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The NAFTA Alternative: Saving Korus FTA Dumping Appeals from the Dumps

Czarina Powell

THE NAFTA ALTERNATIVE: SAVING KORUS FTA DUMPING APPEALS FROM THE DUMPS

*Czarina Powell**

ABSTRACT: Antidumping duties are a trade remedy often utilized against producers in the United States' own bilateral trading partners. Because of *Chevron* deference, foreign companies are at greater risk of being branded "dumpers" simply upon the onset of a petition. On March 15, 2013, the United States celebrated the one-year anniversary of the signing into force of the Korea-US (KORUS) Free Trade Agreement and its promise to eliminate barriers and tariffs. This article acknowledges the importance of the Republic of Korea as a U.S. trading partner, and proposes an alternative appeals system for dumping disputes between the two countries; one that embodies the spirit of the WTO Agreement, while still protecting American industries against harm. This article argues that the system created in the NAFTA binational panel is the fairest and more effective method of resolving dumping disputes. This article calls for the extension and implementation of NAFTA binational panels for all KORUS FTA dumping disputes.

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I. INTRODUCTION

"The U.S. International Trade Commission (ITC) today unanimously ruled that unlawful pricing by Samsung and LG caused injury to the U.S. clothes washer industry . . . .Whirlpool Corporation (NYSE: WHR) welcomes today's decision, which is in response to anti-dumping and anti-subsidy petitions filed by the company in December 2011 on behalf of the U.S. appliance industry."[1] LG responded by stating "LG respects the work the ITC staff and commission have put into this determination, but we disagree with the result, which will harm US retailers and consumers."[2]

On January 23, 2013, the Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC") issued an antidumping duty order against the Republic of South Korea, on all large residential washers from LG Electronics, Inc., Samsung Electronics Co., Ltd., and Daewoo

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* J.D. (Case Western Reserve University School of Law, 2014); Assistant State's Attorney, Cook County State's Attorney's Office, Chicago, Illinois.

[1] Press Release, Whirlpool Corp., Victory for American Washer Industry: Ruling Supports U.S. Workers and Consumers (2013), http://investors.whirlpoolcorp.com/releasedetail.cfm?releaseid=735328 [hereinafter Whirlpool Corp.].

[2] LG Electronics USA, *LG Electronics Disputes ITC Injury Finding in Washing Machine Antidumping Case,* PR Newswire (Jan. 23, 2013), http://www.prnewswire.com/news-releases/lg-electronics-disputes-itc-injury-finding-in-washing-machine-antidumping-case-188058261.html.

Electronics Corporation.[3] Commerce, from its antidumping investigations, determined that the Korean corporations had sold their products at "less-than-fair value" in the United States, while the ITC found that the domestic industry was materially injured.[4] Marc Bitzer, President of Whirlpool Corporation, the American corporation that had initiated the antidumping petition against its Korean competitors, hailed the antidumping duty as "a great victory for the U.S. appliance industry"[5] and stated that Whirlpool's decision to petition for the trade remedy was premised on "defend[ing] the integrity of the global trading system."[6]

At first blush, the issue seems cut and dry: a foreign firm "dumps" its product in the U.S. market for a lower price than it sells at home; U.S. firms struggle to compete with this unfair trade, leading American companies to be injured in their own market. Upon further review, the broad grant of discretion bestowed upon Commerce and the ITC to determine (1) whether the foreign firm has "dumped," its goods in the United States for less than they have sold them at home,[7] and (2) whether a U.S. industry was materially injured by this "dumping,"[8] reveals flaws, and because of the high level of *Chevron* deference[9] granted to these agency decisions by the Court of International Trade and the Court of Appeals for the Federal Circuit, the dumping petition sticks: once a dumper, always a dumper.

This article will argue that the North American Free Trade Agreement ("NAFTA") binational panel process under NAFTA Ch. 19, created to resolve antidumping disputes between the United States, Canada, and Mexico, are an effective dispute mechanism that should be instituted and applied to antidumping appeals between the United States and South Korea. The five-person binational panel, as an alternative to the current U.S. domestic judicial review system, is more in-tune with World Trade Organization ("WTO") priorities and would give more effect to the spirit of the Korea-United States Free Trade Agreement ("KORUS FTA") and free trade at large, fostering stronger relations with the Republic of Korea, one of the largest U.S. trading partners, while still protecting domestic markets against harm. The focus of this article is on the special binational panel appeals process the United States has carved out for Canada and Mexico, and the argument that these procedures should be extended to antidumping disputes between the U.S. and South Korea.

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[3] Large Residential Washers from Mexico and the Republic of Korea: Antidumping Duty Orders, 78 Fed. Reg. 11,148 (Feb. 15, 2013).

[4] *Id.*

[5] Whirlpool Corp., *supra* note 1.

[6] *See* Whirlpool Corp., *Defending U.S. Jobs,* WhirlpoolCorp.com, http://www.whirlpoolcorp.com/facts/.

[7] *See* 19 U.S.C. § 1673(1) (2013) (stating that the "administrating authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold" for less than fair value). *See also* 19 U.S.C. §1677(1) (2013) (stating that "[t]he term 'administering authority' means the Secretary of Commerce").

[8] *See* 19 U.S.C. § 1673(2) (2013) (stating that the Commission determines material injury or retardation of a domestic industry). *See also* 19 U.S.C. §1677(2) (2013) (stating that "[t]he term ''Commission'' means the United States International Trade Commission").

[9] *See* Chevron, U.S.A., Inc. v. *Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984).

Part II of this article will assess the background of the United States' current antidumping dispute system. Part III will analyze the importance of United States' trade relations with South Korea and parallel it with the relations the U.S. has with Canada and Mexico. Part IV will analyze the NAFTA binational panels as an effective alternative antidumping appeals system. Part V will discuss the spirit of the WTO Agreement and how binational panels work better to uphold the ideas of free trade. Part VI will argue for the feasibility of implementing a binational panel for the United States and South Korea, and Part VII will conclude with why the antidumping binational panel is needed in lieu of the status quo.

