australia, and Republic of Korea. Based on the research, the paper concludes by addressing the limitations of the LDR.

II. Evolution of the Lesser Duty Rule

Before discussing the application of the LDR, it is important to know why the issue was raised and how it was included in the WTO Anti-Dumping Agreement. The concept of the LDR was first brought up during the Kennedy Round. Then, it went through the Tokyo Round and was finally established in the WTO Anti-Dumping Agreement in the Uruguay Round. WTO members had different opinions on the introduction of the LDR into the Agreement during trade negotiations. Going through many drafts and debates, the current wording in the Anti-Dumping Agreement was adopted. The issue of whether to mandate the application of the LDR is still being discussed among and within WTO members. Although there have been discussions on the application of the LDR since the 1960s, no clear resolution has been made yet. Therefore, it is necessary to look into the history of the LDR and find out how it should be evolved.

1. Kennedy Round (1964 ~ 1967)

Before the issue of the LDR was raised, there were different opinions among WTO members on whether the anti-dumping duty can exceed the dumping margin. The United Kingdom argued that the anti-dumping duty should never exceed but might be less than the dumping margin.⁵ The European Economic Community

⁵ GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Note*

also claimed that the duty does not have to be equal to the level of the dumping margin as such amount may not be needed to compensate for the material injury caused by dumping, which is the purpose of anti-dumping measures.⁶ Although each country used different expressions, the United States,⁷ Norway,⁸ Canada,⁹

on Meeting on 20-21 October 1965, TN.64/NTB/W/2 (23 November 1965)

⁶ GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by the European Economic Community*, TN.64/NTB/W/10/Add.1 (21 April 1966)

⁷ The United States stated as follows:

“... GATT Article VI provides that the duty shall not be greater in amount than the margin of dumping in respect of such products. However, it could be open to governments to charge a lesser duty when it could be established that a lesser duty would remove the cause or threat of material injury.” GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by the United States*, TN.64/NTB/W/10/Add.3 (28 April 1966)

⁸ Norway stated as follows:

“...It says that “...a contracting party may levy on any dumped products an anti-dumping duty not greater in amount than the margin of dumping ...” and assumes in this way clearly that the duty may be less than the margin of dumping.” GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by Norway*, TN.64/NTB/W/10/Add.4 (29 April 1966)

⁹ Canada stated as follows:

“The Canadian authorities believe that the provisions of paragraph 2 of Article VI provide sufficient guidance on this point.” GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by the Government of Canada*, TN.64/NTB/W/10/Add.5 (5 May 1966)

Denmark,¹⁰ Sweden,¹¹ and New Zealand¹² clearly stated that the duty should not exceed the margin of dumping. Among these countries, the United States, Norway, and Denmark specified that the duty should not go beyond but it may also be less than the dumping margin. Australia also agreed that the level of anti-dumping duty should not exceed the margin of dumping. However, Australia took the position that the anti-dumping duty needs to be imposed as much as the full dumping margin for countries, including Australia, which rely heavily on tariffs for their own development.¹³

¹⁰ Denmark stated as follows:

“The anti-dumping duty must not be greater than the margin of dumping which has been established by the application of the provisions in Article VI:1 of the General Agreement, but may be less than this margin if the competent authorities of the importing country are satisfied that an anti-dumping duty lower than the established margin of dumping would be sufficient to counteract material injury.” GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by Denmark*, TN.64/NTB/W/10/Add.6 (5 May 1966)

¹¹ Sweden stated as follows:

“In Article VI of the GATT there is no other provision regarding the amount of duty than that the duty must not exceed the margin of dumping. It is thus allowed to impose an anti-dumping duty of the same amount as the dumping margin even if such a duty is not necessary from the point of view of protection. The Swedish view is that the anti-dumping duty should have no other purpose than to prevent material injury for the industry. A code regarding anti-dumping procedure should therefore contain a recommendation stating that the duty in each case – within the dumping margin – shall not exceed what is necessary to counter the effects of the injury. Such a clause makes an appraisal of the need for protection in each case necessary, which is in line with the importance of the criterion of injury as the determining factor. ...” GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by Sweden*, TN.64/NTB/W/10/Add.7 (6 May 1966)

¹² New Zealand stated as follows:

“Dumping duty is such amount as the Minister may determine but not exceeding the amount of actual dumping.” GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by New Zealand*, TN.64/NTB/W/10/Add.9 (20 May 1966)

¹³ Australia stated as follows:

“The amount of anti-dumping duty should not exceed the margin of dumping. It would be expected that countries depending to a large degree on the use of their tariff to promote growth and development would need to impose anti-dumping duties equal to the full

During the trade negotiations, the Group on Anti-Dumping Policies held several meetings where the members reviewed their opinions on the items in the Anti-Dumping Checklist including item VI(Anti-Dumping Duties). There was a unanimous view that the provisions of an international anti-dumping code or agreement related to the imposition of the duty should be permissive, not obligatory.¹⁴ The Group also agreed that the anti-dumping duty must not exceed the dumping margin and it should be less than the margin in cases when the lesser duty is sufficient to eliminate the material injury occurred on domestic industries due to dumping. Such issues were also included in the draft list of factors that could be included in the Anti-Dumping Code.¹⁵ The draft stated that “the duty may [should] be less than the margin, if such lesser duty would be adequate to remove the material injury to the domestic industry.” Subsequently, the wording changed from “may[should]” to “desirable”, making the LDR more of a discretionary regulation in the revised list.¹⁶ The revised phrase did not change significantly afterwards as written in Article 9.1 of the WTO Anti-Dumping Agreement.¹⁷ As a result, the

margin of dumping. This applies particularly to Australia where duties are calculated on the basis of the domestic value of goods in the country of origin.” GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by Australia*, TN.64/NTB/W/10/Add.8 (20 May 1966)

¹⁴ GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies – Note by Secretariat on Meetings on 10-11 May 1966*, TN.64/NTB/W/11 (6 June 1966)

¹⁵ GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Possible Elements to Be Considered for Inclusion in an Anti-Dumping Code - Note by the Secretariat*, TN.64/NTB/W/13 (23 August 1966)

¹⁶ GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Possible Elements to Be Considered for Inclusion in an Anti-Dumping Code - Revised List*, TN.64/NTB/W/14 (9 December 1966)

¹⁷ See GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Draft - Anti-Dumping Code*, TN.64/NTB/W/16 (03 March 1967)

current WTO Anti-Dumping Agreement contains a phrase very similar to the amended draft of the Anti-Dumping Code.¹⁸ After much discussion on the LDR, the relevant provision was included in Article 8(a) of the Kennedy Round Code.¹⁹

2. Tokyo Round (1973 ~ 1979)

The provision on the LDR in the Tokyo Round Code has not changed much from that in the Kennedy Round Code. There were only a few minor changes during the Tokyo Round. There was no significant change in Carlisle I²⁰ which was the first negotiating draft. However, there have been attempts to make the LDR mandatory in Carlisle II.²¹ In the next negotiating draft, New Zealand Text I,²² there were

¹⁸ GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Code - Revised Draft*, TN.64/NTB/W/17 (28 March 1967); See TN.64/NTB/W/18, TN.64/NTB/W/19, TN.64/NTB/.

¹⁹ BISD 15S/4-35 (April 1968)
Article 8(a) of the Kennedy Round Code is as follows:

D. Anti-dumping duties and provisional measures

Article 8

Imposition and Collection of Anti-Dumping Duties

(a) The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

²⁰ Carlisle I is “the first negotiating draft that was prepared by Mr. Charles R. Carlisle, then Deputy Director-General of the GATT, who circulated the text as prepared on July 6, 1960 in his capacity as acting Chairman of the Informal Group on Anti-Dumping.” Durling and Nicely, *Understanding the WTO Anti-dumping Agreement : Negotiating History and Subsequent Interpretation*, 4.

²¹ Ibid. Carlisle II is “a revised draft that was released on August 14, 1960, but still was not accepted as a basis for negotiation.”; See Ibid, p.436.

²² Ibid, p.4. “With no progress made in the negotiation, then Director-General of GATT, Mr. Arthur Dunkel, requested New Zealand to draft a text acceptable for future negotiations.

efforts to delete the phrase “it is desirable” and revise the LDR to a mandatory regulation.²³ As seen from the changes made in Carlisle I Text and Carlisle II Text, there have been several attempts to make the LDR mandatory by including the expression “the duty shall”. The phrase “It is also desirable” was then removed in New Zealand I Text and the phrase “the duty be less than” was retained instead. However, the LDR eventually remained as a permissive regulation in the Tokyo Round Code.²⁴

3. Uruguay Round (1986 ~ 1995)

The main issue discussed during the Uruguay Round was whether or not

Through bilateral negotiations with other countries, New Zealand released the next versions of the negotiating drafts – “New Zealand I” on November 6, 1990, “New Zealand II” on November 12, 1990, and “New Zealand III” on November 23, 1990 – each of which was still rejected by most of the countries.”

²³ Ibid, p.436.

Changes made from Carlisle II Text is as follows:

New Zealand I Text

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories Parties to this Agreement. ~~[It is also desirable, and that the duty]~~ ~~[The duty shall]~~ be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

²⁴ Tokyo Round Code is as follows:

8.1. The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are the decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories Parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

public interests should be taken into account in anti-dumping investigations. Japan,²⁵ Hong Kong,²⁶ Singapore,²⁷ Canada,²⁸ and the European Community²⁹ argued that the interests of both users and domestic producers should be considered when imposing anti-dumping duties.³⁰ On the other hand, the United States(US) had a different view on the public interest. The US opposed the inclusion of public interest provisions in the Anti-Dumping Agreement, pointing out that the issues related to it should be examined under domestic legislations rather than GATT negotiations.³¹ Therefore, under the US law, anti-dumping duties must be imposed as much as the full dumping margin, whereas under the EC law, anti-dumping duties can be imposed lower than the dumping margin.