II. BACKGROUND: THE UNITED STATES' ANTI-DUMPING SYSTEM

The United States assesses dumping remedies according to Title VII of the Tariff Act.[10] Dumping is defined as the sale of foreign merchandise in the United States "at less than its fair value" that causes material injury to or retardation of a U.S. industry.[11] If the administrative agencies tasked with investigating dumping deem that dumping has taken place, they assess an antidumping duty to offset the difference between the product's "normal value" and the "less than its fair value." [12] The antidumping duty is levied after making "adjustments for differences in the merchandise, quantities purchased, and circumstances of the sale."[13]

A. The "interested party" petition process

While Commerce may initiate an antidumping investigation "on its own motion,"[14] it "rarely does."[15] Instead, a domestic company may file a petition with Commerce, or simultaneously with the ITC as an "interested party" on behalf of an industry.[16] Private parties initiate more than ninety percent of all the antidumping cases filed.[17] Once a party files a petition, the petition then proceeds through Commerce and the ITC according to the statutory timetable.[18] While the statute allows for interested parties to launch petitions of their own, it is hard to delineate what part of the petition is done for altruistic reasons and what part is done to potentially curb the success of a foreign competitor. [19] There are

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[10] *See* Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, Title VII, updated through Pub. L. No. 103-465 (codified at 19 U.S.C. § 1673a) (2013).

[11] *See* 19 U.S.C. § 1673 (2013).

[12] *Id.*

[13] *See* Robert Carpenter, U.S. Int'l Trade Comm'n, Antidumping and Countervailing Handbook, I-3, note 2 (13th ed. 2008).

[14] *Id.* at II-4, note 8. *See generally* 19 U.S.C. § 1673a(a)(1) (2013).

[15] Carpenter, *supra* note 13, at II-4, note 8.

[16] 19 U.S.C. § 1673a(b)1 (2013).

[17] *See* Robert W. McGee, *The Case to Repeal The Antidumping Laws*, 13 Nw. J. Int'l L. & Bus. 491 at 547 (1993).

[18] *See infra* Figure 1, note 30.

[19] *See* McGee, s*upra* note 17, at 547-48, 551 (suggesting that as "[n]early all of the ANTIDUMPING petitions that U.S. companies file with the Commerce Department result in an investigation," coupled with the fact that "companies are never penalized for submitting

underlying notions that "antidumping is not about remedying unfair trade practices . . . but about protecting the domestic products of the importing country."[20]

Whirlpool, in the example given at start of this article, signed a petition on March 11, 2011 directed to James R. Holbein, Acting Secretary of the ITC, requesting that Korean and Mexican corporations be investigated for their "Bottom Mount Combination Refrigerator-Freezers" originating in the Republic of Korea and Mexico.[21] While it seems anti-competitive for a domestic U.S. company to petition the U.S. government for relief against a foreign competitor, the Noerr-Pennington doctrine gives private parties immunity "from antitrust scrutiny when they lobby the government for certain benefits, even if the lobbying inhibits competition."[22] Whirlpool Corporation would be shielded from accusations that it initiated the antidumping petition against South Korean corporations due to "trade-restraining behaviors."[23] There is a "sham" exception to this protection. However, the exception has been limited to applying only to the antidumping process, not the outcome.[24] This limitation lends fuel to the argument that those industries that petition against dumping on the basis of "unfair trade" are in fact, seeking [unfair] protection from foreign rivals.[25]

It is this self-interested petitioning that launches antidumping investigations and because of the deference the federal courts give to administrative agencies, foreign competitors are essentially branded with a scarlet "D" once a U.S. domestic industry views it as a threat.

B. A Discretionary Investigation Process

Once a petition has been initiated, *Commerce and the ITC decide whether to pursue an investigation by making pr*eliminary determinations as to (1) whether there is dumping, and (2) whether a U.S. industry has been materially injured by it.[26] While the timetable for the preliminary and final determinations is

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incorrect or knowingly false information," lending to the notion that domestic U.S. industries are "using government as a club - to batter [their] opponents and get what [they] want," bringing into question the "[e]thics of [u]sing the [A]NTIDUMPING [l]aws as a [w]eapon").

[20] Wentong Zheng, *Reforming Trade Remedies*, 34 Mich. J. Int'l L. 151, 156-157 (2012) [hereinafter Zheng].

[21] Bottom Mount Combination Refrigerator Freezers from Korea and Mexico, USITC Investigation Nos. 701-TA-477 and 731-TA-1180-1181 (Final), United States International Trade Commission Pub. 4318 (May 2012).

[22] Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C.L. Rev. 357 at 361 (2009) [hereinafter Cho]. *See also* Eastern R. Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127 (1961) (holding that competitors seeking to influence public officials did not amount to illegal anticompetitive conduct under the Sherman Act); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) (holding that a party who petitions the government for action favorable to themselves cannot be sued under the Sherman Anti Trust Act, even if anti-competitiveness may be the motivating factor behind the party's actions).

[23] *See* Cho*, id.*

[24] *Id.*

[25] Diane P. Wood, *"Unfair" Trade Injury: A Competition-Based Approach*, 41 Stan. L. Rev. 1153 at 1171 (1989).

[26] *See* 19 U.S.C. § 1673b (2013).

systematic and structured,[27] Commerce and the ITC, as administrative agencies, are granted wide, discretionary berth when determining the application of the antidumping statutes.[28]

U.S. antidumping duties have been attacked as flawed on multiple fronts,[29] and although the specifics of the issues are beyond the scope of this article, they are numerous and further fuel the argument that foreign companies are not afforded an effective appeals system because these agency decisions are upheld.