It is important to note that there were various views on whether the public interest should be considered when imposing anti-dumping duties as it is closely related to the establishment of the LDR. Paragraph 1 of Article 8 of the GATT Anti-Dumping Code stipulates that it is desirable that anti-dumping duties be less than the margin of dumping where the lesser duty is sufficient to remove injury.³² The Canadian anti-dumping law and the European Community Regulation have “public interest” and “community interest” provisions, respectively. However, only the

²⁵ See MTN.GNG/NG8/W/48/Add.1 at 4.

²⁶ See MTN.GNG/NG8/W/51 at 2.

²⁷ See MTN.GNG/NG8/W/55 at 2-3.

²⁸ See MTN.GNG/NG8/W/65 at 5.

²⁹ See Commission Decision No. 2177/84/ECSC, arts 11(1), 12(1), 1984 O.J. (L201) 17,28; Council Regulation (EEC) No. 2176/84, arts. 11(1), 12(1), 1984 O.J. (L 201)1, 11-12.

³⁰ Stewart, *The GATT Uruguay Round : A Negotiating History (1986-1992)*, 1687.

³¹ GATT Rules Chairman Issues Updated Antidumping Draft as Options are studies, 9 Inside U.S. Trade (Dec, 6, 1991), at 12.

³² Paragraph 1 of Article 8 of the GATT Antidumping Code.

European Community has a regulation that the lesser duty can be imposed when determining anti-dumping duties.³³ Not all countries that were favorable to the consideration of public interest also agreed on imposing the lesser duty.

4. Doha Round (2001 ~)

As written in Article 9.1 of the WTO Anti-Dumping Agreement, the LDR is a discretionary regulation. Therefore, whether or not an anti-dumping duty is imposed lesser than the amount of the dumping margin rests upon the decision of the investigating authority.³⁴ During the Doha Round, the issue of the LDR was discussed more in-depth. Many meetings held during the Doha Round and the member states expressed different opinions regarding the LDR. The Friends of Anti-Dumping Negotiations³⁵(FANs), India, and South Africa supported the mandatory application of the LDR under the WTO Anti-Dumping Agreement, while the United States, Egypt, and Jamaica opposed applying the LDR mandatorily. Many other countries looked at various aspects of the LDR and pointed out some limitations of the system.

³³ Marceau, *Anti-dumping and Anti-trust Issues in Free-trade Areas*, 41.

³⁴ A number of proposals(See TN/RL/GEN/32; TN/RL/GEN/43; TN/RL/GEN/76; TN/RL/GEN/99) claimed mandatory application of the LDR, while the United States(See TN/RL/GEN/58) opposed to such proposals. Mavrodīs, Messerlin, and Wauters, *The Law and Economics of Contingent Protection in the WTO*, 213.

³⁵ Brazil; Chile; Colombia; Costa Rica; Hong Kong; China; Israel; Japan; Korea, Rep. of; Mexico; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand and Turkey

Brazil, one of the members of the FANs, considered the impact of an excessive anti-dumping duty on developing countries as an important matter.³⁶ If the LDR is not applied, developing countries will suffer from the imposition of anti-dumping duties as it can cause trade restrictive effects.³⁷ Anti-dumping duties imposed more than necessary to remove the damage to domestic industries from dumping will give burden to developing countries, making difficult for them to actively engage in international trade. For this reason, Brazil agreed with the mandatory application of the LDR. Brazil also looked at how the mandatory application of the LDR can have different effects depending on interest groups.³⁸ Exporters will always prefer lower duty, whereas authorities will prefer a sufficient amount of anti-dumping duties. The authorities will agree on the obligatory application of the LDR since it will help remove the injury caused by dumping while maintaining an adequate level of competition in domestic markets. Brazil took all international trade participants' positions on the application of the LDR into consideration and concluded that the mandatory application will help alleviate the impact of anti-dumping duties on each participant. China also suggested that the application of the LDR should be mandatory in cases where developed countries impose anti-dumping duties on imports from developing countries.³⁹

³⁶ WTO, *Negotiating Group on Rules - Anti-Dumping: Illustrative Major Issues - Paper from Brazil; Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan; K[...]itserland, Thailand and Turkey*, TN/RL/W/6 (26 April 2002)

³⁷ WTO, *Negotiating Group on Rules - Implementation-Related Issues - Paper by Brazil*, TN/RL/W/7 (26 April 2002)

³⁸ WTO, *Negotiating Group on Rules - Comments on the Lesser Duty Rule - Communication from Brazil*, TN/RL/W/189 (13 October 2005)

³⁹ WTO, *Negotiating Group on Rules - Proposal of the People's Republic of China on the*

Although the FANs emphasized the necessity of the mandatory application of the LDR under the WTO Anti-Dumping Agreement, various problems of the LDR were continuously raised.⁴⁰ One of the problems was that there was no clear guideline on how to assess the lesser duty. Therefore, although many members have their own domestic regulations, there were still many confusion and disagreement on how to apply the Rule. As a solution to the problem, the FANs proposed that applying the LDR should be obligatory and suggested several methods of assessing the lesser duty.⁴¹ Furthermore, the FANs and India argued that the LDR should be applied mandatorily because it meets the purpose of the anti-dumping duty that it should eliminate the injury on domestic industries without fundamentally blocking imports.⁴² They proposed specific measures to amend the related legislations to efficiently implement the mandatory application of the LDR, including various methodologies of calculating the injury margin.⁴³ Other than FANs, South Africa

Negotiation on Anti-Dumping, TN/RL/W/66 (6 March 2003)

⁴⁰ WTO, *Negotiating Group on Rules - Proposal on Lesser Duty - Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway[...]and Matsu; Thailand and Turkey*, TN/RL/W/119 (16 June 2003)

⁴¹ See WTO, *Negotiating Group on Rules - Proposal on Lesser Duty - Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway[...]and Matsu; Thailand and Turkey*, TN/RL/W/119 (16 June 2003) for specific methodologies presented.

⁴² See WTO, *Negotiating Group on Rules - Proposal on Mandatory Application of Lesser Duty Rule - Communication from India*, TN/RL/W/170 (9 February 2005)

⁴³ See WTO, *Negotiating Group on Rules - Lesser Duty Rule - Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Republi[...]and Matsu; Thailand and Turkey*, TN/RL/GEN/1 (14 July 2004); See WTO, *Negotiating Group on Rules - Proposal on Mandatory Application of Lesser Duty Rule - Communication from India*, TN/RL/GEN/32 (22 March 2005); WTO, *Negotiating Group on Rules - Further Submission of Proposals on the Mandatory Application of the Lesser Duty Rule - Paper from Brazil, Chile, Costa Rica, Hon[...], Kinmen and Matsu and Thailand*, TN/RL/GEN/43 (13 May 2005); WTO, *Negotiating Group on Rules - Proposals on the Mandatory Application of the Lesser Duty Rule - Paper from Brazil; Hong Kong, China; India and Japan*, TN/RL/GEN/99 (3 March 2006)

also argued that the LDR should be applied mandatorily.⁴⁴ South Africa even presented detailed proposals on how to amend Article 9.1 in order for it to be more compliant with the objective of the WTO Anti-Dumping Agreement.⁴⁵

Contrary to the FANs' argument, there were also countries that opposed making the application of the LDR mandatory under the WTO Anti-Dumping Agreement. The United States raised a question of whether anti-dumping duties can truly compensate domestic industries for the injury resulting from dumping.⁴⁶ It argued that anti-dumping duties may be effective in offsetting the amount of dumping but may not be able to fully compensate for the damage caused by dumping.⁴⁷ In contradiction to this argument, it was pointed out that many anti-dumping measures were imposed more than what is needed to cope with injurious dumping and this shows the effectiveness of anti-dumping duties.⁴⁸ However, the United States claimed that although there was an increase in the number of anti-dumping measures, this does not necessarily imply that there has been an increase in recent cases where anti-dumping duties were imposed higher than what is needed to

⁴⁴ WTO, *Negotiating Group on Rules - Informal Paper on Anti-Dumping and Subsidies Agreements - Paper from South Africa*, TN/RL/GEN/60 (12 July 2005)

⁴⁵ Ibid.

The amendment proposed by South Africa is as follows as:

“It is desirable that the imposition be permissive in the territory of all Members. Where importers and exporters have cooperated with the authorities in its investigation the duty shall be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.”

⁴⁶ WTO, *Negotiating Group on Rules - Replies to Questions to our First Contribution (TN/RL/W/6) - Anti-dumping - Paper from Brazil; Chile; Colombia; Costa Rica; Hong[...].Japore; Switzerland and Thailand*, TN/RL/W/45 (27 January 2003)

⁴⁷ WTO, *Negotiating Group on Rules - Replies to Questions to our First Contribution (TN/RL/W/6) - Anti-dumping - Paper from Brazil; Chile; Colombia; Costa Rica; Hong[...].Japore; Switzerland and Thailand*, TN/RL/W/45 (27 January 2003)

⁴⁸ Ibid.

remove the injury.⁴⁹ Therefore, it is difficult to conclude that such cases have increased in recent years and it is also less persuasive to argue for the mandatory application of the LDR. The United States also refuted the points raised by the FANs and India on the LDR.⁵⁰ It stated that the FANs and India only tried to find ways to adopt a new regulation rather than making efforts to elaborate the existing rule. Also, it mentioned that the FANs lack empirical evidence to support their arguments on the LDR. According to the United States, the proponents of the mandatory application of the LDR did not fully explain whether the Rule is reliable enough to assess the extent of injury. In addition, they overlooked examining the fact that there is a lack of transparency and adequate judicial review when applying the Rule. The United States further criticized that the proposals made by the advocates did not seem to focus on eliminating injury caused by dumping but rather focused more on assessing the level of anti-dumping duties which may possibly help remove the injury. Moreover, the methodologies that the FANs suggested to revise the LDR to a mandatory regulation will make the calculation of the dumping margin even more complicated, which will eventually lengthen the process of anti-dumping investigations. The proposed methodologies also have the problem of making the parties less cooperative in providing the information necessary to calculate the lesser duty. Furthermore, the obligatory application of the LDR can cause an increase in the number of the WTO dispute settlement proceedings. The United States opposed

⁴⁹ WTO, *Negotiating Group on Rules - Fourth Set of Questions from the United States on Papers Submitted to the Rules Negotiating Group*, TN/RL/W/103 (6 May 2003)

⁵⁰ WTO, *Negotiating Group on Rules - Further Comments on Lesser Duty Proposals - Paper from the United States*, TN/RL/GEN/58 (13 July 2005)

the mandatory application of the LDR, pointing out such problems.

Egypt had a slightly different view on the routine application of the LDR. Egypt argued that the authority to decide whether to apply the LDR or not should be given to the members rather than forcing them to comply with the Rule under the WTO Anti-Dumping Agreement.⁵¹ It claimed that amending the LDR to an obligatory regulation will give more burden to developing members than to developed members as investigating authorities in developing countries normally lack in resources.⁵² Therefore, Egypt agreed on the routine application of the LDR on a limited basis. It suggested that the LDR applied by developed countries in anti-dumping investigations involving developing countries should be made mandatory.

Jamaica also argued that the application of the LDR should be left to each member's discretion as there are practical difficulties in calculating the injury margin.⁵³ There are too many factors to be considered in order to accurately assess the injury margin. Therefore, it may not be even possible to quantify the degree of injury. On this basis, Jamaica suggested that it would be more appropriate to discuss ways to improve the existing regulations rather than to completely amend the LDR.

Many other countries were deeply interested in the issue of the LDR and

⁵¹ WTO, *Negotiating Group on Rules - Egyptian Paper Containing Comments on the Contributions Submitted in the Framework of the Doha Negotiations on the Anti-Dumping Agreement*, TN/RL/W/56 (10 February 2003)

⁵² WTO, *Negotiating Group on Rules - Identification of Issues under the Anti-Dumping Agreement that Need to be Improved and Clarified within the Current Negotiations[...] of the Arab Republic of Egypt*, TN/RL/W/110 (22 May 2003)

⁵³ WTO, *Negotiating Group on Rules - Comments by Jamaica on Proposals to the Negotiating Group on Rules (AD and SCM, Including Fisheries Subsidies) Discussed at the[...]eting on 26 - 30 September 2005*, TN/RL/W/188 (10 October 2005)

indicated the limitations of the Rule. The European Community mentioned that the obligatory implementation of the LDR will result in stricter regulations that are related to the LDR.⁵⁴ Canada pointed out the lack of appropriate methodologies of calculating the amount of duty that is lower than the dumping margin but is sufficient to eliminate the dumping injury. Therefore, Canada argued that such issue should be resolved first before discussing the issue of the obligatory application of the LDR.⁵⁵ Korea agreed with the issue raised by Canada.⁵⁶ However, the United States questioned whether Canada considered procedural methodologies to prevent the LDR from being abused as a means of discrimination among WTO members.⁵⁷

Australia was more interested in the issue related to the LDR than other member states and examined the matter in various aspects. First, Australia questioned whether the proponents of the mandatory application of the LDR were asserting that the Rule should be considered mandatorily or applied mandatorily.⁵⁸ In response to the question, the WTO document clarified that the focus of the discussion was on the mandatory application of the LDR, not the mandatory

⁵⁴ WTO, *Negotiating Group on Rules - Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement)*, TN/RL/W/13 (8 July 2002)

⁵⁵ WTO, *Negotiating Group on Rules - Submission from Canada Respecting the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement)*, TN/RL/W/47 (28 January 2003); WTO, *Negotiating Group on Rules - Submission from Canada Respecting the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement)*, TN/RL/W/47 (28 January 2003)

⁵⁶ See WTO, *Negotiating Group on Rules - Korea's Comments on Canada's Submission on the Anti-Dumping Agreement (TN/RL/W/47)*, TN/RL/W/65 (24 February 2003)

⁵⁷ WTO, *Negotiating Group on Rules - Fourth Set of Questions from the United States on Papers Submitted to the Rules Negotiating Group*, TN/RL/W/103 (6 May 2003)

⁵⁸ WTO, *Negotiating Group on Rules - Replies to Questions to our First Contribution (TN/RL/W/6) - Anti-dumping - Paper from Brazil; Chile; Colombia; Costa Rica; Hong[...];apore; Switzerland and Thailand*, TN/RL/W/45 (27 January 2003)

consideration of the LDR.⁵⁹ Australia further argued that the issue of the LDR should be dealt with differently according to exporting countries. It also raised the possibility that the LDR may not be appropriate in certain circumstances.⁶⁰ It indicated that the observance of the LDR may be improper in situations where a continuous dumping disturbs the world market.⁶¹ Australia suggested that further discussions are needed on whether a mere consideration of the LDR during the process of imposing anti-dumping duties is appropriate to accomplish the objective of the WTO Anti-Dumping Agreement.⁶² It also mentioned that it is important to come up with effective ways to assess the lesser duty when the LDR is made mandatory.⁶³

Although WTO members focused on different aspects of the LDR, most of the members, excluding the United States, proposed the mandatory application of the LDR. There were common issues about the mandatory application of the LDR that the members continuously brought up. The first issue was whether obligating the application of the Rule corresponds to the purpose of the WTO Anti-Dumping Agreement and GATT Article VI. The role of the LDR itself was also discussed by many members. The second main discussion point was about the calculation methodology of the lesser duty. The LDR was first devised to protect domestic

⁵⁹ Ibid.

⁶⁰ WTO, *Negotiating Group on Rules - General Contribution to the Discussion of the Negotiating Group on Rules on the Anti-dumping Agreement - Submission from Australia*, TN/RL/W/86 (30 April 2003)

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

industries to an adequate level. However, several countries pointed out that the application of the Rule may harm certain countries in some cases. As always, it is difficult to satisfy everyone. Therefore, the issue of the mandatory application of the LDR has not been resolved yet and is in constant discussion.

III. Application of the Lesser Duty Rule

China and the United States are the most commonly mentioned countries that do not apply the LDR, while most WTO members apply the LDR mandatorily or use it on a limited basis. Many members of the WTO including the European Union, New Zealand, and India apply the LDR routinely.⁶⁴ Some jurisdictions only apply the LDR in certain circumstances, while others including the United States impose duties to the maximum level at all times.⁶⁵ The European Union, Australia, Republic of Korea are representative countries that have been using anti-dumping measures constantly and applying the LDR mandatorily. However, countries that have strictly applied the LDR have recently shown a tendency to apply the Rule more flexibly. The paper focuses on these three countries comparing how the LDR is differently applied in each country and how the Rule has been revised lately.

1. European Union

The European Union(EU) is mainly mentioned as a representative member of the WTO that strictly follows the LDR, whereas the US is often referred to as a representative that does not. The EU regulates the LDR in the Basic Anti-Dumping Regulation. It obligates the application of the LDR in opposition to the WTO Anti-

⁶⁴ Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Australia's Trade Remedies System - Regulation Impact Statement*, 17.

⁶⁵ Ibid.

Dumping Agreement where the LDR is only left to the discretion of each member.⁶⁶ Many anti-dumping cases in the EU show the importance of the role of the LDR as a means to moderate the amount of anti-dumping duty.⁶⁷

The EU uses a concept of injury margin to assess the amount necessary to offset the injury on domestic industries caused by dumping. Injury margin is a margin that a price of foreign producers needs to be increased so that community producers can cover their production cost and make sufficient profit.⁶⁸ The EU first enacted the Anti-Dumping Act for member states in 1968 and introduced the Kennedy Round Anti-Dumping Code.⁶⁹ Currently, the EU is one of the countries that is most actively using anti-dumping systems. Articles 7.2⁷⁰ and 9.4⁷¹ of the EU Anti-Dumping Regulations stipulate the LDR as a mandatory regulation. According to the current EU anti-dumping rule, the anti-dumping duty should not exceed the dumping margin, and if less than that dumping margin is enough to eliminate damage to the community industry, it is required to impose the lesser amount of the anti-dumping duty.⁷² Therefore, the maximum that can be imposed as an anti-dumping

⁶⁶ Vermulst, *EU Anti-dumping Law and Practice*, 117.

⁶⁷ Ibid.

⁶⁸ Vermulst, "The Anti-Dumping Systems of Australia, Canada, the EEC and the United States of America: Have Anti-Dumping Laws Become a Problem in International Trade?," 765.

⁶⁹ Viner, *Dumping: A Problem in International Trade*, 201.

⁷⁰ Article 7.2 of Regulation 2016/1036 is as follows:

The amount of the provisional anti-dumping duty shall not exceed the margin of dumping as provisionally established, but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Union industry.

⁷¹ Article 9.4 of Regulation 2016/1036 is as follows:

The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Union industry.

⁷² Article 9.4 of Regulation 2016/1036

duty is the dumping margin regardless of the level of damage suffered by the industry in the community, and the minimum is the amount necessary to eliminate the damage.⁷³ In fact, it was stressed in an anti-dumping case that when using the anti-dumping system the EU investigating authority (Commission) should check whether duties are necessary to eliminate damage, otherwise the measures will be invalidated.⁷⁴ However, the EU's anti-dumping regulations do not specify how to calculate the injury margin. Therefore, there is a risk that the Commission's discretionary calculation on the extent to which the damage can be removed could violate the WTO Anti-Dumping Agreement. Although the EU ranks third in the number of anti-dumping cases as a complainant, the fact that it actively uses the LDR that is a defendant-friendly system can be assumed to be the result of considering the position of all member states of the EU.

The EU has applied the LDR mandatorily for a long time. However, it has recently included exceptions to the application of the LDR in the 2018 Amendment and started to allow exceptional situations in which the Rule is not applied if it does not violate the public interest.⁷⁵ 'Point 2a' was added in Article 7 of the EU

⁷³ Van Bael and Bellis, *EU Anti-Dumping and Other Trade Defence Instruments*, 306.

⁷⁴ Case 53/83 *Allied Corporation and Others v. Council* ECR 1621. 23 May 1985, para. 18.

⁷⁵ See Regulation 2018/825 of the European Parliament and of the Council of 30 May 2018.