STATUTORY TIMETABLES FOR ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

Statutory timetable for antidumping investigations (in days)

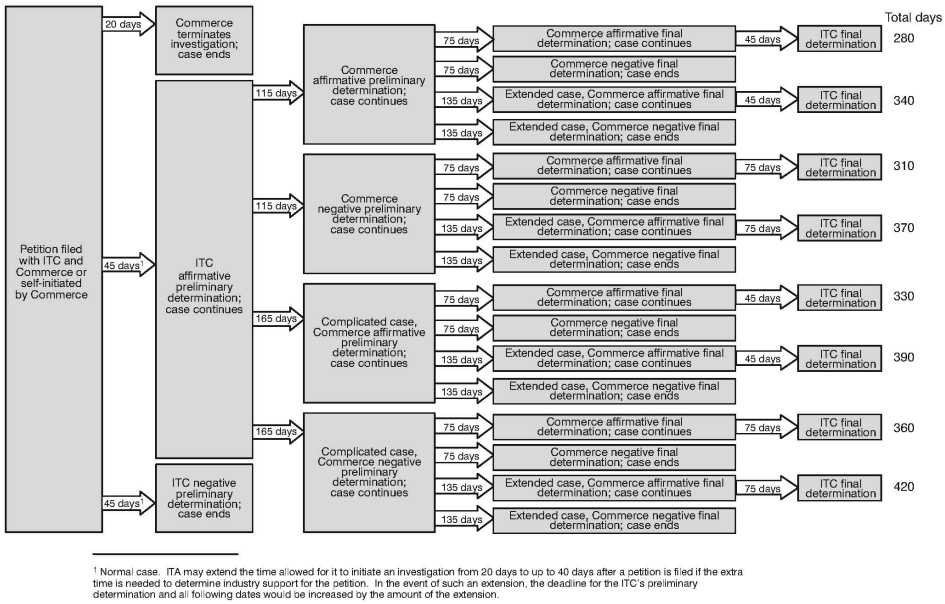

Figure 1: Antidumping Timetable in days.[30]

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[27] *See infra* Figure 1 & note 31.

[28] *See* Chevron, U.S.A., Inc. v. *Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984) (regarding the second prong of the Chevron test that states where Congress has not spoken specifically to the matter, that the administrative agency has discretion to interpret at will, and courts will uphold the interpretation as long as reasonable) [hereinafter Chevron]. *See also* Tariff Act of 1930, § 771(7)(C)(ii)(I–II), as amended, 19 U.S.C.A. § 1677(7)(C)(ii)(I–III) (establishing the ITC's broad discretion to assess evidence on price undercutting in its investigation and the "dumping" impact on the domestic industry).

[29] *See generally* Zheng, *supra* note 20, at 158 (arguing to eliminate the unfair pricing mechanism). *See also* Raj Bhala, *Rethinking Antidumping Law*, 29 Geo. Wash. J. Int'l L. & Econ. 1, 14 (1995) (arguing that "[a]s long as the exporter's marginal revenue from sales in the importing country exceeds its marginal cost of production, the exporter is behaving in an economically rational fashion"); Edward Tracy, *NAFTA Chapter 19 Binational Panel Reviews – Still a Zero Sum Game: The Wire Rod Decision and its Progeny*, 27 Am. U. Int'l L. Rev. 173, 177 (2012) (arguing that "[d]espite a vast body of international jurisprudence outlawing zeroing, U.S. courts sanctioned the practice") [hereinafter Tracy].

[30] UNITED STATES INTERNATIONAL TRADE COMMISSION, STATUTORY TIMETABLES FOR

C. The Appellate Process: Chevron Deference Solidifies Agency Discretion

Once the DOC or the ITC has issued positive antidumping duty orders against the foreign company, the foreign company may petition either agency to appeal.[31] The importer has thirty days after the publication of the antidumping duty order to challenge the assessment of the antidumping duty on its merchandise.[32] The Court of International Trade has jurisdiction to hear appeals of antidumping, as does the Court of Appeals for the Federal Circuit.[33]

While there is an appeals process in place, courts give great deference to the administrative agencies due to the *Chevron* doctrine.[34] Accordingly, tremendous deference is given to the expertise of the Secretary of Commerce in administering the antidumping law.[35] Courts will only overturn agency action if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] This standard of review is narrow.[37] The court will not substitute its own judgment for the agency, and the court will look to whether the agency has provided a rational link between the evidence before it and the decision the agency made.[38] The court will uphold a decision of "less than ideal clarity" and will only overturn if the agency:

> entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [offered an explanation that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[39]

The *Chevron* test is premised on two holdings: (1) if Congress' intention was clear from the statute then the plain language controls, and (2) if the statute is ambiguous or silent on the issue at hand, then the agency's interpretation will be adopted as the interpretation of the statute, as long as it is reasonable.[40] Under 28 U.S.C. § 2643(b), the Court of International Trade must sometimes review issues *de novo*:

ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS (2014), http://www.usitc.gov/trade_remedy/documents/timetable.pdf.

[31] 19 U.S.C. § 1675(b)(1) (2013).

[32] 19 U.S.C. §§ 1673e, 1516a(a)(2) (2013).

[33] 28 U.S.C. §§ 1581(c), 1295(a)(5) (2013).

[34] *See* Chevron, *supra* note 28.

[35] *See* Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers, 6 F.3d 1511 at 1516 (Fed. Cir. 1993). *See also* Smith-Corona v. United States, 713 F.2d 1568 at 1582 (Fed. Cir. 1983).

[36] U.S. v. Mead Corp., 533 U.S. 218 at 229 (2001). *See also* Administrative Procedure Act, 5 U.S.C. § 706 (2013) (stating "the reviewing court shall -- (2) hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[37] *See* Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot., 637 F. Supp. 2d 1270, 1285 (Ct. Int'l Trade 2009).

[38] *Id.* at 1286.

[39] *Id.*

[40] *See* Chevron, *supra* note 28.