Regulation 2016/1036 of 08-06-2016 ('the Basic Anti-Dumping Regulation')^{76,77} It was revised to allow the suspension of applying of the LDR if there is sufficient distortion in raw materials and the proportion of the distorted raw material prices injected into the goods under investigation is more than 17%. However, even if such requirements are met, the Union interest test has to be gone through.⁷⁸ Therefore, the application of the LDR can only be deferred when all these conditions are met.⁷⁹

⁷⁶ Article 7(2b) of the Basic Anti-Dumping Regulation is as follows:

2a. When **examining whether a duty lower than the margin of dumping would be sufficient to remove injury, the Commission shall take into account whether there are distortions on raw materials** with regard to the product concerned.

For the purposes of this paragraph, distortions on raw materials consists of the following measures: dual pricing schemes, export taxes, export surtax, export quota, export prohibition, fiscal tax on exports, licensing requirements, minimum export price, value added tax (VAT) refund reduction or withdrawal, restriction on customs clearance point for exporters, qualified exporters list, domestic market obligation, captive mining if the price of a raw material is significantly lower as compared to prices in the representative international markets

...

For the purpose of this Regulation, a single raw material, whether unprocessed or processed, including energy, for which a distortion is found, must account for not less than 17% of the cost of production of the product concerned. For the purpose of this calculation, an undistorted price of the raw material as established in representative international markets shall be used.

⁷⁷ Nehra, "Suspension of Lesser Duty Rule by the EU in Anti-Dumping Investigations," International Trade Amicus, accessed May 1, 2021, https://www.researchgate.net/publication/344044678_Suspension_of_Lesser_Duty_Rule_by_the_EU_in_Anti-Dumping_Investigations

⁷⁸ What is examined in the Union interest test is stated in Article 7(2b) of the Basic Anti-Dumping Regulation which is as follows:

2b. Where the Commission, on the basis of all the information submitted, can clearly conclude that it is in the Union's interest to determine the amount of the provisional duties in accordance with paragraph 2a of this Article, paragraph 2 of this Article shall not apply. The Commission shall actively seek information from interested parties enabling it to determine whether paragraph 2 or 2a of this Article shall apply. In this regard, the Commission shall examine all pertinent information such as spare capacities in the exporting country, competition for raw materials and the effect on supply chains for Union companies. In the absence of cooperation the Commission may conclude that it is in accordance with the Union interest to apply paragraph 2a of this Article. When carrying out the Union-interest test in accordance with Article 21, special consideration shall be given to this matter.

⁷⁹ Nehra, "Suspension of Lesser Duty Rule by the EU in Anti-Dumping Investigations."

Although there has been some revisions made on the application of the LDR in the EU Regulation, it is difficult to suspend the application of the LDR as the EU industries are requested to pass stringent investigation processes and to provide considerable amount of evidence to prove that all the requirements for the exception are met. In fact, many cases were still unable to avoid the application of the LDR despite the conditions for the exception being met. In the case of *Hot rolled stainless steel sheets and coils from Indonesia, Taiwan and China*⁸⁰, the requirements stated in Article 7(2a) were met against Indonesia and China. However, it was concluded that imposing the duty that is equivalent to the dumping margin goes against the interests of the EU since it would negatively affect the EU companies' supply chains as well as the users.⁸¹ As a result, the application of the LDR was unavoidable in this case.

Out of 20 anti-dumping cases in the EU from 2017 to 2021, the LDR did not come into effect at all in 6 cases and thus the amount of the dumping margin was imposed as the anti-dumping duty (Table 1). This shows that the LDR was applied in most of the anti-dumping investigations in the EU. Although the EU Regulation has recently allowed some exception to the mandatory application of the LDR, no cases where the requirements of the exception were met and the LDR was not applied as a result were found in the past four years. In many anti-dumping investigations

⁸⁰ Official Journal of the European Union, *Commission Implementing Regulation (EU) 2020/508 of 7 April 2020 imposing a provisional anti-dumping duty on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia, the People's Republic of China and Taiwan*, OJ L 110, 8.4.2020, p.3.

⁸¹ Nehra, "Suspension of Lesser Duty Rule by the EU in Anti-Dumping Investigations."

where the LDR was applied and came into effect, anti-dumping duties were imposed at an excessively low level. When there was a big difference between the dumping margin and the injury margin, the lower of the two was imposed as the anti-dumping duty due to the application of the LDR. Therefore, it is easily seen in the cases of the EU that applying the LDR can often lead to situations where the duties are not imposed at a sufficient level to compensate domestic industries for the damage caused by dumping.

Moreover, the application of the LDR varies depending on the exporting country. Among the anti-dumping investigations that were carried out between 2017 and 2021, most were on China. Out of 14 anti-dumping investigations where China was involved as an exporting country, 10 cases were determined to apply the injury margin due to the application of the LDR. In other words, among 14 cases where the LDR came into effect, 10 cases had China involved as an exporting country. Such statistics illustrate that the EU has strictly applied the LDR especially against China.

Taking one of the cases as an example, the LDR was applied in accordance with Article 7(2) of the Basic Regulation in an anti-dumping investigation on *imports of certain hot rolled stainless sheets and coils originating in Indonesia, the People's Republic of China and Taiwan* (Table 1.1). Therefore, the lesser of the dumping margin and the injury elimination level was imposed as the anti-dumping duty. For Indonesia and China, the amount of the injury elimination level was imposed as the anti-dumping duty, while for Taiwan, the amount of the dumping margin was imposed as the anti-dumping duty as each was lower than the other. The dumping

margin and the injury elimination level of Indonesia did not have much difference. Therefore, the application of the LDR did not have a significant impact on the anti-dumping duty. However, for China and Taiwan, there was a big difference between the dumping margin and the injury elimination level. Therefore, the application of the LDR had a strong influence on determining the level of the anti-dumping duty. Especially for China, if it had not been for the application of the LDR, the anti-dumping duty would have been much higher. However, only 19.0% was imposed as the anti-dumping duty rather than 106.5% due to the LDR. Such case shows that applying the LDR can cause the anti-dumping duty to be imposed at an excessively low level.

Table 1. Recent Anti-Dumping Investigations in the EU: 2017-2021

| No. | Year of Document | Country | Commodity | Document No. | Application of Injury Margin Under LDR |
|-----|------------------|----------------------------------|---|--------------------------------|--|
| 1 | 2021 | China | Aluminium extrusions | OJ L 109, 30.3.2021, p. 1–59 | X |
| 2 | 2020 | Republic of Korea | certain heavyweight thermal paper | OJ L 346, 20.10.2020, p. 19–30 | X |
| 3 | 2020 | Indonesia, China, Taiwan | certain hot rolled stainless steel sheets and coils | OJ L 325, 7.10.2020, p.26-73 | O (except Taiwan) |
| 4 | 2020 | China | certain polyvinyl alcohols | OJ L 315, 29.9.2020, p. 1–84 | O (3 companies) O (All other companies) X (Sinopec Group) |
| 5 | 2020 | China | threaded tube or pipe cast fittings, of malleable cast iron and spheroidal graphite cast iron | OJ L 274, 21.8.2020, p. 20–31 | X |
| 6 | 2020 | India | tubes and pipes of ductile cast iron | OJ L 118, 16.4.2020, p. 14–25 | O |
| 7 | 2020 | China, Egypt | certain woven and/or stitched glass fibre fabrics | OJ L 108, 6.4.2020, p. 1–91 | O (China: Yuntianhua group & Other cooperating companies) X (CNBM group & All other companies) X (Egypt) |
| 8 | 2020 | China | steel road wheels | OJ L 65, 4.3.2020, p. 9–23 | O |
| 9 | 2019 | Russia, Trinidad and Tobago, USA | mixtures of urea and ammonium nitrate | OJ L 258, 9.10.2019, p. 21–63 | X (Russia *dumping margin=injury margin) O (Trinidad and Tobago & USA) |
| 10 | 2019 | China | electric bicycles | OJ L 16, 18.1.2019, p. 108–140 | O (except 1 company) |

| | | | | | |
|----|------|----------------------------------|--|--------------------------------|---|
| 11 | 2018 | China | certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 | OJ L 263, 22.10.2018, p. 3–52 | O |
| 12 | 2018 | China | certain corrosion resistant steels | OJ L 34, 8.2.2018, p. 16–35 | O |
| 13 | 2018 | China | certain cast iron articles | OJ L 25, 30.1.2018, p. 6–37 | X |
| 14 | 2017 | Brazil, Iran, Russia and Ukraine | certain hot-rolled flat products of iron, non-alloy or other alloy steel | OJ L 258, 6.10.2017, p. 24–123 | O (Brazil: except 1) X (Iran, Russia, Ukraine) |
| 15 | 2017 | Republic of Belarus | certain concrete reinforcement bars and rods | OJ L 155, 17.6.2017, p. 6–20 | O |
| 16 | 2017 | China | certain seamless pipes and tubes of iron (other than cast iron) or steel (other than stainless steel), of circular cross-section, of an external diameter exceeding 406,4 mm | OJ L 121, 12.5.2017, p. 3–25 | O (except 1) |
| 17 | 2017 | Republic of Korea | certain lightweight thermal paper | OJ L 114, 3.5.2017, p. 3–21 | X |
| 18 | 2017 | China | certain hot-rolled flat products of iron, non-alloy or other alloy steel | OJ L 92, 6.4.2017, p. 68–96 | O |
| 19 | 2017 | China | certain heavy plate of non-alloy or other alloy steel | OJ L 50, 28.2.2017, p. 18–41 | O |
| 20 | 2017 | China, Taiwan | certain stainless steel tube and pipe butt-welding fittings, whether or not finished | OJ L 22, 27.1.2017, p. 14–53 | X |

Source: Compiled by author

Table 1.1. Commission Implementing Regulation (EU) 2020/1408 of 6 October 2020 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia, the People’s Republic of China and Taiwan: Dumping Margin; Injury Elimination Level; Ant-Dumping Duty in Accordance with the LDR

| Country of origin | Dumping margin (%) | Injury elimination level (%) | Anti-dumping duty (%) |
|-------------------|--------------------|------------------------------|-----------------------|
| Indonesia | 17.7 | 17.3 | 17.3 |
| China | 106.5 | 19.0 | 19.0 |
| | 57.1 | 14.6 | 14.6 |
| | 71.7 | 9.2 | 9.2 |
| | 87.3 | 17.5 | 17.5 |
| Taiwan | 4.1 | 24.2 | 4.1 |
| | 7.5 | 18.4 | 7.5 |

Source: OJ L 325, 7.10.2020, p.26-73.