> If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to reach the correct decision.[41]

The U.S. Supreme Court has held that courts can still give deference to an agency's regulations while simultaneously reviewing the facts anew.[42] "Deference can be given to the [agency's] regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, de novo."[43] This implicates foreign exporters and their ability to fight the antidumping duties in the current appeals system. An agency determination is given great weight, and even in cases where the issues are to be determined by the reviewing court *de novo,* agency regulations will be worked into the legal framework that analyze the facts of the case. This makes it nearly impossible to have an agency decision overturned, reinforcing the notion that once petitioned against, the "dumper" is doomed.

Even in cases where plaintiffs have proven that the antidumping duty should be revoked, Commerce retains "unfettered discretion" as to whether to maintain the duty, and it "may" revoke the duty if it so chooses.[44] The Secretary of Commerce is not required to grant revocation, even if it is warranted.[45] When reviewing final "material injury" determinations, the reviewing court must give the ITC "appropriate deference in its interpretation of the material injury statute."[46] In the instances where the Court of International Trade or the Court of Appeals for the Federal Circuit find that the ITC duty was not supported by "substantial evidence,"[47] the courts remand the determinations back to the agency for reconsideration.[48] In only two cases has the ITC "reversed a final injury decision in response to a court remand for reconsideration."[49] The outlook continues to be bleak for foreign companies.

D. Changed Circumstance and The Sunset Clause

Commerce may revoke an antidumping duty if "changed circumstances" warrant revocation or if "a majority of U.S. producers have expressed a lack of interest in continued enforcement of the antidumping order.[50] Commerce granted revocation in seventy-six cases from January 1995 to December 2009; however,

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[41] 28 U.S.C. § 2643(b) (2013).

[42] United States v. Haggar Apparel Co., 526 U.S. 380 at 381 (1999).

[43] *Id.* at 390-92.

[44] *See* Toshiba Corp. v. United States, 15 C.I.T. 597 at 598 (Ct. Int'l Trade 1991).

[45] *Id.*

[46] Nucor Corp. v. United States, 318 F.Supp.2d 1207, 1212 (Ct. Int'l Trade 2004) *aff'd*, 414 F.3d 1331 (Fed. Cir. 2005).

[47] 19 U.S.C. § 1516a(b)(1)(B)(i) (stating that any determination or finding that is unsupported by substantial evidence shall be held unlawful).

[48] *See* Jay Charles Campbell, *The Trade Litigant's Gauntlet: The Hanging Judge and the Teflon Tribunal*, 31 Nw. J. Int'l L. & Bus. 1, 42 (2011) [hereinafter Campbell].

[49] *Id.* at 42, 43.

[50] 19 U.S.C. § 1675(b)(1); 19 C.F.R. §351.222(g).

in all cases revocation occurred because of the U.S. industry's lack of interest in the continued order, and only one case involved "changed circumstances".[51]

Antidumping duties must also be reviewed at a five year mandatory "sunset review."[52] In the sunset review, the ITC must revoke the antidumping order[53] unless it decides that such revocation would lead to continuation or recurrence of dumping "within a reasonably foreseeable time,"[54] or if it would lead to the continuation or recurrence of material injury to the U.S. industry.[55] From July 1998 to May 2005, Commerce found that U.S. industries favored continuation of every case, all 255, in their sunset reviews.[56] Once found to be a dumper, you will so be branded and penalized for the indefinite future.

III. THE IMPORTANCE OF U.S. FREE TRADE PARTNERS TO ITS PROSPERITY

A. Korea: KORUS FTA

In terms of overall trade, as of March 2013, South Korea is the United States number six trading partner, and number eight in terms of total exports.[57] According to the Office of the United States Trade Representative, on March 15, 2013, the one-year anniversary of the Korea-United States (KORUS) FTA's entry into force, the KORUS FTA "[was] living up to its promise to provide tangible benefits for American businesses and workers . . . [and] also supporting U.S. exports of goods and services."[58] U.S. exports to South Korea have increased in just one year in the manufacturing, transportation equipment, and agricultural sectors.[59]

The KORUS FTA was signed on June 30, 2007, approved by Congress on October 12, 2011, approved the Korea National Assembly on November 22, 2011,[60] and the agreement entered into force on March 15, 2012.[61] President Obama announced that the KORUS FTA was "a landmark trade deal that [was] expected to increase annual exports of American goods by up to $11 million and support at least 70,000 American jobs."[62] Actual figures for U.S. manufacturing exports to Korea were $34.3 billion for 2011, and $34.8 billion for 2012.[63]

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[51] *See* Campbell, s*upra* note 48, at 32.

[52] *See* 19 U.S.C. § 1675(c).

[53] *Id.*

[54] *See* 19 U.S.C. § 1675a(a).

[55] *See* 19 U.S.C. § 1675a(c).

[56] *See* Campbell, *supra* note 48, at 33.

[57] *See Top Trading Partners - Total Trade, Exports, Imports,* U.S. Census Bureau (May 2, 2013), http://www.census.gov/foreign-trade/statistics/highlights/top/top1305cm.html.

[58] *See Fact Sheet: U.S.-Korea Agreement Bringing Benefits Home*, Office of the U.S. Trade Representative (May 7, 2013), http://www.ustr.gov/about-us/press-office/fact-sheets/2013/march/us-korea-agreement-bringing-benefits.

[59] *Id.*

[60] *See U.S.-Korea Free Trade Agreement: New Opportunities for U.S. Exporters Under the U.S.-Korea Trade Agreement*, Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta.