2. Australia

Australia uses the term ‘Non-Injurious Price(NIP)’ to assess an adequate price to eliminate the dumping injury. In the Australian government report, NIP is defined as the minimum price that is needed to prevent injury or injury from recurring due to dumped goods.⁸² The Australian Customs Service sets the minimum export price level of producers at the FOB level to ensure that no injury occurs.⁸³ If the non-injurious FOB margin(NIFOB) is lower than the dumping margin, the anti-dumping duty will be determined according to the NIFOB.⁸⁴

Australia obligates the application of the LDR in Article 5(B)⁸⁵ of the Customs Tariff (Anti-Dumping) Act 1975. The Australian law provides more details

⁸² Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Alleged dumping of Ammonium nitrate exported from the People’s Republic of China, Sweden and the Kingdom of Thailand*, REP 473.

⁸³ See Steele, “The Australian Anti-dumping System,” Chapter 6.

⁸⁴ Vermulst, “The Anti-Dumping Systems of Australia, Canada, the EEC and the United States of America: Have Anti-Dumping Laws Become a Problem in International Trade?,” 773.

⁸⁵ Article 5(B) of the Customs Tariff (Anti-Dumping) Act 1975 is as follows:

If:

(a) the Minister is required to perform the function under subsection (5) in respect of goods the subject of a notice under subsection 269TG(1) or (2) of the Customs Act; and

(b) the non-injurious price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice is less than the normal value of goods of that kind as so ascertained, or last so ascertained;

the Minister must, in performing that function, have regard to the desirability of specifying a method such that the sum of the following does not exceed that non-injurious price:

(c) the export price of goods of that kind as so ascertained or last so ascertained;

(d) the interim dumping duty payable on the goods the subject of the notice.;

The Customs Act 1901 – Sect 269TG is as follows:

(1) Subject to section 269TN, where the Minister is satisfied, as to any goods that have been exported to Australia, that:

(a) the amount of the export price of the goods is less than the amount of the normal value of those goods; and

(b) because of that:

on how to apply the LDR than the EU.⁸⁶ Therefore, the application of the LDR in Australia is more transparent and predictable than other countries that apply the LDR. However, Australia has decided to allow some exceptions to the mandatory application of the LDR since 2014. Exceptions are allowed when there is a particular market situation or when there is an involvement of a country that does not conform to the WTO subsidy notification obligation. Also, when Australian industries consisting of numerous small and medium-sized enterprises are involved in the application, it is not required to apply the LDR.⁸⁷

There were various options suggested within Australia before deciding to include exceptions to the routine application of the LDR. There were four options proposed for how to utilize the LDR. The first option was to maintain the mandatory application of the LDR and the second option was to completely eliminate the LDR. In these days, more and more stakeholders support the removal of the LDR, thus, Option 2 was advocated by most stakeholders.⁸⁸ The third option was to eliminate

(i) material injury to an Australian industry producing like goods has been or is being caused or is threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered; or

(ii) in a case where security has been taken under section 42 in respect of any interim duty that may become payable on the goods under section 8 of the Dumping Duty Act--material injury to an Australian industry producing like goods would or might have been caused if the security had not been taken;

the Minister may, by public notice, declare that section 8 of that Act applies:

(c) to the goods in respect of which the Minister is so satisfied; and

(d) to like goods that were exported to Australia after the Commissioner made a preliminary affirmative determination under section 269TD in respect of the goods referred to in paragraph (c) but before the publication of that notice.

⁸⁶ See Australian Anti-dumping Commission, *Dumping and Subsidy Manual*, Chapter 24.

⁸⁷ Ibid.

⁸⁸ Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Australia's Trade Remedies System - Regulation Impact Statement*."

the LDR but apply it only in certain cases.⁸⁹ The last option was to keep the routine application of the LDR but allow exceptions in specific cases.⁹⁰ After analyzing each option, the Australian government concluded that the fourth option was the most ideal way to amend the legislation of the LDR. Under Option 4, the LDR is still an obligatory regulation, however, the application of the Rule is exempted in some circumstances determined by the Minister. Option 4 was thought to be the best option as it captures both the benefits and limitations of the LDR. The option acknowledges that the application of the LDR is desirable, but the mandatory application can cause additional burden on investigations that are already complicated.⁹¹ Therefore, unlike other options, Option 4 encourages the use of the LDR, while allowing some exceptions to mitigate the excessive investigation that may result from the mandatory application of the LDR.⁹²

Among 49 anti-dumping cases in the last four years, only 11 cases had the LDR come into effect (Table 2). The LDR did not come into force at all in 38 cases and 11 of them were due to ‘particular market situation’. China was an exporting country in 22 out of 49 anti-dumping cases, 17 of which had the LDR ineffective. Out of 11 cases where the LDR was not applied due to the existence of a particular market situation, China was an exporter in 10 cases.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

In *Alleged Dumping of Steel Pallet Racking Exported from the People's Republic of China and Malaysia* case, it was not required to apply the LDR for the goods exported from China because of a particular market situation.⁹³ Therefore, it was suggested that a full amount of dumping margin be imposed to steel pallet racking exported to Australia from China and Malaysia.⁹⁴ Also, in *Alleged Dumping of Alloy Round Bar Exported from the People's Republic of China* case, a particular market situation in China and the operation of the Dumping Duty Act made it unnecessary for the Minister to consider the LDR.⁹⁵ In *Alleged Dumping of A4 Copy Paper Exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand* case, although the LDR was considered, it did not have an impact on all the exports from Brazil, China, and Thailand since the NIP was above the normal value.⁹⁶ On the other hand, the LDR was not taken into account at all for the exports from Indonesia because there was a particular market situation found in Indonesia.⁹⁷

⁹³ Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Alleged dumping of steel pallet racking exported from the People's Republic of China and Malaysia*, REP 441.

⁹⁴ Ibid.

⁹⁵ Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Alleged dumping of alloy round bar exported from the People's Republic of China*, REP 384a.

⁹⁶ Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Alleged dumping of A4 copy paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand and alleged subsidization of A4 copy paper exported from the People's Republic of China and the Republic of Indonesia*, REP 341.

⁹⁷ Ibid.

Both the EU and Australia have domestic legislations that obligate the application of the LDR. However, the frequency of the application was very different in actual anti-dumping investigations. Unlike the EU, although Australia routinely applied the LDR under its national legislation, it rarely came into effect in actual investigations. There were many cases in Australia where the exceptions of the application were allowed. On the other hand, it was difficult to find cases in which the LDR was not applied due to exceptional circumstances in the EU even though the EU has also added exceptional clauses to the application of the LDR recently.

Table 2. Recent Anti-Dumping Investigations in Australia: 2017-2021

| No. | Year of Document | Country | Commodity | Document No. | Application of NIP under LDR | Reason for LDR Having No Practical Effect |
|-----|------------------|--|---|-----------------------|--|--|
| 1 | 2021 | Malaysia, Vietnam | Aluminium extrusions | REP 544* | X | NIP = Normal Value |
| 2 | 2021 | Malaysia | Aluminium extrusions (mill finish) | REP 540 | X | NIP > Normal Value |
| 3 | 2021 | Malaysia | Aluminium extrusions (surface finished) | REP 541 | X | NIP > Normal Value |
| 4 | 2021 | China, India, Korea, Malaysia, Taiwan, Vietnam | Zinc coated (galvanised) steel, Aluminium zinc coated steel | REP 521*, REP 522* | X | Particular Market Situation |
| 5 | 2021 | China, Korea, Malaysia, Taiwan, Thailand | Hollow structural sections | REP 529* | TaFong & uncooperative and all other exporters from Taiwan: O All other exporters from Korea, Malaysia, and Taiwan: X China: X | All other exporters from Korea, Malaysia, and Taiwan: NIP > Normal Value China: Particular Market Situation |
| 6 | 2020 | China | Steel reinforcing bar | REP 563* | O | |
| 7 | 2020 | China | Rod in coil | REP 564* | O | |
| 8 | 2020 | Malaysia | Resealable can end closures | REP 527* | X | NIP > Normal Value |
| 9 | 2020 | China | Grinding balls | REP 520* | X | NIP > Normal Value |
| 10 | 2020 | Taiwan | Hot rolled coil steel | REP 528* | O | |

| | | | | | | |
|----|------|--|------------------------------------|-----------------------|------------------------------------|--|
| 11 | 2020 | Indonesia | A4 copy paper | REP 547* | X | Particular Market Situation |
| 12 | 2020 | Thailand | Steel reinforcing bar | REP 518* | X | NIP = Normal Value |
| 13 | 2020 | Korea, Taiwan | Steel reinforcing bar | REP 486*, REP 489* | X | NIP = Normal Value |
| 14 | 2020 | Malaysia | Aluminium extrusions | REP 509* | X | NIP = Normal Value |
| 15 | 2019 | Malaysia, Philippines, Singapore | Resealable can end closures | REP 496* | O | |
| 16 | 2019 | China, Sweden, Thailand | Ammonium nitrate | REP 473 | O | |
| 17 | 2019 | Malaysia | Aluminium extrusions | REP 494* | X | NIP > Normal Value |
| 18 | 2019 | China | PVC flat electric cables | REP 469 | X (export by Guilin) O (others) | Guilin: NIP > Normal Value |
| 19 | 2019 | China | Aluminium extrusions | REP 482* | X | Particular Market Situation |
| 20 | 2019 | China, Malaysia | Steel pallet racking | REP 441 | X | China: Particular Market Situation, Malaysia: NIP > Normal Value |
| 21 | 2019 | Austria, Finland, Korea, Russia, Slovakia | A4 copy paper | REP 463 | X | Finland, Korea, Russia, Slovakia: NIP > Normal Value |
| 22 | 2019 | China, France | Railway wheels | REP 466 | X | NIP > Normal Value |
| 23 | 2019 | China | Alloy round steel bar | REP 384a | X | Particular Market Situation |
| 24 | 2019 | Thailand | Pineapple fruit, consumer / FSI | REP 477*, REP 478* | X | NIP > Normal Value |