[61] *Id.*

[62] Barack Obama, President of the United States, The White House, Office of the Press Sec'y, Statement by the President Announcing the US-Korea Trade Agreement (Dec. 3, 2010),

For the United States, the incentive to enter into a bilateral trade agreement with South Korea was Korea's appeal as a major export market for U.S. goods.[64] To that end, ninety-five percent of all Korean tariffs on U.S. exports will be eliminated by January 1, 2016.[65] Specifically, the KORUS FTA was intended to gain U.S. access to the Korean market for the American car and truck industry and U.S. agricultural products.[66] President Obama also stated that the KORUS FTA would "deepen[] the strong alliance between the United States and the Republic of Korea."[67]

While Korea's importance as a trading partner is apparent, Korea is still subject to the United States' antidumping duties. In fact, from 1985 to 2005, "US $37.3 billion worth of Korean exports were subject to U.S. trade measures[.]"[68] These penalties do not exist in a vacuum, and because of the inability to effectively appeal such charges, Korea is simultaneously being applauded as a trading partner while being punished as a trade infringer.

B. Canada and Mexico: NAFTA, a Parallel System

Canada, like South Korea, is an important trading partner to the United States. As of March 2013, Canada was the United States' top trading partner in terms of overall trade and the exports of goods.[69] Mexico, in March 2013, was the third for overall trade with the United States and second for the export of U.S. goods.[70] On January 1, 1994, NAFTA entered into force and by January 1, 2008, all remaining duties and restrictions were eliminated.[71] "NAFTA created the world's largest free trade area . . . producing $17 trillion worth of goods and services."[72] The United States' incentive was to capitalize on the export of its goods,[73] and NAFTA has been a success story in achieving that end. "U.S. goods export[ed] to NAFTA [countries] in 2010 were $411.5 billion, up 23.4% ($78 billion) from 2009, and 149% from 1994 (the year prior to Uruguay Round) and up 190% from 1993 (the year prior to NAFTA). U.S. exports to NAFTA accounted for 32.2% of overall U.S. exports in 2010."[74]

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http://www.whitehouse.gov/the-press-office/2010/12/03/statement-president-announcing-us-korea-trade-agreement.

[63] *See* Office of the U.S. Trade Representative, *supra* note 60.

[64] *See* Yong-Shik Lee et. al., *The United States-Korea Free Trade Agreement: Path to Common Economic Prosperity or False Promise?* 6 E. Asia L. Rev. 111, 118 (2011) [hereinafter Lee].

[65] *See* Office of the U.S. Trade Representative, *supra* note 60.

[66] *Id.*

[67] *Id.*

[68] *See* Lee, *supra* note 63, at n.84.

[69] *See* U.S. Census Bureau, *supra* note 56.

[70] *See id.*

[71] *See North American Free Trade Agreement (NAFTA),* Office of the U.S. Trade Representative, http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta.

[72] *Id.*

[73] *See* Matthew Burton, *Assigning the Judicial Power to International Tribunals: NAFTA Binational Panels and Foreign Affairs Flexibility*, 88 Va. L. Rev. 1529 at 1548 (2002).

[74] *See* Office of the U.S. Trade Representative, *supra* note 71.

Beyond the general objective of obtaining "preferential treatment for United States goods," the United States also listed in its assessment of NAFTA's benefits "monitoring and effective dispute settlement mechanisms to facilitate compliance with . . . ", the elimination of barriers to market access for U.S. goods, the elimination of foreign subsidies potentially injurious to U.S. industries, and the elimination of export taxes.[75] The finalized NAFTA lists among its objectives the elimination of barriers to trade between the party territories,[76] and the creation of "effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes."[77] The dispute mechanism was one that embraced negotiation and an alternative diversion procedure for anti-dumping and countervailing duty matters away from U.S. courts and towards a more inclusive bilateral process. That mechanism was the NAFTA binational panel process.

While Canada initially sought complete exemption from U.S. antidumping duties for its exporters, it was finally able to compromise with the United States on the binational panel system,[78] and so the binational panel, originally instituted under the Free Trade Agreement between the United States and Canada, was modified and adopted for NAFTA to include both countries' relations with Mexico.[79] The U.S. supported the binational panel on the basis that it would "make dispute resolution more efficient, and thereby mak[ing] the trading bloc more efficient."[80] Thus, a compromise was struck between Canada's desire to have NAFTA as a common trading area where the laws of neither country would apply, and the U.S.'s desire for Canada to "eliminate all Canadian government subsidy programs."[81]

IV. THE NAFTA BINATIONAL PANEL: AN EFFECTIVE ALTERNATIVE APPELLATE MECHANISM

Binational panels are currently only available in the U.S. to NAFTA countries (Canada and Mexico) when disputing positive findings of (1) dumping and (2) material injury to the U.S. domestic market.[82] Chapter 19 of NAFTA allows for binational panel proceedings as an alternative to the current dumping appeals process of judicial review in U.S. domestic courts.[83]

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[75] *See H.R.3450, 3450—11*, 103d Cong. § 108(5)(a),(k) (1993), GPO.Gov, http://www.gpo.gov/fdsys/pkg/BILLS-103hr3450enr/pdf/BILLS-103hr3450enr.pdf.

[76] *See Chapter One: Objectives, article 102(1)(a),* NAFTA Secretariat, (May 13, 2013), https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=FullView&mid=1214&language=en-US&#b55964ef-f08f-4554-a1a9-9bc888941cdc.

[77] *Id.* at art. 102(e).

[78] *See* Eric J. Pan, *Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication*, 40 Harv. Int'l L.J. 379, 383 (1999) [hereinafter Pan].

[79] *Id.* at 384.

[80] *See* Burton, *supra* note 73, at 1549, n.82.

[81] *See id.*

[82] *See generally* Tracy, *supra* note 29, at 186.

[83] North American Free Trade Agreement, pmbl., chp. 19, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

Under NAFTA Article 1904, a petitioner that disagrees with: "alleged injury" from Commerce and the ITC in the United States may opt for binational panel review instead of the regular U.S. judicial review system.[84] While a party may opt for a panel in lieu of judges, the panels are tasked with applying "the importing party's domestic antidumping law."[85] In most cases, the binational panels uphold Commerce decisions. However on unresolved matters of law or determinations lacking evidence, the panelists are more likely to step away from U.S. law and apply past binational panel precedent.[86]

Each of the NAFTA nations must keep an ongoing roster of lawyers in good standing that may serve on the five-member binational panel. During a dispute, each country appoints two panelists, and the two countries agree on the fifth panelist.[87] The countries have 55 days from the request for a panel to agree on the fifth member, but if they cannot agree, they must draw lots to decide, by the 61st day, who will be the fifth panelist.[88] The panel, in its ruling, can uphold agency action or send back to the agency for further action.[89] The timeline that the panel follows is one intended to speed up the process of appealing final antidumping duties.[90]

Once a binational panel has issued a determination, the ITC "shall within the period specified by the panel or committee, take action not inconsistent with the decision of the panel or committee."[91] Furthermore, binational panel decisions are not subject to domestic judicial review and "no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise."[92] But, strictly speaking, panels do not bind future panels.[93]

In situations where the parties dispute the binational panel's ruling, there is a three-person Extraordinary Challenge Committee available, but reviews under the auspices of this appeals panel are rare.[94] The party's government may petition for this extraordinary measure if it feels there was a conflict of interest, or if there was a fundamental departure from a rule of procedure.[95]

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[84] *See* Tracy, *supra* note 29, at 177.

[85] *Id.*

[86] *See* Pan, *supra* note 78, at 445.

[87] *See* NAFTA Secretariat, *supra* note 75, at annex 1901.2.

[88] *Id.*

[89] *See* Tracy, *supra* note 29, at 188.

[90] *See* Angel R. Oquendo, *The Comparative and the Critical Perspective in International Agreements,* 15 UCLA Pac. Basin L.J. 205 at 218 (1997).

[91] 19 U.S.C. § 1516(a)(7)(A).

[92] *Id.*

[93] *See* Tracy, *supra* note 29, at 187, n.74 (citing to NAFTA art. 1904, para. 9 indicating the case's concern with "the Involved Parties with respect to the particular matter between the Parties that is before the panel").

[94] *Id.* at 188.

[95] *See* Office of the U.S. Trade Representative*, supra* note 70, Chap. 19, annex 1904.13.

Ideal Timeline for a NAFTA Chapter 19 Panel Review as per the Rules of Procedure

R. 34	Request for Panel Review filed	Day 0
R. 39	Complaints to be filed	Within 30 days after Request for Panel Review
R. 40	Notices of Appearance to be filed	Within 45 days after Request for Panel Review
Annex 1901.2(3)	Panel Selection to be completed by the Parties by	Day 55
R. 41	Final Determination, Reasons, Index and Administrative Record to be filed	Within 15 days after filing of Notice of Appearance
Annex 1901.2(3)	Parties to select 5th Panelist by	Day 61
R. 57 (1)	Briefs by Complainants to be filed	Within 60 days after filing of Administrative Record
R. 57(2)	Briefs by Investigating Authority or Participants in support to be filed	Within 60 days after Complainants' Briefs
R. 57(3)	Reply Briefs to be filed	Within 15 days after Authority's Briefs
R. 57(4)	Appendix to the Briefs to be filed	Within 10 days after Reply Briefs
R. 67(1)	Oral Argument to begin	Within 30 days after Reply Briefs
Article 1904.14	PANEL DECISION DUE	315 days after Request for Panel Review

Figure 2: NAFTA Binational Panel Sample Schedule for appealing antidumping duties.[96]

This article argues that binational panels should be further expanded and implemented for those countries with whom the U.S. has negotiated special bilateral agreements, such as the Republic of Korea through the KORUS FTA. This will foster trade relations with the largest U.S. trading partners, while still protecting domestic markets against harm.

[96] *See* NAFTA Secretariat, *supra* note 76.

V. THE BINATIONAL PANEL: EMBODIMENT OF THE WTO SPIRIT

In this era of global free trade, the trend has become to reduce tariffs through trade agreements, yet simultaneously to use trade remedies as a backstop against the same trading partners.[97] In the face of this, the WTO Agreement continues to stand for the notion that global trade should be unrestricted.[98] While the WTO Agreement upholds the ideals of free trade, it also acknowledges the continuation of certain non-tariff barriers, such as antidumping duties.[99] Similar to the United States' dumping provisions, antidumping duties are assessed under the WTO Agreement when a member country can show that an item was imported into the country in question for less than fair value.[100] The WTO Agreement allows each Member country the discretion to establish a unique national antidumping regime, but nonetheless requires Members to adhere to core precepts in order to ensure a substantial degree of consistency and uniformity amongst the Member regimes.[101]

The United States is a signatory to the antidumping provisions in the General Agreement on Tariffs and Trade 1994 ("GATT")[102] and the Agreement on Implementation of Article VI of the GATT (the WTO Antidumping Agreement),[103] which hammer out guidelines for WTO Members in adjudicating antidumping disputes and assessing subsequent duties. Countries are free to administer their own antidumping laws as long as they comply with the terms of the WTO Antidumping Agreement.[104]

The U.S. felt that Article VI of the GATT diluted the original antidumping authority given to nations.[105] The U.S. position on the GATT panels shifted from the early 1980s, when the United States was winning antidumping conflicts over other countries, to the late 1980s, where panel decisions went against the U.S. and U.S. negotiators opted instead to support deference to national authority decisions.[106] Nevertheless, the United States has since amended its own domestic

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[97] *See* Zheng, *supra* note 20, at 155.

[98] *See* Reid M. Bolton, *Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. Through Heightened Scrutiny,* 29 Berkeley J. Int'l L. 66, 70 (2011) [hereinafter Bolton].

[99] *Id.*

[100] *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

[101] *See* Christopher F. Corr, *Trade Protectionism in the New Millennium: The Ascendency of Antidumping Measures,* 18 NW. J. Int'l L. & Bus. 49 at 75 (1997).