| | | | | | | |
|----|------|--|---|------------------------------------|---|---|
| 25 | 2019 | China | Rod in coil | REP 468* | X | Particular Market Situation |
| 26 | 2018 | China | Steel reinforcing bar | REP 467* | X | NIP > Normal Value |
| 27 | 2018 | Korea | Hot rolled structural steel sections | REP 465* | X | NIP = Normal Value |
| 28 | 2018 | Taiwan | Hot rolled coil steel | REP 454* | X | NIP = Normal Value |
| 29 | 2018 | Thailand | Pineapple fruit, consumer / FSI | REP 455* | X | NIP > Normal Value |
| 30 | 2018 | China, Korea, Taiwan | Zinc coated (galvanised) steel, Aluminium zinc coated steel | REP 457*, REP 456* | X | China: Particular Market Situation Korea, Taiwan: NIP > Normal Value |
| 31 | 2018 | China | Hollow structural sections | REP 285A* | X | NIP > Normal Value |
| 32 | 2018 | China | Deep drawn stainless steel sinks | REP 459* | O | |
| 33 | 2018 | China | Aluminium zinc coated steel | REP 410*, REP 409* | X | NIP > Normal Value |
| 34 | 2018 | China | Steel reinforcing bar | REP 412*, REP 411*, REP 423* | X | Particular Market Situation |
| 35 | 2018 | China | Rod in coil | REP 414*, REP 413* | X | Particular Market Situation |
| 36 | 2018 | Greece, Indonesia, Spain, Taiwan, Thailand | Steel reinforcing bar | REP 418 | X | NIP > Normal Value |

| | | | | | | |
|----|------|---|---|---|---|---|
| 37 | 2017 | South Africa | Wire ropes | REP 401 | O | |
| 38 | 2017 | China | Aluminium extrusions | REP 392* | X | Particular Market Situation |
| 39 | 2017 | India, Malaysia, Vietnam | Zinc coated (galvanised) steel | REP 370 | X | NIP > Normal Value |
| 40 | 2017 | USA | Cooling tower water treatment controllers | REP 377 | O | |
| 41 | 2017 | Korea | Aluminium zinc coated steel, Zinc coated (galvanised) steel | REP 385*, REP 386* | X | NIP = Normal Value |
| 42 | 2017 | Malaysia, Vietnam | Aluminium extrusions | REP 362 | X | NIP > Normal Value |
| 43 | 2017 | Indonesia, Taiwan, Thailand | Power transformers | REP 383 | X | NIP = Normal Value |
| 44 | 2017 | China | Aluminium zinc coated steel, Zinc coated (galvanised) steel | REP 365* ~ 368*, REP 371* ~ 372*, REP 374* ~ 376* | X | NIP = Normal Value |
| 45 | 2017 | Italy | Tomato products, prepared or preserved | REP 349*, REP 354* | X | NIP > Normal Value |
| 46 | 2017 | Brazil, China, Indonesia, Thailand | A4 copy paper | REP 341 | X | Brazil, China, Thailand: NIP > Normal Value Indonesia: Particular Market Situation |
| 47 | 2017 | Spain | Steel reinforcing bar | REP 380* | X | NIP = Normal Value |
| 48 | 2017 | India, Malaysia, Philippines, Singapore | Resealable can end closures | REP 350 | O | |

| | | | | | | |
|----|------|----------|------------------------------------|----------|---|--------------------|
| 49 | 2017 | Thailand | Pineapple fruit, consumer / FSI | REP 373* | X | NIP > Normal Value |
|----|------|----------|------------------------------------|----------|---|--------------------|

Source: Compiled by author

* Review of anti-dumping measures

'X' indicates a situation in which the LDR was not considered because of certain circumstances or in which the LDR was considered but did not come into effect.

'O' indicates a situation in which the LDR was applied and came into effect.

3. Republic of Korea

Republic of Korea has also applied the LDR very strictly. Korea uses two methods to calculate the injury margin for domestic industries. Methodology 1 is price undercutting, which is similar to the method used in Australia and Methodology 2 is price underselling, which is similar to the method used in the EU.⁹⁸ In the recent anti-dumping investigations, the injury margin was calculated mainly using Methodology 2.⁹⁹ In Korea, the dumping margin is calculated differently depending on companies, while the injury margin is calculated as a single injury margin for the entire industry.¹⁰⁰ Therefore, regardless of whether the dumping margin is high or low, the injury margin is applied uniformly. Such system increases the influence of applying the LDR on the final determination of anti-dumping duties. Therefore, Korea needs to be more prudent in calculating the injury margin and using the LDR.

Almost half of Korea's anti-dumping investigations in the past four years have imposed anti-dumping duties only up to the level of the injury margin which was the lower of the dumping margin and the injury margin due to the strict

⁹⁸ Insoo Pyo(표인수) and Se Yeal You(유세열), "Review on Anti-circumvention and Lesser-duty Rule for the Revitalization of Trade Remedy in Korea (무역구제제도의 활성화와 우회덤핑 및 최소부과원칙의 재검토)," 89.

⁹⁹ Ibid.

¹⁰⁰ Republic of Korea and developing countries mostly adopt global injury margin, which is assessing a single injury margin for one industry. On the other hand, countries like the European Union and New Zealand use individual injury margin, calculating injury margin for each exporter. The former method has a problem that the injury margin can be underestimated. 서울대학교 국제대학원·지식경제부 무역위원회, "산업피해구제 수준의 합리적 운용을 위한 개선방안 연구."

application of the LDR (Table 3). However, only 2 out of 8 cases in 2020 and 2021 had the LDR come into effect. This shows that the application rate of the LDR in Korea has decreased sharply recently. Despite the mandatory application of the LDR, the anti-dumping duty was set at the level of the dumping margin as it was lower than the injury margin in most of the recent cases. Also, in anti-dumping investigations where the anti-dumping duty was set at the level of the injury margin due to the application of the LDR, the anti-dumping duty was often determined lower than when the LDR was not applied.

The EU, Australia, and Korea all have domestic laws on the mandatory application of the LDR, however, the frequency of it coming into effect in actual anti-dumping investigations in each country was very different. The EU had the highest frequency and Australia had the lowest. The application pattern of the LDR depending on exporting countries was also different in each country. In Korea, out of 12 cases in which the LDR did not come into effect, China was an exporting country in 8 cases. This shows that LDR did not come into effect more frequently when China was an exporter in Korea's anti-dumping investigations. Also, the LDR was often ineffective when China was involved in anti-dumping investigations in Australia mainly due to the existence of a particular market situation. On the other hand, in the EU, the LDR came into effect in most cases where China was an exporting country.

Table 3. Recent Anti-Dumping Investigations in Korea: 2017-2021

| No. | Final Assessment Year | Country | Commodity | Dumping Margin (%) | Injury Margin (%) | Anti-Dumping Duty (%) | Document No. | Application of Injury Margin Under LDR |
|-----|-----------------------|---------------------|--|--------------------|-------------------|-----------------------|---------------|--|
| 1 | 2021 | China | Presensitized aluminum plate for offset printing | 8.78 ~ 10.32 | 21.89 | 8.78 ~ 10.32 | 구제 23-2020-2호 | X |
| 2 | 2020 | China | H-steel | 28.23 ~ 32.72 | 35.21 | 28.23 ~ 32.72 | 구제 23-2020-1호 | X |
| 3 | 2020 | Japan, India, Spain | Stainless steel bar | 3.51 ~ 66.05 | 15.39 | 3.51 ~ 15.39 | 구제 23-2019-9호 | O |
| 4 | 2020 | Vietnam | Plywood | 9.18 ~ 10.65 | 97.97 | 9.18 ~ 10.65 | 구제 23-2019-7호 | X |
| 5 | 2020 | Malaysia | Plywood | 4.73 ~ 38.10 | 45.78 | 4.73 ~ 38.10 | 구제 23-2019-6호 | X |
| 6 | 2020 | China | Plywood | 3.98 ~ 27.21 | 35.15 | 3.98 ~ 27.21 | 구제 23-2019-5호 | X |

| | | | | | | | | |
|----|------|----------------------------|---------------------------------------|---------------|-------|---------------|---------------|---|
| 7 | 2020 | China | Coniferous wood plywood | 5.33 ~ 7.15 | 36.24 | 5.33 ~ 7.15 | 구제 23-2019-4호 | X |
| 8 | 2020 | Japan | Stainless steel plate | 22.53 ~ 43.72 | 13.17 | 13.17 | 구제 23-2019-3 | O |
| 9 | 2019 | China, India | PET film | 13.51 ~ 36.98 | 54.32 | 13.51 ~ 36.98 | 구제 23-2018-5호 | X |
| 10 | 2019 | China, Indonesia, Thailand | Biaxially oriented polypropylene film | 2.15 ~ 25.59 | 25.04 | 25.04 | 구제 23-2018-4호 | O |
| 11 | 2019 | India | Ethyl acetate | 8.56 ~ 22.20 | 19.84 | 19.84 | 구제 23-2018-3호 | O |
| 12 | 2019 | China, Singapore, Japan | Ethyl acetate | 4.73 ~ 37.98 | 30.18 | 4.73 ~ 30.18 | 구제 23-2018-2호 | O |
| 13 | 2018 | China | Float glass | 12.04 ~ 36.01 | 36.01 | 36.01 | 구제 23-2017-6호 | X |
| 14 | 2018 | United States, Malaysia, | Ethanolamine | 12.64 ~ 90.56 | 21.79 | 12.64 ~ 21.79 | 구제 23-2017-4 | O |