[102] *See* GATT, *supra* note 100.

[103] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 68 U.N.T.S. 201 (1994).

[104] *See* Paul C. Rosenthal & Robert T.C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve its Objectives During the Uruguay Round?*, 31 Law & Pol'y Int'l Bus. 871 at 872 (2000).

[105] *Id.* at 871.

[106] *Id.*

antidumping law,[107] effectively implementing the system prescribed by the WTO Agreement, "except as specifically noted."[108]

In addition to domestic remedies that a country may enact, the WTO Agreement has a Dispute Settlement Body[109] that members may petition to resolve trade issues.[110] The procedure involves first, a consultation with the disputing country, and then the country may seek a dispute resolution panel under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.[111] The WTO panels are enforceable under binding dispute resolution.[112] This Dispute Settlement Body is utilized by various WTO members, and it encourages settlement of disputes, resembling the NAFTA binational panel process.

Since 1995 the United States has referred 13 antidumping matters involving Korea to the WTO dispute settlement system, Korea has likewise initiated 32 against the United States.[113] While the WTO does provide this alternative dispute mechanism, "[t]he standard of review by panels (and by the Appellate Body) in most WTO proceedings is considerably broader than the general standard in the United States for review of administrative decisions . . . [.]"[114] Much of the U.S. scholarly criticism about NAFTA binational panels concerns panelists' utilizing the "correct" standard of review, the U.S. *Chevron* standard. Having KORUS FTA disputes go before the WTO dispute settlement system could potentially attract a more neutral standard of review.

VI. FEASIBILITY OF IMPLEMENTING A BINATIONAL PANEL FOR THE KORUS FTA

Arguments against the application of a binational panel process between Korea and the United States include the fact that binational panels are not favored by many American trade authors.[115] Accusations have been that (A) the differences in culture and laws will make it difficult to maintain a separate appellate panel, and (B) that it is undesirable to leave trade remedies in the hands of panelists who are not judges, but rather professionals who may misapply U.S.

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[107] *See* Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 Title VII, updated through Pub. L. No. 103-465 (codified at 19 U.S.C. § 1673a), *supra* note 10.

[108] *See* Matsushita Elec. Indus. Co. v. United States, 529 F. Supp 670, 673 (Ct. Int'l Trade 1981).

[109] *See* Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 Ariz. J. Int'l & Comp. Law 457 at 470 (2002) [hereinafter Bhala & Gantz].

[110] *Id.*

[111] *Id.*

[112] *See* Bolton, *supra* note 98, at 76.

[113] *Anti-dumping Initiations: Reporting Member vs Exporting Country 01/01/1995 - 31/12/2012*, WTO, WTO.Org, http://www.wto.org/english/tratop_e/adp_e/AD_InitiationsRepMemVsExpCty.pdf.

[114] *See* Bhala & Gantz, *supra* note 109, at 615.

[115] *See generally* Tracy, *supra* note 29, at 187, n.74 (citing NAFTA art. 1904, para. 9, which states "the Involved Parties with respect to the particular matter between the Parties that is before the panel").

domestic law, and (C) that the antidumping system is inherently flawed and its complete disbandment is desirable to all other solutions.

A. Overcoming Differences

1. Language

Arguments against the implementation of a separate binational panel process for the KORUS-FTA may include the language hurdle of having panelists versed in both English and Korean. Under the NAFTA binational panels, proceedings for the United States and Canada can take place in both English and French.[116] Mexico has experienced similar barriers, but the procedural leniency in NAFTA would also allow for proceedings in Spanish, if parties so chose.[117] The NAFTA experience of these proceedings taking place in different languages can help Korea and the United States institute a binational panel in both languages, without pioneering the notion.

2. Legal Systems

Arguments against the feasibility of a binational panel may also emphasize that Korea is a civil law country whereas the United States works under a common law system.[118] While the legal systems are different, South Korea's administrative and corporate laws are modeled after the United States system.[119] Additionally, the NAFTA binational panels, as an example, draw from the same pool of professionals as WTO dispute settlement panels. This indicates that the roster for a potential KORUS FTA antidumping binational panel can get a running start by drawing from the WTO Dispute Settlement Body roster.[120] Furthermore, Mexican WTO panelists have transitioned onto the NAFTA binational panels with ease.[121] As of 1999, five of seven NAFTA decisions were authored, in part, by Mexican panelists, indicating no cultural or legal difficulty.[122]

There is already a system in place in the KORUS FTA that allows for investor-state dispute settlement between investors and either the United States or Korean governments, as the case may be.[123] Korea and the U.S. afford investors domestic-like treatment,[124] and for dispute settlements, either countries' investors can seek arbitration panels, appointed by the Secretary General of the

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[116] *See* Oquendo, *supra* note 90, at 220, 221.

[117] *Id.* at 221.

[118] *See* Katherine Wang, *The Korea-U.S. Free Trade Agreement: Motivations for Investor-State Dispute Settlement Provisions,* 18 U.C. Davis J. Int'l L. & Pol'y 505 at 518 (2012).

[119] *Id.* at 521.

[120] *See* WTO, *supra* note 113.

[121] *See* Pan, *supra* note 78, at 441.

[122] *Id.*

[123] Jeanne J. Grimmet, Dispute Settlement in the U.S.-South Korea Free Trade Agreement (KORUS FTA), Congressional Research Service 1 (2012), http://www.fas.org/sgp/crs/row/R41779.pdf [hereinafter Grimmet].

[124] KORUS FTA, Chapter 11, Section A: Investment, Article 11.3, Office of the United States Trade Representative, http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file587_12710.pdf.

International Centre for Settlement of Investment Disputes.[125] A similar provision was included in the NAFTA, and while some authorities cite the cost and the inconvenience to the United States, "[t]o date, the United States has prevailed in all investor-state cases brought against it.[126] This system provides yet another foundation for an alternative dispute system for antidumping appeals.

B. Trade Practitioners Versus Judges

While those who serve on the NAFTA binational panels are not judges, they are experienced legal professionals who remain on the country's NAFTA binational panel roster in case their services are needed.[127] Some legal scholars have noted that rather than having full-time judges on the panel, panelists are individuals who must balance jobs outside the panel with their job as panelists.[128] Cross-referencing the NAFTA binational panels and the WTO antidumping dispute panels show that over half the names appear on both panels for the United States, Canada, and Mexico.[129] While they may not be judges, they will have a better understanding of legal issues if they participate in antidumping proceedings in two different legal settings.

Furthermore, the accusation that panelists do not apply American law as consistently as judges has led some critics to point to the Wire Rod case.[130] One critic argued that the binational panel "broke with NAFTA directives" by applying WTO law over binding U.S. law,[131] although Commerce later got rid of the controversial methodology for the assessment of dumping at issue in Wire Rod.[132] A critic of the Wire Rod case admitted that the binational panel used the first *Chevron* prong in assessing whether there was dumping, but because the panel decided that Congress explicitly denounced zeroing and that Commerce violated the explicit rule by assessing dumping penalties using this method of calculation, the author felt that this was not the application of the rule as U.S. judges would have concluded.[133] This argument, even if taken in the light most favorable to this critic, does not demonstrate that the panel failed to apply U.S. law, as the panel did undertake a *Chevron* analysis. The author's argument thus

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[125] *Id.* at Section B: Investor-State Dispute Settlement, Articles 11.15-11.25.

[126] *See* Grimmet, *supra* note 123, at 6.

[127] *See* Office of the U.S. Trade Representative, *supra* note 71, Chapter 19, annex 1901.2

[128] *See* Juscelino F. Colares & John W. Bohn, *NAFTA's Double Standards of Review,* 42 Wake Forest L. Rev. 199, 221 (2007).

[129] *See* WTO, *supra* note 113.

[130] *See* Binational Panel Review of Carbon and Certain Alloy Steel Wire Rod from Canada, USA-CDA-2008-1904-02, 2 (May 11, 2012) [hereinafter Wire Rod] (originally remanding the case to Commerce with regards to "zeroing," however ultimately affirmed Commerce's decision).

[131] *See* Tracy, *supra* note 29, at 176.

[132] *See* 77 F.R. 8101-01, Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification (Feb. 14, 2012) (demonstrating how Commerce changed the way it calculated dumping, from a system that was based on weighted-average margins of exports while offsets for non-dumped comparisons were not factored ("zeroing), running inconsistent with WTO mandates, prompting Commerce to undertake new methodologies that paralleled the WTO).

[133] *Id.* at 191-192.

seems premised on the disappointment that the American industry did not emerge victorious.

While the binational panel decision itself is not reviewable,[134] NAFTA does grant "exclusive original jurisdiction over constitutional attacks on binational panels" to the United States for the District of Columbia Circuit.[135] If either country in the proceeding felt there was a constitutional issue at hand in an appeal of a U.S. antidumping determination, they could file a constitutional action before the D.C. Circuit within thirty days of final notice publication in the Federal Register of the completion of the binational panel.[136]

C. Scrapping the System Entirely: Impractical

While there is much scholarship for repealing antidumping remedies altogether, this article is written with awareness that doing so would be "politically infeasible in the current protectionist atmosphere of Congress."[137] This article acknowledges that eliminating trade remedies altogether is an impractical solution since even the WTO Agreement recognizes antidumping duties as a valid trade remedy and has its own system of review of antidumping determinations.[138]

This article argues that for the United States' largest trading partners - Canada, Mexico, and if extended, Korea - binational panels are a more effective way of dealing with trade disputes that arise. Binational panels are an alternative appeals system that sufficiently acknowledge the special trade relationships that the United States has. Carving out this exception would ensure that its biggest trade allies are not subjected to the stigma and penalties of being branded and penalized as dumpers under the current rigged system.

VII. CONCLUSION: THE UNTENABLE STATUS QUO

The United States is celebrating the successful first anniversary of prosperity and enhanced exports with the Republic of Korea under the KORUS FTA. The elimination of trade duties on the front end are shouted from the rafters, but a prejudicial backstop remains.

The current antidumping system in U.S. law has effectively handicapped the ability of U.S. trading partners to appeal petitions against them. There will always be self-interest at play in trade relations, but if the United States continues to allow domestic corporations to petition the Commission and the ITC to cut out the competition, then foreign competitors are doomed from the start: once a dumper, always a dumper. Court deference to agencies under the Chevron

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[134] *See* 19 U.S.C. § 1516a(g)(2)(A)-(B) (stating "if binational panel review of a determination is requested pursuant to article 1904 of the NAFTA or of the Agreement, then . . . the determination is not reviewable under subsection (a) of this section, and . . . no court of the United States has power or jurisdiction to review the determination on any question of law or fact by an action in the nature of mandamus or otherwise").

[135] *See* 19 U.S.C. § 1516a(g)(4)(A).

[136] *See* 19 U.S.C. § 1516a(g)(4)(C).

[137] *See* Cho, *supra* note 22, at 362.

[138] *See* Bolton, *supra* note 98.

principle has made appeals virtually impossible. However, in the specific instance of the NAFTA binational panel process, the United States has acknowledged the special trade relationship it has with its North American counterparts and carved out an exception to its own impenetrable system.

This exception should be applied to Korea and binational panels should be implemented for antidumping disputes under the KORUS FTA. The barriers to establishing the panel are not insurmountable and much of the ground work has already been laid with Canada and Mexico. For the United States to continue to refuse to acknowledge the hypocrisy of knocking down Korean trade barriers, while simultaneously fortifying its wall against Korean exports would be to go against the very spirit of the free trade movement championed by the WTO Agreement. Binational panels are a simple solution to a continuing trade injustice.