| | | | | | | | | |
|----|------|--|-------------------------------|--------------|-------|--------------|---------------|---|
| | | Thailand, Japan | | | | | | |
| 15 | 2018 | China | Galvanized steel wire | 8.60 | 66.25 | 8.60 | 구제 23-2017-3호 | X |
| 16 | 2018 | Japan, China, Finland | Coated printing paper | 5.90 ~ 56.30 | 16.23 | 16.23 | 구제 23-2017-2호 | O |
| 17 | 2018 | Taiwan, Thailand, United Arab Emirates | PET film | 3.67 ~ 60.95 | 89.10 | 3.67 ~ 60.95 | 구제 23-2017-1호 | X |
| 18 | 2017 | Vietnam, Ukraine, India | Ferro-silico-manganese | 4.06 ~ 32.21 | 19.06 | 19.06 | 구제 23-2016-5 | O |
| 19 | 2017 | China | Digital offset printing plate | 5.86 ~ 10.32 | 10.21 | 5.86 ~ 10.21 | 구제 23-2016-4 | O |
| 20 | 2017 | Japan, India, Spain | Stainless steel bar | 3.56 ~ 66.05 | 15.39 | 3.56 ~ 15.39 | 구제 23-2016-3 | O |

| | | | | | | | | |
|----|------|----------|---------|--------------|-------|--------------|--------------|---|
| 21 | 2017 | China | Plywood | 4.57 ~ 27.21 | 35.15 | 4.57 ~ 27.21 | 구제 23-2016-2 | X |
| 22 | 2017 | Malaysia | Plywood | 3.96 ~ 38.10 | 45.78 | 3.96 ~ 38.10 | 구제 23-2016-1 | X |

Source: 표인수·유세열 (2018, 89), Edited by author.

IV. Rationale and Limitations of the Lesser Duty

Rule

The LDR was established to prevent excessive dumping margins from being imposed as anti-dumping duties. However, if high-quality products are dumped in domestic markets, more damage can be done to domestic industries even if the LDR is applied. Such structural problems of the LDR are illustrated using a simple assumption.

Table 4. An Assumed Situation

| Country A (Exporter) | Country B (Importer) | Margin |
|--|----------------------|---|
| Normal Value: \$100 Exporting Price: \$50 | Domestic Price: \$80 | Dumping Margin: \$50 Injury Margin: \$30 |

Source: Author

Assume that there is a product in Country A that has a domestic price of \$100 (Table 4). A competitive product of Country A is sold at \$80 in Country B. Dumping occurs when Country A exports its product to Country B for \$50 which is lower than the normal value of the product in Country A. In this situation, the dumping margin is \$50 which is the difference between the domestic price and the exporting price of Country A, and the injury margin is \$30 which is the difference between the domestic price of Country B and the exporting price of Country A. When the LDR is applied, the lower of the dumping margin and the injury margin – in this case the injury margin – should be imposed as an anti-dumping duty. Therefore, if

an anti-dumping duty is determined at level of the injury margin in compliance with the LDR and imposed on the product exported at a price of \$50, it will be sold at a price of \$80 in Country B which is the same as the price of the domestic product in Country B. On the other hand, if an anti-dumping duty is imposed at the level of the dumping margin, the imported products will be sold at a price of \$100 in Country B which is higher than the price of the domestic product in Country B.

Looking at the two cases described above, from the perspective of Country B, it will theoretically be better if Country A's products are imported and sold at the same price of \$80 in Country B than \$100, which is higher than Country B's domestic price. However, it should be examined whether the product of Country A to be sold at the same price as that of Country B surely benefits Country B in reality. Domestic prices of exporting countries are usually higher than those of importing countries when the exporting countries are advanced countries such as the US, the EU, and Japan. If high-quality products produced by advanced countries are exported to Country B at a lower price and the LDR is applied, the price of the products exported from Country A only goes up to the domestic price of Country B. Therefore, Country B, which is an importer, will be able to purchase high-quality products of Country A at a low price. From the perspective of stakeholders of Country B's domestic industries, it will be difficult for Country B's domestic products to compete with high-quality and inexpensive products imported from Country A.

Most economists argue that the LDR is a reasonable system, given that imposing anti-dumping duties as much as the injury margin and setting the imported

product's price at the level of Country B's domestic price can give consumers in Country B a wide range of product choices while triggering sufficient competition in the domestic industry. In reality, however, if high-quality products sold at higher prices in Country A are sold at the same price as Country B's domestic products in Country B, everyone will want to consume high-quality products imported from Country A. In this case, the LDR does not adjust the starting point for fair competition by equating the prices of Country B's domestic products and the products imported from Country A but rather makes it difficult for domestic products to compete against imported products. On the other hand, when the dumping margin is imposed as anti-dumping duties without applying the LDR, the product will be imported at a price of \$100 which is more expensive than the price of Country B's domestic products. This can lead to a problem where the import itself is fundamentally blocked. Therefore, if the LDR is not applied at all, the domestic industry may be overprotected. For this reason, economists argue that the imports should be adjusted to the domestic price of \$80.

However, there are still many problems with the mandatory application of the LDR. The fact that the product is \$100 in Country A means that it has a higher product value than that of Country B. Therefore, if these products are priced at \$80 in Country B which is the same as the domestic price, it is natural that Country B's products become less competitive. As a result, the domestic industry will not be protected. Furthermore, the fact that Country A can export \$100 worth of goods to Country B at \$80 after applying the LDR leads to a contradictory situation that Country A is allowed to dump the products to Country B at \$80 which is still lower

than \$100. Also, if the price of imported products is determined at the price level of domestic products by applying the LDR, domestic producers in Country B will not be able to raise domestic prices even when the quality of domestic products is improved. The price rise will make domestic products less competitive since already high-quality dumped products are cheaper. Such problems show that the LDR is not necessarily a reasonable system. Therefore, it is not desirable to apply the LDR mandatorily in all cases.

V. Conclusion

The LDR was first introduced during the Kennedy Round. Different countries had different views on the application of the LDR. Although several attempts were made in the Tokyo Round, the LDR was finally established as a “desirable” regulation in the WTO Anti-Dumping Agreement during the Uruguay Round. However, there are still many unresolved problems related to the application of the LDR and whether the Rule should be made mandatory is still under discussion.

The European Union, Australia, and Korea are countries that have been using the LDR actively, however, the frequency of the LDR coming into effect in actual anti-dumping investigations varies by country. The application of the LDR was the most effective in the EU and the least effective in Australia. Although both countries have recently started to make some exceptions to the mandatory application of the LDR, there have been more cases in Australia where the LDR did not come into force due to exceptional circumstances than in the EU. The LDR was introduced to prevent the imposition of excessive duties while sufficiently protecting domestic industries. However, it causes some contradictory situations, including tolerating some degree of dumping. When there is a big difference between the dumping margin and the injury margin, simply applying the LDR may also result in the imposition of excessively low anti-dumping duties without deeply examining the appropriate level of duties that can fully eliminate the damage caused by dumping. Therefore, the LDR which appears to be a theoretically perfect rule has many flaws when applied in actual investigations.

As it has been more than 50 years since the LDR was first devised, changes are needed in accordance with the new trade order. The analysis in this paper shows that the mandatory application of the LDR that most WTO members insisted on is no longer a reasonable proposal. Therefore, the Rule should remain as a discretionary regulation in the WTO Anti-Dumping Agreement. However, more detailed guidelines should be provided to make it easier for the member states to use the LDR under their own national legislations. Detailed provisions regarding the LDR are required in the Anti-Dumping Agreement for more transparent and reasonable application across countries.

Reference

<Journal Article/Books>

- Durling, James P., and Matthew R. Nicely. 2002. *Understanding the WTO Anti-dumping Agreement : Negotiating History and Subsequent Interpretation*. London: Cameron May.
- Marceau, Gabrielle. 1994. *Anti-dumping and Anti-trust Issues in Free-trade Areas*. Oxford: Clarendon Press; New York: Oxford University Press.
- Mavroidis, Messerlin, Wauters, Messerlin, Patrick A, and Wauters, Jasper M. 2008. *The Law and Economics of Contingent Protection in the WTO*. Cheltenham, UK; Northampton, MA, USA: Edward Elgar.
- Mavroidis, Petros C. 2016. *The Regulation of International Trade. Volume 2, The WTO Agreements on Trade in Goods*. Cambridge, Massachusetts: The MIT Press.
- Steele. 1989. "The Australian Anti-dumping System." in J. Jackson and E. Vermulst (eds.). *Anti-Dumping Law and Practice: A Comparative Study*. University of Michigan Press.
- Stewart, Terence P. 1993. *The GATT Uruguay Round : A Negotiating History (1986-1992)*. Deventer; Boston: Kluwer Law and Taxation Publishers.
- Van Bael and Bellis. 2011. *EU Anti-Dumping and Other Trade Defence Instruments*. Alphen Aan Den Rijn: Wolters Kluwer Law International.
- Vermulst, Edwin A. 1989. "The Anti-Dumping Systems of Australia, Canada, the EEC and the United States of America: Have Anti-Dumping Laws Become a Problem in International Trade?." 10 MICH. J. INT'L L. 765.
- Vermulst, Edwin A. 1996. *EU Anti-dumping Law and Practice*. London: Sweet & Maxwell.
- Viner, Jacob. 1991. *Dumping: A Problem in International Trade*. Fairfield: Augustus M. Kelley Publishers.
- Wolfrum Rüdiger, Stoll Peter-Tobias, and Koebele Michael. 2008. *WTO : Trade Remedies*. Leiden; Boston: Martinus Nijhoff Publishers.

<Foreign Articles>

- 서울대학교 국제대학원·지식경제부 무역위원회. 2009. "산업피해구제수준의 합리적 운용을 위한 개선방안 연구."

표인수, 유세열. 2018. “무역구제제도의 활성화와 우회덤핑 및 최소부과 원칙(lesser-duty rule)의 재검토.” 국제통상연구 제23권 제4호, 65-96.

<GATT/WTO Documents>

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Note on Meeting on 20-21 October 1965*, TN.64/NTB/W/2 (23 November 1965)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by the European Economic Community*, TN.64/NTB/W/10/Add.1 (21 April 1966)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by the United States*, TN.64/NTB/W/10/Add.3 (28 April 1966)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by Norway*, TN.64/NTB/W/10/Add.4 (29 April 1966)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by the Government of Canada*, TN.64/NTB/W/10/Add.5 (5 May 1966)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by Denmark*, TN.64/NTB/W/10/Add.6 (5 May 1966)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by Sweden*, TN.64/NTB/W/10/Add.7 (6 May 1966)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by New Zealand*, TN.64/NTB/W/10/Add.9 (20 May 1966)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Checklist - Addendum - Comments by Australia*, TN.64/NTB/W/10/Add.8 (20 May 1966)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Code - Revised Draft*, TN.64/NTB/W/17 (28 March 1967)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Anti-Dumping Code - Second Revised Draft*, TN.64/NTB/W/18 (14 April 1967)

GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Draft - Anti-Dumping Code*, TN.64/NTB/W/16 (03 March 1967)

- GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Draft Report on the Group on Anti-Dumping Policies*, TN.64/NTB/W/19 (24 April 1967)
- GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Note by Secretariat on Meetings on 10-11 May 1966*, TN.64/NTB/W/11 (6 June 1966)
- GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Possible Elements to Be Considered for Inclusion in an Anti-Dumping Code - Note by the Secretariat*, TN.64/NTB/W/13 (23 August 1966)
- GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Possible Elements to Be Considered for Inclusion in an Anti-Dumping Code - Revised List*, TN.64/NTB/W/14 (9 December 1966)
- GATT, *Sub-Committee on Non-Tariff Barriers - Group on Anti-Dumping Policies - Report of the Group on Anti-Dumping Policies*, TN.64/NTB/ (05 May 1967)
- GATT, *Uruguay Round - Group of Negotiations on Goods (GATT) - Negotiating Group on MTN Agreements and Arrangements - Amendments to the Anti-Dumping Code - Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/51 (12 September 1989)
- GATT, *Uruguay Round - Group of Negotiations on Goods (GATT) - Negotiating Group on MTN Agreements and Arrangements - Amendments to the Anti-Dumping Code - Submission by Canada*, MTN.GNG/NG8/W/65 (22 December 1989)
- GATT, *Uruguay Round - Group of Negotiations on Goods (GATT) - Negotiating Group on Negotiating Group on [MTN Agreements and Arrangements] - Proposed Elements for a Framework for Negotiations Principles and Objectives for Anti-Dumping Rules - Communication from the Delegation of Singapore*, MTN.GNG/NG8/W/55 (13 October 1989)
- GATT, *Uruguay Round - Group of Negotiations on Goods (GATT) - Negotiating Group on MTN Agreements and Arrangements - Submission of Japan on the Amendments to the Anti-Dumping Code - Addendum*, MTN.GNG/NG8/W/48/Add.1 (29 January 1990)
- WTO, *Negotiating Group on Rules - Anti-Dumping: Illustrative Major Issues - Paper from Brazil; Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan; K[...]itzerland, Thailand and Turkey*, TN/RL/W/6 (26 April 2002)
- WTO, *Negotiating Group on Rules - Comments by Jamaica on Proposals to the Negotiating Group on Rules (AD and SCM, Including Fisheries Subsidies) Discussed at the[...]eting on 26 - 30 September 2005*, TN/RL/W/188 (10 October 2005)

- WTO, *Negotiating Group on Rules - Comments on the Lesser Duty Rule - Communication from Brazil*, TN/RL/W/189 (13 October 2005)
- WTO, *Negotiating Group on Rules - Egyptian Paper Containing Comments on the Contributions Submitted in the Framework of the Doha Negotiations on the Anti-Dumping Agreement*, TN/RL/W/56 (10 February 2003)
- WTO, *Negotiating Group on Rules - Fourth Set of Questions from the United States on Papers Submitted to the Rules Negotiating Group*, TN/RL/W/103 (6 May 2003)
- WTO, *Negotiating Group on Rules - Further Comments on Lesser Duty Proposals - Paper from the United States*, TN/RL/GEN/58 (13 July 2005)
- WTO, *Negotiating Group on Rules - Further Submission of Proposals on the Mandatory Application of the Lesser Duty Rule - Paper from Brazil, Chile, Costa Rica, Hon[...], Kinmen and Matsu and Thailand*, TN/RL/GEN/43 (13 May 2005)
- WTO, *Negotiating Group on Rules - General Contribution to the Discussion of the Negotiating Group on Rules on the Anti-dumping Agreement - Submission from Australia*, TN/RL/W/86 (30 April 2003)
- WTO, *Negotiating Group on Rules - Identification of Issues under the Anti-Dumping Agreement that Need to be Improved and Clarified within the Current Negotiations[...]*n of the Arab Republic of Egypt, TN/RL/W/110 (22 May 2003)
- WTO, *Negotiating Group on Rules - Implementation-Related Issues - Paper by Brazil*, TN/RL/W/7 (26 April 2002)
- WTO, *Negotiating Group on Rules - Informal Paper on Anti-Dumping and Subsidies Agreements - Paper from South Africa*, TN/RL/GEN/60 (12 July 2005)
- WTO, *Negotiating Group on Rules - Korea's Comments on Canada's Submission on the Anti-Dumping Agreement (TN/RL/W/47)*, TN/RL/W/65 (24 February 2003)
- WTO, *Negotiating Group on Rules - Lesser Duty Rule - Communication from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Republi[...]*and Matsu; Thailand and Turkey, TN/RL/GEN/1 (14 July 2004)
- WTO, *Negotiating Group on Rules - Proposal on Lesser Duty - Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway[...]*and Matsu; Thailand and Turkey, TN/RL/W/119 (16 June 2003)
- WTO, *Negotiating Group on Rules - Proposal on Mandatory Application of Lesser Duty Rule - Communication from India*, TN/RL/GEN/32 (22 March 2005)
- WTO, *Negotiating Group on Rules - Proposal on Mandatory Application of Lesser Duty Rule - Communication from India*, TN/RL/W/170 (9 February 2005)

WTO, *Negotiating Group on Rules - Proposals on the Mandatory Application of the Lesser Duty Rule - Paper from Brazil; Hong Kong, China; India and Japan*, TN/RL/GEN/99 (3 March 2006)

WTO, *Negotiating Group on Rules - Proposal of the People's Republic of China on the Negotiation on Anti-Dumping*, TN/RL/W/66 (6 March 2003)

WTO, *Negotiating Group on Rules - Replies to Questions to our First Contribution (TN/RL/W/6) - Anti-dumping - Paper from Brazil; Chile; Colombia; Costa Rica; Hong[...].apore; Switzerland and Thailand*, TN/RL/W/45 (27 January 2003)

WTO, *Negotiating Group on Rules - Submission from Canada Respecting the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement)*, TN/RL/W/47 (28 January 2003)

WTO, *Negotiating Group on Rules - Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement)*, TN/RL/W/13 (8 July 2002)

<Others>

Australian Anti-dumping Commission. 2018. *Dumping and Subsidy Manual*. Chapter 24.

Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education. 2012. *Australia's Trade Remedies System - Regulation Impact Statement*.

Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Alleged dumping of A4 copy paper exported from the Federative Republic of Brazil, the People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand and alleged subsidization of A4 copy paper exported from the People's Republic of China and the Republic of Indonesia*, REP 341.

Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Alleged dumping of Ammonium nitrate exported from the People's Republic of China, Sweden and the Kingdom of Thailand*, REP 473.

Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Alleged dumping of alloy round bar exported from the People's Republic of China*, REP 384a.

Australian Government - Department of Industry Innovation, Science, Research and Tertiary Education, *Alleged dumping of steel pallet racking exported from the People's Republic of China and Malaysia*, REP 441.

Case 53/83 Allied Corporation and Others v. Council ECR 1621 (23 May 1985)

Nehra, Vikrant. 2020. "Suspension of Lesser Duty Rule by the EU in Anti-Dumping Investigations." International Trade Amicus. Accessed May 1, 2021. https://www.researchgate.net/publication/344044678_Suspension_of_Lesser_Duty_Rule_by_the_EU_in_Anti-Dumping_Investigations

Official Journal of the European Union, *Commission Implementing Regulation (EU) 2020/508 of 7 April 2020 imposing a provisional anti-dumping duty on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia, the People's Republic of China and Taiwan*, OJ L 110, 8.4.2020, p.3.

국문초록

WTO 반덤핑 협정상 최소부과원칙의 발전과 한계

서울대학교 국제대학원
국제학과 국제통상전공
전 현 지

WTO 반덤핑 협정상 최소부과원칙은 덤핑마진과 피해마진 중 더 낮은 정도를 반덤핑 관세로 부과하는 원칙이다. 이는 본래 덤핑으로 인해 국내 산업에 가해진 피해를 제거할 수 있는 수준으로만 반덤핑 관세를 부과하기 위해 만들어졌다. 따라서 대부분의 WTO 회원국들은 오래 전부터 최소부과원칙의 의무화를 주장했다. 최소부과원칙은 케네디 라운드에 최초로 고안되어 큰 변화 없이 WTO 반덤핑 협정에 도입되었다. 이후에 한번도 개정되지 않았으며 여전히 재량규정으로 남아있다. 동원칙은 이론적으로는 매우 이상적인 원칙이지만 실제 반덤핑 사건에 적용되었을 때 많은 문제점이 있다. 더 나아가 동원칙을 가장 활발히 사용하던 회원국인 유럽연합, 호주와 한국도 최근 들어 최소부과원칙을 유연하게 적용하려는 움직임을 보이고 있다. 이러한 변화와 동원칙이 지닌 한계를 볼 때에 WTO 반덤핑 협정상 최소부과원칙은 새로운 무역 질서에 맞게 시급히 개선되어야 한다.

주제어: WTO 반덤핑 협정, 최소부과원칙, 피해마진, 덤핑마진

학번: 2019-24542